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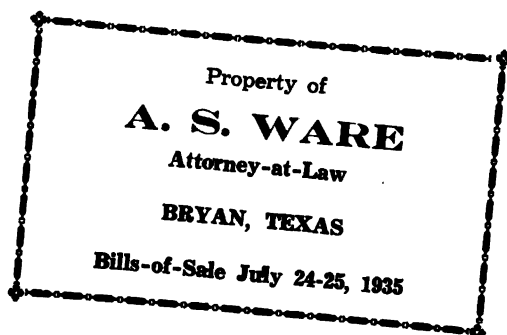
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# CASES REPORTED

	Page		Page
Abbott v. Springfield (Mo. App.).....	443	Bell v. Self (Tex. Civ. App.).....	304
Abbott v. Western Union Tel. Co. (Mo. App.).....	769	Benson v. State (Tex. Cr. App.).....	538
Abilene Steam Laundry Co. v. Carter (Tex. Civ. App.).....	571	Bermuda Land & Live Stock Co., Richardson v. (Tex. Civ. App.).....	746
Adkins v. Adkins (Ky.).....	462	Berry, Ex parte (Tex. Cr. App.).....	799
Aguinaga v. Medina Valley Irr. Co. (Tex. Com. App.).....	515	Berry v. Majestic Milling Co. (Mo. App.)..	434
Akin, Kansas City Southern R. Co. v. (Ark.).....	350	Best v. Melcon (Ky.).....	662
Alexander Eccles & Co. v. Munn (Ark.)..	626	Best & Russell Cigar Co. v. William Reese Co. (Tex. Civ. App.).....	317
Alexander, National Equitable Soc. v. (Tex. Civ. App.).....	602	Bibb v. Daniels (Ky.).....	454
Allen, Bates & Rogers Const. Co. v. (Ky.)	467	Bingham v. Commonwealth (Ky.).....	459
Allen, Turner, Day & Wolworth Handle Co. v. (Ky.).....	477	Bingham v. Edmonds (Mo.).....	885
Alsop v. State (Tex. Cr. App.).....	195	Blisard, Prince v. (Tex. Civ. App.).....	301
American Nat. Ins. Co. v. Wallace (Tex. Civ. App.).....	859	Blythe, Jones v. (Ark.).....	348
American Snuff Co., Walker v. (Ky.).....	172	Boatenhamer, Pittman & Harrison Co. v. (Tex. Civ. App.).....	972
American Surety Co. of New York, Porterfield v. (Mo. App.).....	119	Boggs, Schallert v. (Tex. Civ. App.).....	601
American Surety Co. of New York, State ex rel. Simmons (now Hatton) v. (Mo.)..	428	Bosworth v. Kentucky Highlands R. Co. (Ky.).....	671
American Roads Machinery Co. v. Balinger (Tex. Civ. App.).....	265	Bowden v. Waggoner (Tex. Civ. App.)....	606
Amsler v. Cavitt (Tex. Civ. App.).....	766	Bowman v. Knights of Pythias of State of Missouri (Mo. App.).....	925
Anderson, Chattanooga Warehouse & Cold Storage Co. v. (Tenn.).....	153	Bowman & Blatz v. Raley (Tex. Civ. App.)	723
Anderson v. Crum (Mo. App.).....	907	Bowser & Co. v. Cain Auto Co. (Tex. Civ. App.).....	554
Anderson v. Johnson (Mo.).....	23	Boyce v. Howell (Mo. App.).....	89
A. R. Humble Stave & Lumber Co. v. Dunbar (Ky.).....	458	Brady v. McCuiston (Tex. Civ. App.)....	815
Arkansas Light & Power Co., Terral v. (Ark.).....	139	Bransford Realty Co., Dickens v. (Tenn.)	644
Arkansas-Louisiana Highway Imp. Dist. v. Douglas-Gould & Star City Road Imp. Dist. (Ark.).....	150	Brenard Mfg. Co. v. Barnett (Tex. Civ. App.).....	990
Armendarez, Hotel Dieu v. (Tex. Com. App.).....	518	Breuninger v. Hill (Mo.).....	67
Armstrong, McKneely v. (Tex.).....	192	Brown, Johnson v. (Mo.).....	55
Arnett, State v. (Mo.).....	82	Broderick v. McRae Box Co. (Ark.).....	935
Arnold v. Scharff (Tex. Civ. App.).....	326	Brotherhood of American Yeoman, Markland v. (Mo. App.).....	774
Arnold, State ex rel. Haller v. (Mo.).....	374	Broughton, Johnson v. (Ky.).....	455
Atkinson v. Thomas (Ark.).....	779	Brown, Baker v. (Tex. Civ. App.).....	312
Austin v. Campbell (Tex. Civ. App.).....	277	Brown, Stark v. (Tex. Civ. App.).....	811
Austin v. Huffman (Tex. Civ. App.).....	283	Bryant, Ft. Worth & D. C. R. Co. v. (Tex. Civ. App.).....	556
Austin v. Kelly (Tex. Civ. App.).....	282	Bryant v. Hamblin (Ky.).....	786
Austin v. Yates (Tex. Civ. App.).....	282	Bryant v. Meadors (Ky.).....	177
Aycock v. Paraffine Oil Co. (Tex. Civ. App.).....	851	Bryant, Sutton v. (Ky.).....	786
Aycock v. Reliance Oil Co. (Tex. Civ. App.)	848	Buckner v. Buckner (Mo.).....	887
Ayres v. Middleton Theater Co. (Mo. App.)	911	Budd v. Burnett (Ark.).....	337
Baker v. Brown (Tex. Civ. App.).....	312	Burnett, Budd v. (Ark.).....	337
Baker v. Slaughter & Moorehead (Tex. Civ. App.).....	557	Burns, Weller v. (Tex. Civ. App.).....	861
Baker Bros., Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.).....	244	Burow v. State (Tex. Cr. App.).....	905
Baker's Adm'r, Louisville & N. R. Co. v. (Ky.).....	674	Busby v. Reid (Ark.).....	625
Ballard v. Smith (Ky.).....	489	Caddick Milling Co., Citizens' Trust Co. v. (Mo. App.).....	774
Barber, Old River Co. v. (Tex. Civ. App.)	758	Cain Auto Co., S. F. Bowser & Co. v. (Tex. Civ. App.).....	554
Barnett, Brenard Mfg. Co. v. (Tex. Civ. App.).....	990	Campbell, Austin v. (Tex. Civ. App.).....	277
Barnett v. Logan (Mo. App.).....	440	Campbell v. Sanders (Ark.).....	934
Barnett Bros. v. Porter (Ark.).....	625	Campbell Banking Co. v. Hamilton (Tex. Civ. App.).....	621
Barr, Louisville & N. R. Co. v. (Ky.).....	184	Cape Girardeau-Jackson Interurban R. Co. v. Light & Development Co. of St. Louis (Mo.).....	361
Barthold v. Thomas (Tex. Com. App.)....	506	Carroll Contracting Co. v. Newsome (Mo. App.).....	114
Bates & Rogers Const. Co. v. Allen (Ky.)	467	Carter, Abilene Steam Laundry Co. v. (Tex. Civ. App.).....	571
Beach v. State (Tex. Cr. App.).....	540	Cassin v. Lusk (Mo.).....	902
Beall v. Moore (Tex. Civ. App.).....	622	Cathey, Ward v. (Tex. Civ. App.).....	289
Beaumont Cotton Oil Mill Co. v. Hester (Tex. Civ. App.).....	702	Cavitt, Amsler v. (Tex. Civ. App.).....	766
		Cecil's Ex'rs and Trustees v. Embury (Ky.)	451
		Chambers v. Consolidated Garage Co. (Tex. Civ. App.).....	565
		Chance v. State (Tex. Cr. App.).....	208
		Chancellor v. Slaughter (Tex. Civ. App.)..	239
		Chandler v. Riley (Tex. Civ. App.).....	716

	Page		Page
Chapin v. Quisenberry (Ark.).....	341	Davis, Huskey v. (Mo.).....	45
Charles Clarke & Co. v. Mannheim Ins. Co. (Tex. Com. App.).....	528	Davis, United States Fidelity & Guaranty Co. v. (Ky.).....	950
Chas. F. Querl Lumber Co., City of St. Louis v. (Mo.).....	21	Day, Western Clay Drainage Dist. v. (Ark.).....	338
Chattanooga Warehouse & Cold Storage Co. v. Anderson (Tenn.).....	153	Delano, Titus v. (Mo.).....	44
Cherry v. Kirkland (Ark.).....	344	Delgado, Farrias v. (Tex. Civ. App.).....	610
Chesapeake & O. R. Co. v. Coleman (Ky.).....	947	De Mayo v. Kansas City (Mo.).....	380
Chesapeake & O. R. Co. v. Commonwealth (Ky.).....	793	Denman v. Pyle (Tex. Civ. App.).....	335
Chicago, M. & St. P. R. Co., Clevenger v. (Mo.).....	867	Depriest, Park v. (Ark.).....	777
Chicago, R. I. & G. R. Co. v. Sears (Tex. Com. App.).....	684	Dessauer v. Supreme Tent, Knights of the Maccabees of the World (Mo.).....	896
Childress v. State (Tex. Cr. App.).....	193	Dewitt v. J. G. Hutchinson & Co. (Mo. App.).....	910
Choice v. Dallas (Tex. Civ. App.).....	753	Dickens v. Bransford Realty Co. (Tenn.).....	644
Chrisman v. Chrisman (Tenn.).....	783	Dickey v. Gulf, T. & W. R. Co. (Tex. Civ. App.).....	552
Christopher v. State (Tex. Cr. App.).....	799	Dignowity v. Fly (Tex.).....	505
Citizens' Trust Co. v. Caddick Milling Co. (Mo. App.).....	774	Dillon v. Whitley (Tex. Civ. App.).....	329
City Nat. Bank v. Laughlin (Tex. Civ. App.).....	617	Dodge, Thompson v. (Tex. Civ. App.).....	586
City of Austin, Millers' Mut. Fire Ins. Co. v. (Tex. Civ. App.).....	825	Donahue v. Louisville, H. & St. L. R. Co. (Ky.).....	491
City of Ballinger, American Road Machinery Co. v. (Tex. Civ. App.).....	265	Doneghy v. Robinson (Mo.).....	655
City of Clinton, McMillian v. (Mo. App.).....	918	Donehee, National Live Stock Commission Co. v. (Mo. App.).....	929
City of Dallas, Choice v. (Tex. Civ. App.).....	753	Dorsey v. Cogdell (Tex. Civ. App.).....	303
City of Dallas v. Halford (Tex. Civ. App.).....	725	Douglas-Gould & Star City Road Imp. Dist., Arkansas-Louisiana Highway Imp. Dist. v. (Ark.).....	150
City of Forney v. Mounger (Tex. Civ. App.).....	240	Da Bose, C. J. Gerlach & Bro. v. (Tex. Civ. App.).....	742
City of Glasgow, Culmer v. (Mo. App.).....	916	Danbar, A. R. Humble Stave & Lumber Co. v. (Ky.).....	458
City of Lexington, Martin v. (Ky.).....	483	Dunham, Wiard v. (Mo.).....	873
City of Nashville, State v. (Tenn.).....	649	Dunn v. Dunn (Ky.).....	943
City of Rosebud v. Vitek (Tex. Civ. App.).....	728		
City of St. Louis v. Chas. F. Querl Lumber Co. (Mo.).....	21	Earl v. Ellison (Ark.).....	842
City of Springfield, Abbott v. (Mo. App.).....	443	Easley v. Rowe (Ark.).....	145
C. J. Gerlach & Bro. v. Du Bose (Tex. Civ. App.).....	742	Eaton-Blewett Co., Quarles v. (Tex. Civ. App.).....	596
Clapp v. Kenley (Mo.).....	10	Eccles & Co. v. Munn (Ark.).....	626
Clark v. First Nat. Bank (Tex. Com. App.).....	677	Edmonds, Bingham v. (Mo.).....	885
Clark v. State (Tex. Cr. App.).....	544	Edwards, Metropolitan Casualty Ins. Co. v. (Tex. Civ. App.).....	856
Clarke & Co. v. Mannheim Ins. Co. (Tex. Com. App.).....	528	Edwards, Stout v. (Mo. App.).....	128
Clay v. State (Tex. Cr. App.).....	968	Ellison, Earl v. (Ark.).....	342
Clay's Committee v. Washington (Ky.).....	484	Ellison, State ex rel. Buckner v. (Mo.).....	401
Clevenger v. Chicago, M. & St. P. R. Co. (Mo.).....	867	Ellison, State ex rel. McNulty v. (Mo.).....	881
Cogdell, Dorsey v. (Tex. Civ. App.).....	308	El Paso & S. W. R. Co. v. Lovick (Tex. Civ. App.).....	283
Coleman, Chesapeake & O. R. Co. v. (Ky.).....	947	Embry, Cecil's Exrs and Trustees v. (Ky.).....	451
Colorado & S. F. R. Co., Nabors v. (Tex. Civ. App.).....	276	Empire Coal Co., Empire Coal Mining Co. v. (Ky.).....	474
Commonwealth, Bingham v. (Ky.).....	459	Empire Coal Mining Co. v. Empire Coal Co. (Ky.).....	474
Commonwealth, Chesapeake & O. R. Co. v. (Ky.).....	798	E. O. Barnett Bros. v. Porter (Ark.).....	625
Conner v. Schnell & Weaver (Tex. Civ. App.).....	753	Ernst, San Antonio, U. & G. R. Co. v. (Tex. Civ. App.).....	908
Connor v. State (Tex. Cr. App.).....	207	Evers, Kircher v. (Mo. App.).....	917
Consolidated Garage Co., Chambers v. (Tex. Civ. App.).....	565	Ewing, Menees v. (Tenn.).....	648
Cook, Louisville & N. R. Co. v. (Ky.).....	661		
Crady v. Greer (Ky.).....	167	Farmers' & Merchants' Nat. Bank v. Lillard Milling Co. (Tex. Civ. App.).....	260
Crum, Anderson v. (Mo. App.).....	907	Farrias v. Delgado (Tex. Civ. App.).....	610
Culmer v. Glasgow (Mo. App.).....	916	Felder v. Houston Oil Co. (Tex. Com. App.).....	797
Cumberland County Educational Soc., Young v. (Ky.).....	494	First Nat. Bank, Clark v. (Tex. Com. App.).....	677
Cummins v. Mullins (Ky.).....	170	First Nat. Bank v. Rush (Tex. Com. App.).....	521
Cummins, State v. (Tenn.).....	161	First State Bank v. Hamer (Tex. Civ. App.).....	222
Cunningham v. Cunningham (Tex. Civ. App.).....	242	Fly, Dignowity v. (Tex.).....	505
Cupples Station Light, Heat & Power Co., Frohchstein v. (Mo. App.).....	90	Ft. Smith Compress Co., Kansas City Southern R. Co. v. (Ark.).....	147
		Ft. Worth & D. C. R. Co. v. Hapgood (Tex. Civ. App.).....	909
Dahlke, Hubbard v. (Mo.).....	652	Ft. Worth & R. G. R. Co. v. Bryant (Tex. Civ. App.).....	556
Dallas Waste Mills, Kingsville Cotton Oil Co. v. (Tex. Civ. App.).....	832	Ft. Worth & R. G. R. Co. v. Wilhite (Tex. Civ. App.).....	705
Danciger v. Stone (Mo.).....	865	Foscue v. Provident Nat. Bank (Tex. Civ. App.).....	555
Daniel, Morris v. (Ky.).....	668	Foster, Hindmon v. (Tex. Civ. App.).....	262
Daniels, Bibb v. (Ky.).....	454	Fovella v. State (Tex. Cr. App.).....	207
Davis, Hartford Accident & Indemnity Co. v. (Ky.).....	950		

	Page		Page
Franklin County v. Missouri Pac. R. Co. (Mo.)	874	Hawkins, State v. (Mo.)	4
Frans v. Jacobs (Ky.)	163	Hayes v. West Virginia Oil Gas & By-Products Co. (Ky.)	174
Fread v. State (Tex. Cr. App.)	605	Heidemann v. Kleins (Mo. App.)	913
Fred, Ingram v. (Tex. Civ. App.)	298	Heimer v. Yates (Tex. Com. App.)	680
Fries v. Royal Neighbors of America (Mo. App.)	180	Helms Bros., Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.)	853
Frolichstein v. Cupples Station Light, Heat & Power Co. (Mo. App.)	90	Henrietta Oil & Gas Co. v. W. B. Worsham & Co. (Tex. Civ. App.)	819
Frommel, Schriver v. (Ky.)	165	Henson v. Kansas City (Mo.)	13
Funk & Son v. Young (Ark.)	143	Hentschel, Pierce City v. (Mo.)	31
Garber v. Missouri Pac. R. Co. (Mo.)	877	Hesse, Morris v. (Tex. Civ. App.)	710
Gardner v. State (Tex. Cr. App.)	694	Hester, Beaumont Cotton Oil Mill Co. v. (Tex. Civ. App.)	702
Garesche, State ex rel. Sanitary Street Flushing Mach. Co. v. (Mo.)	900	Hickman v. Swain (Tex. Civ. App.)	548
Gees, Reid v. (Mo.)	878	Hickman v. Wright (Tenn.)	447
General Bonding & Casualty Ins. Co. v. Harless (Tex. Civ. App.)	807	Hill, Breuninger v. (Mo.)	67
Georgia Casualty Co. v. Griesenbeck (Tex. Civ. App.)	273	Hoefflin v. Wilkerson (Ky.)	607
Gerlach & Bro. v. Du Bose (Tex. Civ. App.)	742	Hogue, J. R. Watkins Medical Co. v. (Ark.)	628
German-American Ins. Co. of New York, Trust Co. of St. Louis County v. (Mo. App.)	98	Holcomb, Western Union Tel. Co. v. (Tex. Com. App.)	509
Gideon, State ex rel. Greene County v. (Mo.)	358	Hotel Dieu v. Armendarez (Tex. Com. App.)	518
Gill v. McFaddin (Tex. Civ. App.)	722	Houston v. Shear (Tex. Civ. App.)	976
Gill v. State (Tenn.)	637	Houston Oil Co., Fielder v. (Tex. Com. App.)	797
Gillespie v. State (Tex. Cr. App.)	967	Howell, Boyce v. (Mo. App.)	89
Gilroy v. Rowley (Tex. Civ. App.)	623	Howell, McCreless v. (Tex. Civ. App.)	972
Glascos v. State (Tex. Cr. App.)	966	Howe Scale Co. of Illinois, State ex rel. Jones v. (Mo.)	8
Gordner v. St. Louis Screw Co. (Mo. App.)	930	Hubbard v. Dahlke (Mo.)	652
Graham-Brown Shoe Co., Peterson v. (Tex. Civ. App.)	737	Hudmon v. Foster (Tex. Civ. App.)	262
Greene v. Robison (Tex.)	498	Huffman, Austin v. (Tex. Civ. App.)	283
Greenspon, Roper v. (Mo. App.)	922	Huggins v. State (Tex. Cr. App.)	804
Greer, Crady v. (Ky.)	167	Humble Stave & Lumber Co. v. Dunbar (Ky.)	458
Greer v. Joyce (Ark.)	344	Huskey v. Davis (Mo.)	45
Gregory, Ex parte (Tex. Cr. App.)	204	Hutchins v. Wilson (Tenn.)	155
Gribble v. State (Tex. Cr. App.)	215	Hutchinson & Co., Dewitt v. (Mo. App.)	916
Griesenbeck, Georgia Casualty Co. v. (Tex. Civ. App.)	278	Ingram v. Fred (Tex. Civ. App.)	298
Griffith v. State (Tex. Civ. App.)	293	Ingram v. Lattimore (Tex. Civ. App.)	297
Griswold v. Haas (Mo.)	856	Jackson, Le Blanc v. (Tex. Com. App.)	687
Groes v. White (Mo. App.)	920	Jackson, Stone v. (Tex.)	953
Gulf, C. & S. F. R. Co. v. Helms Bros. (Tex. Civ. App.)	853	Jacobs, Frans v. (Ky.)	163
Gulf, C. & S. F. R. Co. v. Scripture (Tex. Civ. App.)	269	Jamison v. Van Aiken (Mo.)	404
Gulf, T. & W. R. Co., Dickey v. (Tex. Civ. App.)	552	Jenkins, Missouri Pac. R. Co. v. (Ark.)	937
Gunter v. Williams (Ark.)	136	J. G. Hutchinson & Co., Dewitt v. (Mo. App.)	916
Haas, Griswold v. (Mo.)	356	Johnson, Anderson v. (Mo.)	23
Hadden, Rowles v. (Tex. Civ. App.)	251	Johnson v. Brown (Mo.)	55
Hailey, Ogilvie v. (Tenn.)	645	Johnson v. Broughton (Ky.)	455
Halford, City of Dallas v. (Tex. Civ. App.)	725	Johnston, Western Union Tel. Co. v. (Tex. Com. App.)	516
Ham, Thomason v. (Tex. Civ. App.)	561	Jones v. Blythe (Ark.)	348
Hamblin, Bryant v. (Ky.)	786	Jones, McKamey Bros. v. (Tex. Civ. App.)	607
Hamer, First State Bank v. (Tex. Civ. App.)	222	Jones v. Texas Electric Ry. (Tex. Civ. App.)	749
Hamilton, Campbell Banking Co. v. (Tex. Civ. App.)	621	Joyce, Greer v. (Ark.)	344
Hancock v. York (Mo.)	63	J. R. Watkins Medical Co. v. Hogue (Ark.)	628
Hanks, Merchants' Life Ins. Co. v. (Tex. Civ. App.)	596	Kansas City, De Mayo v. (Mo.)	380
Hannes v. Raube (Tex. Civ. App.)	985	Kansas City, Henson v. (Mo.)	13
Happgood, Ft. Worth & D. C. R. Co. v. (Tex. Civ. App.)	969	Kansas City v. Public Service Commission of Missouri, two cases (Mo.)	381
Hardy Buggy Co. v. Paducah Banking Co. (Ky.)	452	Kansas City, M. & O. R. Co. of Texas v. O'Connell (Tex. Civ. App.)	757
Harless, General Bonding & Casualty Ins. Co. v. (Tex. Civ. App.)	307	Kansas City Southern R. Co. v. Akin (Ark.)	350
Harrison v. Sharpe (Tex. Civ. App.)	731	Kansas City Southern R. Co. v. Ft. Smith Compress Co. (Ark.)	147
Hart, Ex parte (Tex. Cr. App.)	204	Kelly, Austin v. (Tex. Civ. App.)	282
Hartford Accident & Indemnity Co. v. Davis (Ky.)	950	Kenley, Clapp v. (Mo.)	10
Hartford Fire Ins. Co. v. Walker (Tex. Com. App.)	682	Kennedy v. Kennedy (Tex. Civ. App.)	581
Hartt v. Yturria Cattle Co. (Tex. Civ. App.)	612	Kentucky Highlands R. Co., Bosworth v. (Ky.)	671
		Kentucky River Timber & Coal Co. v. Mosely (Ky.)	180
		Kingsville Cotton Oil Co. v. Dallas Waste Mills (Tex. Civ. App.)	832
		Kircher v. Evers (Mo. App.)	917
		Kirkland, Cherry v. (Ark.)	344
		Kleine, Heidemann v. (Mo. App.)	913

	Page		Page
Knight v. Oldham (Tex. Civ. App.).....	567	Mercantile Trust Co. v. Paulding Stave Co. (Mo. App.).....	438
Knights of Pythias of State of Missouri, Bowman v. (Mo. App.).....	925	Merchants' Life Ins. Co. v. Hanks (Tex. Civ. App.).....	596
Kroell v. Lutz (Mo. App.).....	926	Merchants' Life Ins. Co. v. Lathrop (Tex. Civ. App.).....	593
Lagow v. State (Tex. Cr. App.).....	211	Merchants' Life Ins. Co. v. Mots (Tex. Civ. App.).....	596
Laidacker v. Palmer (Tex. Civ. App.).....	739	Merriweather v. Western Union Tel. Co. (Ky.).....	190
Lamm v. State (Tex. Cr. App.).....	209	Metropolitan Casualty Ins. Co. v. Edwards (Tex. Civ. App.).....	856
Lancaster v. Whittle (Tex. Civ. App.).....	334	Metropolitan St. R. Co., Quirk v. (Mo. App.).....	103
Landers v. State (Tex. Cr. App.).....	694	Metropolitan St. R. Co., Quirk v. (Mo. App.).....	106
Lathrop, Merchants' Life Ins. Co. v. (Tex. Civ. App.).....	593	Middleton Theater Co., Ayres v. (Mo. App.).....	911
Lattimore, Ingram v. (Tex. Civ. App.).....	297	Millers' Mut. Fire Ins. Co. v. Austin (Tex. Civ. App.).....	825
Laughlin, City Nat. Bank v. (Tex. Civ. App.).....	617	Mimms, McMurry v. (Ky.).....	167
Le Blanc v. Jackson (Tex. Com. App.).....	687	Missouri, K. & T. R. Co. v. Morgan (Tex. Com. App.).....	512
Leftridge v. Western Union Tel. Co. (Mo.).....	18	Missouri, K. & T. R. Co. of Texas v. Baker Bros. (Tex. Civ. App.).....	244
Leonard v. Torrance (Tex. Civ. App.).....	295	Missouri Pac. R. Co., Franklin County v. (Mo.).....	874
Levi, Rosser v. (Tex. Civ. App.).....	314	Missouri Pac. R. Co., Garber v. (Mo.).....	377
Lewis, Randolph v. (Tex. Com. App.).....	795	Missouri Pac. R. Co. v. Jenkins (Ark.).....	937
Light & Development Co. of St. Louis, Cape Girardeau-Jackson Interurban R. Co. v. (Mo.).....	361	Modern Woodmen of America, Markland v. (Mo. App.).....	921
Lillard Milling Co., Farmers' & Merchants' Nat. Bank v. (Tex. Civ. App.).....	260	Moffat v. Schenck (Tenn.).....	157
Lisle, Lisle's Adm'r v. (Ky.).....	496	Mooney v. State (Ark.).....	151
Lisle's Adm'r v. Lisle (Ky.).....	496	Moore, Beall v. (Tex. Civ. App.).....	622
Little, Ryberg v. (Mo.).....	356	Moore, Pace v. (Tex. Civ. App.).....	238
Logan, Barnett v. (Mo. App.).....	440	Morgan, Missouri, K. & T. R. Co. v. (Tex. Com. App.).....	512
Louisville, H. & St. L. R. Co., Donahue v. (Ky.).....	491	Morris v. Daniel (Ky.).....	663
Louisville & N. R. Co. v. Baker's Adm'r (Ky.).....	674	Morris v. Hesse (Tex. Civ. App.).....	710
Louisville & N. R. Co. v. Barr (Ky.).....	184	Morse v. State (Tex. Cr. App.).....	965
Louisville & N. R. Co. v. Cook (Ky.).....	661	Mosely, Kentucky River Timber & Coal Co. v. (Ky.).....	180
Louisville & N. R. Co. v. McIntosh (Ky.).....	181	Motz, Merchants' Life Ins. Co. v. (Tex. Civ. App.).....	596
Louisville & N. R. Co. v. Vaughan's Adm'r (Ky.).....	938	Moulton, Reid v. (Mo.).....	34
Louisville & N. R. Co., Williams v. (Ky.).....	172	Mounger, City of Forney v. (Tex. Civ. App.).....	240
Louisville & N. R. Co. v. Wright (Ky.).....	184	Mullins, Cummins v. (Ky.).....	170
Lovick, El Paso & S. W. R. Co. v. (Tex. Civ. App.).....	283	Munn, Alexander Eccles & Co. v. (Ark.).....	626
Lusk, Cassin v. (Mo.).....	902	Nabors v. Colorado & S. R. Co. (Tex. Civ. App.).....	276
Lusk v. Public Service Commission (Mo.).....	72	National Equitable Soc. v. Alexander (Tex. Civ. App.).....	602
Lutz, Kroell v. (Mo. App.).....	926	National Live Stock Commission Co. v. Donohoe (Mo. App.).....	929
Lyle v. Purdy (Ky.).....	667	National Union Fire Ins. Co., Walker v. (Tex. Com. App.).....	638
McClellan v. Howell (Tex. Civ. App.).....	972	New River Lumber Co. v. Tennessee R. Co. (Tenn.).....	639
McClellan, Brady v. (Tex. Civ. App.).....	815	Newsome, Carroll Contracting Co. v. (Mo. App.).....	114
McEntire v. Thomason (Tex. Civ. App.).....	563	Non-Royalty Shoe Co. v. Phoenix Assur. Co., Limited, of London, England (Mo.).....	37
McFaddin, Gill v. (Tex. Civ. App.).....	722	O'Connell, Kansas City, M. & O. R. Co. of Texas v. (Tex. Civ. App.).....	757
McGowan, Pullman Co. v. (Tex. Civ. App.).....	842	Odiome, Ramsey v. (Tex. Civ. App.).....	615
McIntosh, Louisville & N. R. Co. v. (Ky.).....	181	Ogilvie v. Hailey (Tenn.).....	645
McKamey Bros. v. Jones (Tex. Civ. App.).....	607	Oldaker v. Spiking (Mo.).....	59
McKinney v. State (Tex. Cr. App.).....	700	Oldham, Knight v. (Tex. Civ. App.).....	567
McKneely v. Armstrong (Tex.).....	192	Old River Co. v. Barber (Tex. Civ. App.).....	758
McMillian v. Clinton (Mo. App.).....	918	Old River Co., Russell v. (Tex. Civ. App.).....	705
McMurry v. Mimms (Ky.).....	167	Orear, State ex rel. Kansas City v. (Mo.).....	392
McRae Box Co., Broderick v. (Ark.).....	935	Overland Auto Co. v. Winters (Mo.).....	1
Magnolia Compress & Warehouse Co. v. St. Louis Cash Register Co. (Mo. App.).....	125	Owen, Republic Oil & Gas Co. v. (Tex. Civ. App.).....	319
Majestic Milling Co., Berry v. (Mo. App.).....	434	Owens, Providence-Washington Ins. Co. v. (Tex. Civ. App.).....	558
Mannheim Ins. Co., Charles Clarke & Co. v. (Tex. Com. App.).....	528	Oyen v. Willings (Ky.).....	464
Markland v. Brotherhood of American Yeoman (Mo. App.).....	774	Pace v. Moore (Tex. Civ. App.).....	238
Markland v. Modern Woodmen of America (Mo. App.).....	921	Paducah Banking Co., Hardy Buggy Co. v. (Ky.).....	452
Markum v. Markum (Tex. Civ. App.).....	835		
Marshall v. State (Tex. Cr. App.).....	798		
Martin v. Lexington (Ky.).....	433		
Martin, Stovall v. (Tex. Civ. App.).....	321		
Mauney v. State (Tex. Cr. App.).....	959		
Mays, Wall v. (Mo.).....	871		
Meadors, Bryant v. (Ky.).....	177		
Medina Valley Irr. Co., Aguinaga v. (Tex. Com. App.).....	515		
Melcon, Best v. (Ky.).....	662		
Memphis, D. & G. R. Co. v. Thompson (Ark.).....	346		
Menees v. Ewing (Tenn.).....	648		
Mengel Box Co. v. Stevens (Tenn.).....	635		

	Page		Page
Palmer, Laidacker v. (Tex. Civ. App.)..	739	Rousset v. Settegast (Tex. Civ. App.)....	219
Paraffine Oil Co., Aycock v. (Tex. Civ. App.) .....	851	Rowe, Easley v. (Ark.) .....	145
Parham, Western Union Tel. Co. v. (Tex. Civ. App.) .....	740	Rowles v. Hadden (Tex. Civ. App.).....	251
Park v. Depriest (Ark.).....	777	Rowley, Gilroy v. (Tex. Civ. App.).....	623
Parks v. Thomas (Ark.).....	141	Royal Neighbors of America, Fries v. (Mo. App.).....	130
Paulding State Co., Mercantile Trust Co. v. (Mo. App.).....	438	Rugg v. State (Tenn.).....	630
Payne, Southwestern Telegraph & Telephone Co. v. (Tex. Civ. App.).....	983	Runyon, Superior Coal Co. v. (Ky.).....	945
Peterson v. Graham-Brown Shoe Co. (Tex. Civ. App.).....	737	Rush, First Nat. Bank v. (Tex. Com. App.) .....	521
Phoenix Assur. Co., Limited, of London, England, Non-Royalty Shoe Co. v. (Mo.)	37	Russell v. Oil River Co. (Tex. Civ. App.)	705
Phoenix Ins. Co. of Hartford, Conn., Trust Co. of St. Louis County v. (Mo. App.)..	93	Ryberg v. Little (Mo.).....	356
Pierce City v. Hentschel (Mo.).....	31	St. Charles Sav. Bank v. Thompson & Gray Quarry Co. (Mo.) .....	868
Piersol, State v. (Mo.).....	53	St. Louis, B. & M. R. Co. v. Vick (Tex. Civ. App.).....	247
Pittman & Harrison Co. v. Boatenhamer (Tex. Civ. App.).....	972	St. Louis, B. & M. R. Co. v. Webber (Tex.) .....	677
Pitts v. State (Tex. Cr. App.).....	198	St. Louis Cash Register Co., Magnolia Compress & Warehouse Co. v. (Mo. App.) .....	125
Pitts v. State (Tex. Cr. App.).....	199	St. Louis Screw Co., Gordner v. (Mo. App.) .....	930
Porter, E. O. Barnett Bros. v. (Ark.)...	625	St. Louis S. F. R. Co. v. Winslow (Ark.)..	782
Porter, Thompson v. (Ky.).....	948	San Antonio, U. & G. R. Co. v. Ernst (Tex. Civ. App.) .....	603
Porter v. Withers Estate Co. (Mo. App.)..	109	Sanders, Campbell v. (Ark.).....	934
Porterfield v. American Surety Co. of New York (Mo. App.).....	119	Schaff, Reid v. (Mo. App.).....	85
Preston, Ward v. (Ky.).....	793	Schallert v. Boggs (Tex. Civ. App.).....	601
Price, Riggs v. (Mo.).....	420	Scharff, Arnold v. (Tex. Civ. App.).....	326
Prince v. Blisard (Tex. Civ. App.).....	301	Schenck, Moffat v. (Tenn.).....	157
Prince Line, Limited, of Newcastle, England, v. Steger (Tex. Civ. App.).....	223	Schnell & Weaver, Conner v. (Tex. Civ. App.) .....	753
Providence-Washington Ins. Co. v. Owens (Tex. Civ. App.).....	558	Schrivier v. Frommel (Ky.).....	165
Provident Nat. Bank, Foscue v. (Tex. Civ. App.).....	555	Schultz v. Scott (Tex. Civ. App.).....	830
Pryor, Torrance v. (Mo.).....	430	Scott, Schultz v. (Tex. Civ. App.).....	830
Public Service Commission, Lusk v. (Mo.)	72	Scott v. Scott (Ky.).....	175
Public Service Commission of Missouri, Kansas City v., two cases (Mo.).....	381	Scripture, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.).....	269
Public Service Commission of Missouri, State ex rel. Missouri, K. & T. R. Co. v. (Mo.) .....	386	Seaboard Air Line R. Co., West Const. Co. v. (Tenn.).....	633
Pullman Co. v. McGowan (Tex. Civ. App.)	842	Sears, Chicago, R. I. & G. R. Co. v. (Tex. Com. App.) .....	684
Purdy, Lyle v. (Ky.).....	667	Self, Bell v. (Tex. Civ. App.).....	304
Pyle, Denman v. (Tex. Civ. App.).....	335	Settegast, Rousset v. (Tex. Civ. App.)....	219
Quarles v. Eaton-Blewett Co. (Tex. Civ. App.) .....	596	S. F. Bowser & Co. v. Cain Auto Co. (Tex. Civ. App.).....	554
Querl Lumber Co., City of St. Louis v. (Mo.) .....	21	Sharpe, Harrison v. (Tex. Civ. App.)....	731
Quirk v. Metropolitan St. R. Co. (Mo. App.) .....	103	Shear, Houston v. (Tex. Civ. App.).....	976
Quirk v. Metropolitan St. R. Co. (Mo. App.) .....	106	Shields, Taylor v. (Ky.).....	168
Quisenberry, Chapin v. (Ark.).....	341	Simmons v. Western Indemnity Co. (Tex. Civ. App.).....	713
Raley, Bowman & Blatz v. (Tex. Civ. App.) .....	723	Slaughter, Chancellor v. (Tex. Civ. App.)	239
Ramsey v. Odiorne (Tex. Civ. App.).....	615	Slaughter & Moorehead, Baker v. (Tex. Civ. App.).....	557
Randolph v. Lewis (Tex. Com. App.).....	795	Smalley, Vogt v. (Tex. Com. App.).....	511
Raube, Hannes v. (Tex. Civ. App.).....	985	Smith, Ballard v. (Ky.).....	489
Reese Co., Best & Russell Cigar Co. v. (Tex. Civ. App.).....	317	Southern Lumber & Mfg. Co., Petition of (Tenn.) .....	639
Reid, Busby v. (Ark.).....	625	Southwestern Telegraph & Telephone Co. v. Payne (Tex. Civ. App.).....	988
Reid v. Gees (Mo.).....	878	Spencer, Texas & N. O. R. Co. v. (Tex. Civ. App.) .....	989
Reid v. Moulton (Mo.).....	34	Spiking, Oldaker v. (Mo.).....	59
Reid v. Schaff (Mo. App.).....	85	Standard Trust Co., Tennessee R. Co. v. (Tenn.) .....	639
Reliance Oil Co., Aycock v. (Tex. Civ. App.) .....	848	Stark v. Brown (Tex. Civ. App.).....	811
Republic Oil & Gas Co. v. Owen (Tex. Civ. App.) .....	319	State, Alsip v. (Tex. Cr. App.).....	195
Richardson v. Bermuda Land & Live Stock Co. (Tex. Civ. App.).....	746	State v. Arnett (Mo.).....	82
Riggs v. Price (Mo.).....	420	State, Beach v. (Tex. Cr. App.).....	540
Riley, Chandler v. (Tex. Civ. App.).....	716	State, Benson v. (Tex. Cr. App.).....	538
Riley, Stump v. (Tex. Civ. App.).....	603	State, Burow v. (Tex. Cr. App.).....	805
Robinson, Doneghy v. (Mo.).....	655	State, Chance v. (Tex. Cr. App.).....	208
Robinson v. Wiess (Mo.).....	889	State, Childress v. (Tex. Cr. App.).....	193
Robison, Greene v. (Tex.).....	498	State, Christopher v. (Tex. Cr. App.).....	799
Roper v. Greenspon (Mo. App.).....	922	State, Clark v. (Tex. Cr. App.).....	544
Rosser v. Levi (Tex. Civ. App.).....	314	State, Clay v. (Tex. Cr. App.).....	968
		State, Connor v. (Tex. Cr. App.).....	207
		State v. Cummins (Tenn.).....	161
		State, Fovella v. (Tex. Cr. App.).....	207
		State, Fread v. (Tex. Cr. App.).....	695
		State, Gardner v. (Tex. Cr. App.).....	694

	Page		Page
State, Gill v. (Tenn.)	637	Thompson v. Dodge (Tex. Civ. App.)	596
State, Gillespie v. (Tex. Cr. App.)	967	Thompson, Memphis, D. & G. R. Co. v. (Ark.)	346
State, Glascoe v. (Tex. Cr. App.)	956	Thompson v. Porter (Ky.)	948
State, Gribble v. (Tex. Cr. App.)	215	Thompson v. State (Tex. Cr. App.)	800
State, Griffith v. (Tex. Civ. App.)	293	Thompson & Gray Quarry Co., St. Charles Sav. Bank v. (Mo.)	868
State v. Hawkins (Mo.)	4	Titus v. Delano (Mo.)	44
State, Huggins v. (Tex. Cr. App.)	804	Torrance, Leonard v. (Tex. Civ. App.)	295
State, Lagow v. (Tex. Cr. App.)	211	Torrance v. Pryor (Mo.)	430
State, Lamm v. (Tex. Cr. App.)	209	Trust Co. of St. Louis County v. German-American Ins. Co. of New York (Mo. App.)	98
State, Landers v. (Tex. Cr. App.)	694	Trust Co. of St. Louis County v. Phoenix Ins. Co. of Hartford, Conn. (Mo. App.)	98
State, McKinney v. (Tex. Cr. App.)	700	Tunnichiff v. Watts (Mo.)	876
State, Marshall v. (Tex. Cr. App.)	798	Turner, Day & Woolworth Handle Co. v. Allen (Ky.)	477
State, Mauney v. (Tex. Cr. App.)	959	United States Fidelity & Guaranty Co. v. Davis (Ky.)	950
State, Mooney v. (Ark.)	151	Van Auken, Jamison v. (Mo.)	404
State, Morse v. (Tex. Cr. App.)	965	Van Cleave v. Walker (Tex. Civ. App.)	767
State v. Nashville (Tenn.)	649	Vaughan's Adm'r, Louisville & N. R. Co. v. (Ark.)	938
State v. Piersol (Mo.)	58	Venn v. State (Tex. Cr. App.)	534
State, Pitts v. (Tex. Cr. App.)	198	Venn v. State (Tex. Cr. App.)	535
State, Pitts v. (Tex. Cr. App.)	199	Vick, St. Louis, B. & M. R. Co. v. (Tex. Civ. App.)	247
State, Rugg v. (Tenn.)	630	Vitek, City of Rosebud v. (Tex. Civ. App.)	728
State, Taylor v. (Tex. Cr. App.)	539	Vogt v. Smalley (Tex. Com. App.)	511
State, Thomas v. (Tex. Cr. App.)	201	Waggoner, Bowden v. (Tex. Civ. App.)	605
State, Thompson v. (Tex. Cr. App.)	800	Walker v. American Snuff Co. (Ky.)	172
State, Venn v. (Tex. Cr. App.)	534	Walker, Hartford Fire Ins. Co. v. (Tex. Com. App.)	682
State, Venn v. (Tex. Cr. App.)	535	Walker v. National Union Fire Ins. Co. (Tex. Com. App.)	683
State, Wallace v. (Tex. Cr. App.)	206	Walker, Van Cleave v. (Tex. Civ. App.)	767
State, Weaver v. (Tex. Cr. App.)	698	Wall v. Mays (Mo.)	871
State, White v. (Tex. Cr. App.)	199	Wallace, American Nat. Ins. Co. v. (Tex. Civ. App.)	859
State, White v. (Tex. Cr. App.)	200	Wallace v. State (Tex. Cr. App.)	206
State, Wilson v. (Tex. Cr. App.)	542	Ward v. Cathey (Tex. Civ. App.)	289
State, Wilson v. (Tex. Cr. App.)	802	Ward v. Preston (Ky.)	793
State, Wingo v. (Tex. Cr. App.)	547	Washington, Clay's Committee v. (Ky.)	484
State ex rel. Buckner v. Ellison (Mo.)	401	Watkins Medical Co. v. Hogue (Ark.)	628
State ex rel. Greene County v. Gideon (Mo.)	358	Watts, Tunnichiff v. (Mo.)	876
State ex rel. Haller v. Arnold (Mo.)	574	W. B. Worsham & Co., Henrietta Oil & Gas Co. v. (Tex. Civ. App.)	819
State ex rel. Jones v. Howe Scale Co. of Illinois (Mo.)	8	Weaver v. State (Tex. Cr. App.)	698
State ex rel. Kansas City v. Orear (Mo.)	392	Webber, St. Louis, B. & M. R. Co. v. (Tex.)	677
State ex rel. McNulty v. Ellison (Mo.)	881	Weller v. Burns (Tex. Civ. App.)	861
State ex rel. Missouri, K. & T. R. Co. v. Public Service Commission of Missouri (Mo.)	386	West Const. Co. v. Seaboard Air Line R. Co. (Tenn.)	633
State ex rel. Sanitary Street Flushing Mach. Co. v. Garesche (Mo.)	900	Western Clay Drainage Dist. v. Day (Ark.)	338
State ex rel. Simmons (now Hatton) v. American Surety Co. of New York (Mo.)	428	Western Indemnity Co., Simmons v. (Tex. Civ. App.)	713
Steger, Prince Line, Limited, of Newcastle, England, v. (Tex. Civ. App.)	223	Western Union Tel. Co., Abbott v. (Mo. App.)	769
Stevens, Mengel Box Co. v. (Tenn.)	635	Western Union Tel. Co. v. Holcomb (Tex. Com. App.)	509
Stewart v. Wisconsin Steel Co. (Ky.)	479	Western Union Tel. Co. v. Johnston (Tex. Com. App.)	516
Stone, Danciger v. (Mo.)	865	Western Union Tel. Co., Leftridge v. (Mo.)	18
Stone v. Jackson (Tex.)	953	Western Union Tel. Co., Merriweather v. (Ky.)	190
Stout v. Edwards (Mo. App.)	128	Western Union Tel. Co. v. Farham (Tex. Civ. App.)	740
Stovall v. Martin (Tex. Civ. App.)	321	West Virginia Oil Gas & By-Products Co., Hayes v. (Ky.)	174
Stump v. Riley (Tex. Civ. App.)	603	White, Groes v. (Mo. App.)	920
Superior Coal Co. v. Runyon (Ky.)	945	White v. State (Tex. Cr. App.)	199
Supreme Tent, Knights of the Maccabees of the World, Dessauer v. (Mo.)	896	White v. State (Tex. Cr. App.)	200
Sutton v. Bryant (Ky.)	786	Whitesides v. Wood (Tex. Civ. App.)	333
Swain, Hickman v. (Tex. Civ. App.)	548	Whitley, Dillon v. (Tex. Civ. App.)	329
Taylor v. Shields (Ky.)	168	Whittle, Lancaster v. (Tex. Civ. App.)	334
Taylor v. State (Tex. Cr. App.)	539	Wiard v. Dunham (Mo.)	873
Taylor v. Wilson (Ky.)	670	Wiese, Robinson v. (Mo.)	889
Tennessee R. Co., New River Lumber Co. v. (Tenn.)	639	Wilhite, Ft. Worth & R. G. R. Co. v. (Tex. Civ. App.)	705
Tennessee R. Co. v. Standard Trust Co. (Tenn.)	639		
Terral v. Arkansas Light & Power Co. (Ark.)	139		
Texas Electric Ry., Jones v. (Tex. Civ. App.)	749		
Texas Harvester Co. v. Wilson-Whaley Co. (Tex. Civ. App.)	574		
Texas & N. O. R. Co. v. Spencer (Tex. Civ. App.)	989		
Thomas, Atkinson v. (Ark.)	779		
Thomas, Barthold v. (Tex. Com. App.)	506		
Thomas, Parks v. (Ark.)	141		
Thomas v. State (Tex. Cr. App.)	201		
Thomason v. Ham (Tex. Civ. App.)	561		
Thomason, McEntire v. (Tex. Civ. App.)	563		



	Page		Page
Wilkerson, Hoefflin v. (Ky.).....	667	Withers Estate Co., Porter v. (Mo. App.)	109
William Reese Co., Best & Russell Cigar		Wood, Whitesides v. (Tex. Civ. App.).....	333
Co. v. (Tex. Civ. App.).....	317	Worsham & Co., Henrietta Oil & Gas Co.	
Williams, Gunter v. (Ark.).....	138	v. (Tex. Civ. App.).....	819
Williams v. Louisville & N. R. Co. (Ky.)	172	Wright, Hickman v. (Tenn.).....	447
Willings, Oyen v. (Ky.).....	464	Wright, Louisville & N. R. Co. v. (Ky.)..	184
Wilson, Hutchins v. (Tenn.).....	155		
Wilson v. State (Tex. Cr. App.).....	542	Yates, Austin v. (Tex. Civ. App.).....	282
Wilson v. State (Tex. Cr. App.).....	802	Yates, Heimer v. (Tex. Com. App.).....	680
Wilson, Taylor v. (Ky.).....	670	York, Hancock v. (Mo.).....	63
Wilson-Whaley Co., Texas Harvester Co.		Young v. Cumberland County Educational	
v. (Tex. Civ. App.).....	574	Soc. (Ky.) .....	494
Wingo v. State (Tex. Cr. App.).....	547	Young, Funk & Son v. (Ark.).....	143
Winslow, St. Louis S. F. R. Co. v. (Ark.)..	782	Yturria Cattle Co., Hartt v. (Tex. Civ.	
Winters, Overland Auto Co. v. (Mo.).....	1	App.) .....	612
Wisconsin Steel Co., Stewart v. (Ky.)... 479			



# THE SOUTHWESTERN REPORTER VOLUME 210

(277 Mo. 426)

**OVERLAND AUTO CO. v. WINTERS et al.**  
(No. 19516.)

(Supreme Court of Missouri, Division No. 2.  
March 4, 1919. Rehearing Denied and Motion to Transfer to Court in Banc Overruled March 17, 1919.)

**1. EVIDENCE**  $\Leftrightarrow$  423(6) — **PAROL EVIDENCE**  
— **SHOWING INDORSEER TO BE MAKER.**

Under Negotiable Instruments Law, § 68, the legal effect of the blank indorsement of one not otherwise a party to the instrument cannot be varied by evidence from a source other than the instrument itself.

**2. BILLS AND NOTES**  $\Leftrightarrow$  248 — **RECOVERING**  
**FROM INDORSEER AS MAKER.**

Where, under Negotiable Instruments Law, one is an indorser of a note and liable only as such, recovery cannot be had of him as maker, although the petition charges him to be such and parol evidence showing him to be such is admitted without objection.

**3. BILLS AND NOTES**  $\Leftrightarrow$  488 — **ACTION—PETITION—CHARGING PARTY AS MAKER.**

A petition alleging defendant to be comaker of a note does not charge him as such, the allegation being contradicted by setting out of note therein showing his name only to appear on the back of the note without words indicating intent to be bound otherwise than as indorser.

**4. BILLS AND NOTES**  $\Leftrightarrow$  414 — **NOTICE OF DISHONOR** — **"ACCOMMODATED PARTY"** — **"ACCOMMODATION."**

One is not shown to be an accommodation or accommodated indorser, so that under Rev. St. 1909, §§ 10050, 10059, 10085, notice of dishonor need not be given him, by the fact that the car, for the price of which the note was given, was bought for both him and the maker; for the "party accommodated" is the one for whose convenience the paper is made; the term being inseparable from accommodation paper, and implying an accommodation party, as indicated by section 10000, defining "accommodation party."

[Ed. Note.—For other definitions, see Words and Phrases, Accommodated Party.]

Appeal from Circuit Court, Jackson County; Allen C. Southern, Judge.

Action by the Overland Auto Company against C. F. Winters and W. B. Strang. Defendant last named appealed to the Court of

Appeals (180 S. W. 561), where judgment for plaintiff was reversed and case certified to the Supreme Court for final determination. Judgment of trial court reversed.

Bowersock & Fizzell, Bowersock, Hall & Hook, and Robert B. Fizzell, all of Kansas City, for appellant.

James C. Rieger and Willard P. Hall, both of Kansas City, for respondent.

WHITE, C. This suit is on a promissory note. The judgment in the circuit court of Jackson county was for the plaintiff. The case was appealed to the Kansas City Court of Appeals, where the judgment of the circuit court was reversed in a majority opinion written by Judge Trimble. Judge Ellison dissented and caused the case to be certified to this court for final determination.

We cannot do better than to adopt the statement of the facts and in the main the exposition of the law by the majority opinion of the Kansas City Court of Appeals:

"Plaintiff, as assignee for value before maturity of a negotiable promissory note, brought suit thereon against C. F. Winters and W. B. Strang. While the petition alleged that 'defendants by their promissory note herewith filed dated May 1, 1911, for value received promised to pay,' etc., yet it also set out the note on the face of the petition in words and figures as follows:

"\$460.00      Kansas City, Mo., May 1, 1911.

"'Ninety days after date we promise to pay to the order of H. A. Dougherty, four hundred sixty and no-100 dollars, at Kansas City, Mo. Value received with interest at 8 per cent. per annum.      C. F. Winters.'

"'W. B. Strang. (on back).'

"The petition then alleged the assignment of the note to plaintiff before maturity; that \$50 had been paid thereon February 23, 1912; and that the remainder was due and unpaid, for which judgment was asked. Defendant Winters filed an answer admitting the execution of the note, but denied that there was any consideration therefor between him and the plaintiff. Plaintiff filed a reply to this answer in which the plea of no consideration was denied. Defendant Strang filed a separate answer in which he denied, under oath, the execution of the note sued on, and also denied generally all the allegations of the petition.

"At the trial a jury was waived. The note

was introduced showing Winters' signature at the bottom, in the usual place for the payor's name, and the name of W. B. Strang on the back. This was admitted to be Mr. Strang's signature. The plaintiff then introduced Dougherty, the payee of the note, who testified, without objection from either defendant, that the note was given under the following circumstances: Dougherty was agent for the Overland Auto Company and was selling automobiles for said company. Winters came to him and said he and Mr. Strang wanted to buy an automobile for use in the land business of Overland Park, and he asked Dougherty if he would take a note for part payment of the machine. Dougherty replied that he would look the matter up and let him know. Dougherty further testified that his company would not allow him to take notes directly to it in payment of machines, but, owing to Strang's financial standing, he concluded to take the note himself and give his personal check to the company for that amount. Dougherty then notified Winters that they could buy a machine in the way they proposed if he had one that suited them. Winters and Strang then came to Dougherty's place of business, where Dougherty told the latter of his decision to accept the note and pay the cash therefor to the company himself in view of Strang's standing. Strang and Winters then picked out a car, and Dougherty drove it about for them, demonstrating it and otherwise going through the preliminaries necessary to make a sale. Strang at first objected to the color of the car, saying he wanted a gray car, while this was blue. But he finally decided to take it, saying, 'We will take this one.' Thereupon Dougherty drew up the note and handed it to them. There were some alterations to be made in the car, so that it was not ready for delivery until the next day. When it was ready, the money due on the car was paid, and the note, signed as above shown, was delivered, and the car turned over to defendants. No understanding was had between Dougherty and Strang as to how the note should be signed, that is, nothing was said about it, though Dougherty wrote the note, 'we promise to pay,' etc.; but when it was delivered no objection was made to its being signed the way it was.

"The petition did not allege that notice of dishonor was given to Strang, nor did it allege any facts to show that, as an indorser, he was not entitled to notice; and, unless the evidence outlined above presents facts which relieve the necessity of notice, no showing of the kind was made.

"At the close of plaintiff's evidence, counsel for Strang offered a demurrer in his behalf, saying as it was presented:

"We ask a finding in the nature of a demurrer on the part of defendant Strang, on the ground that he is an indorser on the note, and there is no proof of presentation to the maker and notice to the indorser."

"The court overruled the demurrer, and the defendants introduced no testimony. Whereupon the court found for plaintiff and rendered judgment against both defendants for the amount due on said note. The defendant Strang alone appealed.

[1, 2] "1, 2. The principles by which the question of defendant Strang's liability is to be determined vary according to the interpretation placed upon the petition. If that pleading be

considered as charging both defendants with liability as makers of the note, then the question is: Can parol testimony be permitted to change the written instrument sued on, by showing that Strang is not an indorser as the note says he is, but is in reality a comaker with Winters? Before the enactment of the Negotiable Instruments Law (approved April 10, 1906, Laws of Mo. 1906, p. 243, and now forming chapter 86 of the Revised Statutes of Missouri 1909), the rule in this state was that:

"One who writes his name on the back of a note of which he is neither the payee nor indorser, becomes prima facie liable as comaker and will be held to be such in the absence of extrinsic evidence that it was the contract or understanding of the parties at the time he so indorsed it that he should be liable only as indorser."

"See *First National Bank v. Guardian Trust Co.*, 187 Mo. 494, loc. cit. 518, 86 S. W. 109, 70 L. R. A. 79.

"But this rule is changed by section 63 of the Negotiable Instruments Act (now section 10033, R. S. Mo. 1909), which reads as follows:

"A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

"And said rule is also changed by section 64 of said act (now section 10034, R. S. Mo. 1909), which reads as follows:

"Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser," etc.

"See *Walker v. Dunham*, 185 Mo. App. 396, 115 S. W. 1086; *Thorpe v. White*, 188 Mass. 333, loc. cit. 334, 74 N. E. 592; *Toole v. Crafts*, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455; *Gibbs v. Guaraglia*, 75 N. J. Law, 163, 67 Atl. 81; *Far Rockaway Bank v. Norton*, 186 N. Y. 484, 79 N. E. 709; *In re Alldred's Estate*, 229 Pa. 627, 79 Atl. 141.

"The clause in section 63 of said act, 'unless he clearly indicates by appropriate words his intention to be bound in some other capacity,' undoubtedly means words written upon the instrument itself, and hence this is a statutory command that the legal effect of a blank indorsement cannot be changed or varied by evidence from another source. *Porter v. Moles*, 151 Iowa, 279, 131 N. W. 23; *Neosho Milling Co. v. Farmers' Co-operative, etc., Co.*, 130 La. 949, 58 South. 825; *Deahy v. Choquet*, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N. S.) 847; *Baumeister v. Kuntz*, 53 Fla. 340, 42 South. 886; *Rockfield v. First Nat. Bank*, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; *First National Bank v. Bickel*, 143 Ky. 754, 137 S. W. 790. This last-named case (143 Ky. at page 757, 137 S. W. at page 791) says:

"The purpose of the statute is to exclude parol evidence, and to make the written instrument control the rights of the parties. The statute fixing the legal effect of the instrument, parol evidence may not be received to give it a different effect."

"So that, if the petition sued Strang as a comaker with Winters, plaintiff cannot recover, even though there was no objection to the evidence showing him to be such, since the statute says what legal effect shall be given to such

an instrument, and the court is not at liberty to give it any other effect.

[3] "3. But the petition does not charge Strang as comaker. The note is set out in full on the face of the petition, and it shows Winters to be maker and Strang to be indorser, since it shows Strang's name appears on the back thereof. This fixes the capacity in which Strang is sued as that of indorser and corrects any misrecitation in the prior paragraphs of the petition that he was a comaker. *Burroughs v. Wilson*, 59 Ind. 536. Moreover, the record clearly shows that defendant Strang, in presenting his demurrer to the evidence, recognized that the petition sued him 'as an indorser on the note.' Hence there ought to be no question but that the case must be decided upon the theory that Strang is sued as an indorser.

[4] "Taking up the question of Strang's liability on this theory, what is the result? Section 89 of said act (now section 10069, R. S. Mo. 1909) provides that:

"Except as herein otherwise provided, when a negotiable instrument has been dishonored by \* \* \* nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged."

"So that, unless Strang comes within the exceptions otherwise provided in the act, he is discharged from liability on the note, since no notice of dishonor was given him, nor was presentment for payment made. The exceptions contained in the act are found in sections 80 and 115 (now sections 10050 and 10085, R. S. Mo. 1909), the first of which says:

"Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented."

"And the second of which reads:

"Notice of dishonor is not required to be given to an indorser in either of the following cases: (1) \* \* \* (2) Where the indorser is the person to whom the instrument is presented for payment; (3) where the instrument was made or accepted for his accommodation."

"It will be observed that the petition alleges no facts showing that Strang comes within any of these exceptions. So far as the petition goes, Strang is sued simply as an indorser, and not as an accommodation, or as an accommodated, indorser. It has usually been held that, in a suit against an indorser, presentment and notice must be alleged, or the excuse for the absence thereof must be stated. 8 Cyc. 133; *Jacard v. Anderson*, 32 Mo. 188. However, if presentment, demand, and notice are alleged, it seems a waiver thereof may be shown. *Faulkner v. Faulkner*, 73 Mo. 327. But the record does not show any objection to or assault made upon the petition, and we will not decide whether, under such circumstances it is necessary to plead facts showing that the indorser comes within the exceptions noted by the statute, in which notice of presentment and nonpayment is dispensed with. Because if the facts shown by the evidence do not bring Strang within the exceptions, then he cannot be held liable, regardless of the question whether the petition does or does not contain allegations as to his being an accommodation or accommodated indorser.

"Now the evidence does not show that Strang

was either an accommodation or an accommodated indorser. Examining that evidence to see what it contains, without regard to whether it can be considered or not, we see that the best that can be said of it is that the car was possibly purchased for both Winters and Strang. But, even if this be true, there is nothing to show that Strang agreed to contract in any other way than as indorser. Dougherty admits that nothing was said about the capacity in which Strang agreed to be bound. So that, so far as the evidence shows, he contracted only as indorser, and plaintiff has sued him only as such, and neither the petition nor the evidence shows that he contracted in any capacity other than as an ordinary indorser. If the evidence shows anything beyond this, it shows that he was in reality one of the purchasers of the car. If he was, then he should have signed the note as maker, but the parties chose to put the contract in writing showing his liability to be that of an indorser, and the Negotiable Instruments Law says that, when they do that, his liability shall be that of an indorser, and parol evidence will not be allowed to change it. In other words, whether the evidence, showing him to be a maker of the note be objected to or not, the court must determine Strang's liability according to the contract as written, since the law says that shall determine the matter."

The opinion then holds that there was no evidence to show the defendant was brought within the exceptions mentioned in the Negotiable Instrument Act so as to dispense with notice to him of dishonor.

The majority opinion and dissenting opinion agree that one who signs as an indorser may not by parol evidence be shown to have signed in any other capacity, but under sections 10050 and 10085 parol evidence may be introduced to show in what character he indorses, whether he is an accommodation party or the party accommodated. If he is the party accommodated by making the instrument, he is not entitled to notice as provided in section 10085; likewise it is not necessary to show presentment under section 10050 unless the indorser had no reason to expect the instrument would be paid when presented.

The respondent contends that defendant is the accommodated party and the dissenting opinion of Judge Ellison so holds, in which case it would be necessary to remand the case so that evidence might be introduced for the purpose of showing whether or not he had reason to expect the instrument would be paid if presented. The difference between the majority opinion and the dissenting opinion arises in regard to defendant's character with respect to the note. It is a difference depending upon the definition of the expression "for his accommodation" as it is used in sections 10050 and 10085. Respondent bases its position on the proposition that the defendant was the party accommodated by applying the ordinary definition of the term "accommodation." The party accommodated is the one for whose convenience the paper is

made. "Accommodation" is defined in Anderson's Law Dictionary as "convenience, favor, benefit." Respondent quotes the case of *First National Bank v. Bickel*, 143 Ky. 754, 137 S. W. 790, where an "accommodated party" within the meaning of section 10060 and 10085 is defined thus:

"The indorser for whose accommodation the instrument was made or accepted is one who receives value therefor."

But Black's Law Dictionary defines "accommodation" in these words: "An arrangement or engagement made as a favor to another, not upon a consideration received."

The holding generally of the courts, in considering paper of this character, is not to accept the ordinary definition of accommodation, but to give it a meaning such as the one given by Black. In a sense, every one who makes a note on receiving a consideration for it is the party accommodated. But the expression "accommodated party" the "party for whose accommodation the paper is made" is nearly always used by the courts in connection with "accommodation paper." There is no accommodated party without his correlative, an accommodation party. The Negotiable Instrument Act does not define accommodation paper, but does define accommodation party in Section 10000, R. S. 1909, as one who signs an instrument for the purpose of "lending his name to some other person." The "other person," necessarily, is the accommodated party. In the case of *Rea v. McDonald*, 68 Minn. 187, loc. cit. 191, 71 N. W. 12, the court gives this definition:

"'Accommodation paper' is defined as such as is made, accepted, or indorsed by one party for the benefit of another without consideration. It represents and is a loan of credit to the party accommodated."

The case of *Thom v. Kibbee*, 62 N. J. Law, 753, loc. cit. 754, 42 Atl. 729, has this:

"The accommodated party, in a legal sense, is the person to whom the credit of the accommodating party is loaned, not a third person who may receive an advantage by the loan of the credit."

The Supreme Court of Hawaii considered the subject in the case of *Dillingham v. Scott*, 19 Hawaii, 421, loc. cit. 426, and said:

"It is evident that a person may be accommodated within a broad use of that term without being the accommodated party in the legal sense. The accommodated party has been defined as the one to whom the credit is loaned."

In the case of *Mosser v. Criswell*, 150 Pa. 409, 24 Atl. 618, the Supreme Court of Pennsylvania thus comments upon a transaction in which this question was involved:

"A new note made by defendant was in a certain popular sense an accommodation, that is,

a convenience, to the plaintiff, just as it is a convenience to a creditor who wants his money but cannot get it from his debtor in cash, to get payment by a note on which he can raise the money temporarily, though at the risk of an indorsement which he may ultimately have to pay. But this is very far from what the law means by accommodation paper."

These definitions are in accord with the general trend of authority and show that the courts assign a technical meaning to the word "accommodation." The "party accommodated" is inseparable from accommodation paper, and implies an accommodation party.

The evidence offered by the plaintiff shows that the defendant was not in that sense an accommodated party; he was not one for whom anybody gratuitously executed the note. He was accommodated in the sense that he was benefited by the transaction, but he was not accommodated in the sense that there was a lending of credit to him. He was an ordinary indorser and therefore entitled to notice of dishonor before he could be held, and no notice was given.

The judgment of the circuit court is reversed.

ROY, C., absent.

PER CURIAM. The foregoing opinion by WHITE, C., is adopted as the opinion of the court.

All the Judges concur.

#### STATE v. HAWKINS. (No. 21019.)

(Supreme Court of Missouri, Division No. 2.  
March 4, 1919.)

#### 1. INDICTMENT AND INFORMATION $\S$ 75(2)—SUFFICIENCY—CLERICAL MISPRISION.

In an indictment for abortion under Rev. St. 1909, § 4458, if the record showed the omission of the word "did" in charging the assault upon prosecutrix as contended, such patent clerical misprision would be supplied by the most casual reader, and would not render the information bad.

#### 2. ABORTION $\S$ 5—INFORMATION—LICENSED PHYSICIAN.

Rev. St. 1909, § 4458, does not apply to physicians alone, and it was not necessary to charge that defendant was a licensed physician, where it was alleged that the abortion was not necessary to save the life of mother or child, and had not been advised by a physician, and such charge would necessitate either charge or proof of defendant's not acting under physician's advice.

#### 3. ABORTION $\S$ 1—STATUTES—REPEAL.

Rev. St. 1909, § 4458 (Laws 1907, p. 230), relating to abortion and manslaughter, was en-

acted to repeal Rev. St. 1890, § 1825, and repealed by clear implication Rev. St. 1909, §§ 4458, 4459.

**4. INDICTMENT AND INFORMATION §110(5) — STATUTORY LANGUAGE—ABORTION.**

The second count of an indictment under Rev. St. 1909, § 4458, following the language of the statute, held sufficient to charge the "felony of abortion" in a case of pregnancy wherein the fetus has not quickened.

**5. CRIMINAL LAW §878(3) — VERDICT—CONVICTION ON ONE COUNT.**

A verdict reciting that the jury "find the defendant guilty as charged in the second count of the information" and assessing punishment is sufficient, where the second count for "felony of abortion" was good.

**6. CRIMINAL LAW §1060(7) — APPEAL — GROUNDS OF MOTION FOR NEW TRIAL.**

The question of the insufficiency of certain instructions given by the state cannot be reviewed, where not properly raised in the motion for new trial.

**7. CRIMINAL LAW §1053 — APPEAL—PRESERVATION OF EXCEPTIONS.**

An assignment of error for unmerited rebuke of defendant's counsel cannot be reviewed, where counsel apologized to the court and failed to except to the court's act.

**8. ABORTION §11—EVIDENCE—NEGATIVES OF STATUTE.**

In a prosecution for abortion, evidence of prosecutrix's not being advised of medical necessity of an abortion and of her good health prior to the use of means by which the abortion was committed was a sufficient compliance, naught to contrary appearing, with the requisite of making proof of the negatives in Rev. St. 1909, § 4458.

**9. ABORTION §11—EVIDENCE—SUFFICIENCY.**

In a prosecution for the "felony of abortion," under Rev. St. 1909, § 4458, held, that there was substantial evidence of all elements of offense charged.

**10. CRIMINAL LAW §1159(4) — REVIEW — CREDIBILITY—QUESTION FOR JURY.**

Where the prosecutrix in an abortion case was impeached by a bad reputation for chastity, and by divers contradictions, her credibility was for the jury.

Appeal from Circuit Court, Audrain County; Ernest S. Gantt, Judge.

J. B. Hawkins was convicted of the "felony of abortion" under Rev. St. 1909, § 4458, and he appeals. Affirmed.

Defendant, convicted in Audrain county of a violation of section 4458, R. S. 1909, and sentenced to imprisonment in the county jail for 60 days and to pay a fine of \$300, has appealed in the usual way.

Such of the facts as are necessary to make clear the contentions of error made upon this appeal run thus: One Oneida Tipton, resid-

ing in Pike county, had sexual intercourse with a man of the vicinage named Carey Steele. Becoming, as she believed, pregnant since her menses failed to appear on time she went by train from her home with Steele to Mexico, where defendant, who is a duly licensed physician, maintains an office for the practice of his profession. Arriving at Mexico, prosecutrix waited in the railroad depot till Steele went to see defendant to arrange for prosecutrix's visit to him. Returning shortly, Steele took prosecutrix to the office of defendant. Defendant placed her in an operating chair, dilated her private parts with a speculum, and then inserted therein an instrument of some sort and of the size and shape of a lead pencil, which, when used, created a bearing-down sensation, and was followed by a flow of blood. The parts were then packed with what both prosecutrix and defendant call "wool." For this service Steele paid defendant \$25.

Following this treatment prosecutrix became ill, and lay down on a bed in defendant's office till train time. On her way back to her home she grew worse, and was forced to lie down on the car seat. Prosecutrix thereafter continued more or less ill, and on the morning of the second day following the operation detailed she passed a fetus, she says. After this she became so ill and began suffering with such severe pain and cramping in the lower anterior abdominal region that she called a local physician, one Dr. Bartlett. When the latter appeared, she only disclosed to him the fact of her miscarriage on his direct questioning as to the fact after he had examined her; whereupon he asked to be allowed to examine the fetus. Being shown this, he remarked, "That's it all right." As to what was said by Dr. Bartlett, prosecutrix is corroborated by the testimony of her mother. Dr. Bartlett administered remedies, and shortly after prosecutrix fully recovered.

The defendant corroborated the prosecutrix as to her visit to him, her statement to him of her pregnancy, his examination of her person to ascertain this fact, and his treatment of her; but he denied the use of any hard, pencil-shaped instrument on her person. He further testified that she was not pregnant, but that she was suffering when he treated her merely from delayed menstruation and a relaxed condition of the muscles of the womb and of the ligaments which support it. He admits the insertion into the parts of what he calls "wool," but he says this was to support the womb, and, inferentially, not to stanch a flow of blood.

Dr. Bartlett, testifying for defendant, denied that he found any evidence of a miscarriage, or of prosecutrix's former pregnancy. He said that prosecutrix was merely suffering from delayed menstruation. This wit-

ness denied stating that when he examined the alleged fetus he admitted its identity as such, and said that he was informed by prosecutrix's mother that the former had had a miscarriage before he inquired as to the history of her illness.

The testimony shows that, if prosecutrix was in fact pregnant, such condition had subsisted only for some five or six weeks; there had been no quickening of the fetus. The reputation of prosecutrix for chastity and morality was shown to be bad. It was also shown that she had made some efforts looking toward a suit against Steele for damages, but abandoned these on ascertaining that his financial condition was such as to preclude the collection of any judgment she might obtain. Other facts will be referred to in our opinion.

Clarence A. Barnes, of Mexico, Mo., for appellant.

Frank W. McAllister, Atty. Gen., and S. E. Skelley, Asst. Atty. Gen., for the State.

FARIS, J. (after stating the facts as above). [1] I. It is contended by defendant that the information filed herein is insufficient. The criticism is necessarily directed toward the second count, since this is the count upon which defendant was convicted. Omitting merely formal parts, which are conventional and in no wise assailed, this information reads thus:

"And the said R. D. Rodgers, prosecuting attorney within and for the county of Audrain, in the state of Missouri, upon his oath further informs the court that on the 15th day of February, A. D. 1917, at said county of Audrain, state aforesaid, the said J. B. Hawkins did then and there, in and upon the body of said Oneida Tipton, a pregnant woman, then and there being, willfully, unlawfully, and feloniously make an assault, and did then and there willfully, unlawfully, and feloniously use and employ in and upon the body, womb, and private parts of the said Oneida Tipton a certain instrument and instruments, the exact nature and description of which said instrument and instruments is to this informant and prosecuting attorney unknown, and did then and there willfully, unlawfully, and feloniously insert, thrust, and force the said instrument and instruments into the body, womb, and private parts of the said Oneida Tipton, with the willful, unlawful, and felonious intent then and there and thereby to procure, promote, and produce a miscarriage and abortion upon, by, and to the said Oneida Tipton, the same not being then and there necessary to preserve the life of the said Oneida Tipton, and not being necessary to preserve the life of an unborn child then in the womb of the said Oneida Tipton, and not being advised by a duly licensed physician to be necessary for the purpose of preserving the life of the said Oneida Tipton, and not being advised by a duly licensed physician to be necessary for the purpose of preserving the life of an unborn child then in the womb of the said Oneida Tipton, the use of said instrument and instruments in the manner aforesaid by the said J. B. Haw-

kins in and upon the body, womb, and private parts of her, the said Oneida Tipton, not then and there or thereafter causing or producing the death of said Oneida Tipton, or the death of a quick child whereof she, the said Oneida Tipton, was pregnant—against the peace and dignity of the state."

One of the specific attacks upon the information is that the word "did" is omitted, and thus the information fails and omits to charge that defendant did make an assault upon the prosecutrix. We are of the opinion that both the fact and the law are against this contention. A mere cursory examination of the information discloses that it charges "that \* \* \* the said J. B. Hawkins did then and there, in and upon the body of said Oneida Tipton, \* \* \* willfully, unlawfully, and feloniously make an assault." Even if in fact the record bore out learned counsel's contention (as it will be noted it does not), we would upon authority have refused to hold the information bad, since such an omission is so patent a clerical misprision as that it will be at once seen, understood, and supplied by the most casual reader. *State v. Massey*, 274 Mo. 578, 204 S. W. 541.

[2, 3] The provisions of section 4458, under which the prosecution of defendant was had, apply not alone to physicians, but to all persons who may commit the offenses therein denounced. The only reference made in the above section to physicians is that which makes it a defense if an abortion be committed by a duly licensed physician, or upon the advice of a duly licensed physician, when such abortion is necessary to save the life of the woman, or of an unborn and quick child. (With the provision touching permitted action by the state board of health we have here, of course, nothing to do, since the point is not involved.) It was not necessary to charge that defendant was a licensed physician, if, as was done, it was charged that the abortion was not necessary to save the life of the woman, or the life of an unborn child, and that defendant had not been advised by such a physician of such necessity for the act charged. If the pleader had charged that defendant was a licensed physician, then it would not have been necessary to either charge or prove that he did not act under the advice of a physician. *State v. Gow*, 235 Mo. 307, 138 S. W. 648. Section 4458, which was enacted in 1907 (Laws 1907, p. 230) for the stated purpose and intent of repealing section 1825, R. S. 1899, clearly had the further effect of repealing by clear implication section 1823 and section 1853, R. S. 1899 (now sections 4456 and 4459, R. S. 1909). So that section 4458, R. S. 1909, contains all of the offenses formerly defined and denounced by sections 1823, 1825, and 1853, R. S. 1899. *Kelly's Crim. Law & Prac.* 493; *State ex rel. v. Shields*, 280 Mo. 91, 180 S. W. 298.



[4] The learned pleader who drew the information in this case *ex abundanti cautela* charged the offense in two counts, in order to guard against the contingency of a failure of proof that the prosecutrix was pregnant. The record discloses that the events fully justified this precaution. Section 4458 defines and denounces two crimes: (1) Manslaughter in the second degree; and (2) the "felony of abortion." Both of these offenses are committed by the identical means; they are differentiated solely by the result. If the woman die, or if, being with a quick child, such child die, the crime is manslaughter in the second degree. If the woman is not in fact pregnant, or if, though pregnant, the child or fetus is not quick, and the woman does not die, the crime is the so-called "felony of abortion." The second count of the information follows the language of the statute, which is sufficient. If there is a fault of pleading in this count, it arises from the fact that the pleader, through commendable caution, used some language which was not necessary, in an effort to use all the language that was necessary. Without more, we are of the opinion that the second count of the information presents a sufficient charge of the "felony of abortion" in a case of pregnancy wherein the fetus has not quickened.

[5] II. It is urged that the verdict of the jury is insufficient. This verdict, signature and formal parts omitted, reads thus:

"We, the jury, find the defendant guilty as charged in the second count of the information, and we assess his punishment at a fine of \$800 and imprisonment in the county jail for a term of 60 days."

The second count was, we hold above, a good and sufficient charge of the felony of abortion. The verdict is good as a general finding of guilty of the offense charged in the second count of the information. *State v. Martin*, 230 Mo. 1, 129 S. W. 931, 139 Am. St. Rep. 628; *State v. Van Wye*, 136 Mo. 228, 37 S. W. 938, 58 Am. St. Rep. 627; *State v. Schmidt*, 137 Mo. 266, 38 S. W. 938. The cases cited are cases wherein, as here, but one offense was stated in different ways in separate counts, so as to meet the variant exigencies of the proof; nevertheless general verdicts were ruled to be good. The case at bar is by this phase much stronger against the contention made by defendant, in this, that while but a single crime is charged as having been committed in two ways, there is yet a general verdict (in contradistinction to the technical special verdict) finding defendant guilty of having committed the offense in the specific manner charged in the second count. Obviously there is no merit in this contention.

[6] III. Some complaint is made of the insufficiency of certain instructions given for the state; but, since no such matter is properly raised in the motion for a new trial, we

find ourselves unable to review it here. *State v. Rowe*, 271 Mo. 88, 196 S. W. 7; *State v. McBrien*, 265 Mo. 594, 178 S. W. 489.

[7] IV. Defendant complains that an unmerited rebuke of his counsel in the course of the trial by the trial judge prejudiced his case before the jury. The record discloses that in cross-examination one of defendant's counsel had asked a question of the prosecuting witness which was deemed by the state to be objectionable, in that it seriously reflected upon the chastity of the witness. Counsel for the state asked the court to reprimand counsel. The court sustained the state's objection, and in doing so said, "That's objectionable; you shouldn't do that, Mr. Duval." Thereupon counsel replied, "Can't show the character of this complaining witness?" Upon which the court said, "Don't speak to the court that way." Whereupon counsel apologized by stating that he did not mean it that way, and excused himself by saying that he was just recovering from a surgical operation, and that his nerves were unsettled. The court upon this explanation stated that he accepted the apology of counsel, and thus ended the episode. We need indulge in no homily upon the reciprocal obligations of courtesy due from the bar to the court and from the court to the bar; these courtesies are fairly well known to both bench and bar. In the language used by counsel in this episode, as the cold record discloses it, there seems little which is objectionable; so it must have been the manner and tone pitch of counsel to which the court objected. But, be this all as may be, no exception was taken by defendant's counsel. Indeed, so far from excepting was he that he in effect frankly acknowledged his error and apologized. Absent exception, we cannot review the point.

[8-10] V. Lastly, it is complained that the evidence is not sufficient to sustain the conviction. So far as we are able to grasp the point of this contention, it is bottomed upon an alleged failure of the state to bring forward some proof of the negatives contained in the statute and which we discussed in *State v. De Groat*, 259 Mo. 364, 168 S. W. 702, and in *State v. Casto*, 231 Mo. 398, 132 S. W. 1115. In an effort to comply with the burden of proving the negatives set out in the statute under which this prosecution was had, the state asked the prosecutrix this question: "What was the state of your health, physical health, when you went up there?" To this she answered: "I was feeling very well; I hadn't been sick at all." The witness also stated that defendant did not advise her of the medical necessity of bringing about an abortion. Recognizing the difficulties of making this proof, we nevertheless held that evidence of antecedent good health prior to the use of the means by which the abortion was committed was a su-

scient compliance, naught in contravention appearing, with the requisite of making proof of the statutory negatives. *State v. Casto*, supra; *State v. De Groat*, supra. Upon the question of the sufficiency otherwise of the case made by the proof of the state, it is enough to say that there is substantial evidence, either direct or circumstantial, of all of the component elements of the offense charged. While the prosecutrix is impeached for that her reputation for chastity is shown to be of the worst, and by divers contradictions, there is yet substantial proof, since the credibility of the witnesses was for the jury, and not for us. Moreover, upon a number of contradictions prosecutrix is corroborated by her mother's testimony.

Other contentions are made, but all these are either lacking in merit or are not borne out by the record.

Finding no error meet for reversal, it results that the case must be affirmed. Let it be so ordered.

All concur.

(377 Mo. 313)

STATE ex rel. JONES, Circuit Atty., v.  
HOWE SCALE CO. OF ILLI-  
NOIS. (No. 18797.)

(Supreme Court of Missouri, Division No. 2.  
March 4, 1919.)

1. CORPORATIONS  $\S$  652—FOREIGN—LICENSE  
—PENALTY—"CIVIL ACTION."

A proceeding against a foreign corporation to recover a penalty under Rev. St. 1909,  $\S$  8040, for a violation of section 3039 is clearly a civil action.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Civil Action.]

2. CONSTITUTIONAL LAW  $\S$  43(1)—CONSTITUTIONAL QUESTIONS—WAIVER.

A question upon the constitutionality of a statute upon which the suit is based should be lodged at the earliest moment that good pleading and orderly procedure will admit, otherwise it is waived; and it cannot be raised for the first time upon motion to quash execution.

Appeal from St. Louis Circuit Court;  
Eugene McQuillan, Judge.

Suit by the State on the relation of Seibert G. Jones, Circuit Attorney of the City of St. Louis, against the Howe Scale Company of Illinois. Judgment was rendered for plaintiff. From an order overruling a motion to quash execution on the judgment, defendant appeals. Transferred to St. Louis Court of Appeals.

This is an appeal from an order of the circuit court of the city of St. Louis, overruling defendant's motion to quash an execution issued out of said court to collect a judgment

which had theretofore been rendered against said defendant in the sum of \$1,000.

The original suit which resulted in the above-mentioned judgment was instituted by the state of Missouri at the relation of the circuit attorney of the city of St. Louis, and sought to recover from the defendant a penalty in the sum of \$1,000 under section 3040, Rev. St. 1909, for a violation by said foreign corporation of the provision of section 3039, Rev. St. 1909.

Defendant filed a demurrer to the petition, which was overruled, and upon defendant's refusal to plead further judgment was rendered against it for the above sum.

On the theory that a constitutional question was involved an appeal was granted defendant to this court. This court held that a constitutional question was not involved, and certified the case to the St. Louis Court of Appeals. See 253 Mo. 63, 161 S. W. 789. Thereafter the Court of Appeals affirmed the judgment. See 182 Mo. App. 658, 166 S. W. 328.

After the mandate from the Court of Appeals reached the circuit court an execution was issued upon the judgment. Thereafter defendant filed a motion to quash the execution which motion is as follows:

"Now comes defendant, the Howe Scale Company of Illinois, by its attorney, and respectfully shows:

"That on July 10, 1914, there was issued out of the circuit court, city of St. Louis, in cause No. 59475A, execution No. 129 to the October term, 1914, commanding the sheriff of said city to cause to be made of the goods, chattels, and property of defendant a certain judgment rendered in said cause on February 7, 1910, for \$1,000 and costs, and that the said sheriff threatens to levy on the property of defendant. That said execution should be set aside, stayed and quashed for the following reasons, to wit:

"(1) Because the judgment under which said execution is issued is void.

"(2) Because the court had no jurisdiction to assess a fine or to enter said judgment.

"(3) Because section 1025, R. S. 1899, enacted in 1903, under which said judgment purports to be entered, does not provide that the penalty defined in section 1026, R. S. 1899, shall be applicable.

"(4) Because there is no law authorizing the imposition of a fine for a failure to observe the provisions of section 1025, as enacted in 1903.

"(5) Because section 1026, R. S. 1899, is unconstitutional and void, because in violation of section 28, article 4 of the Constitution of Missouri, as the act in which said section was passed contains more than one subject, expresses in its title the subject of each other section, and does not express in its title the subject of said section known as section 1026.

"(6) Because the said execution and judgment violate section 25 of article 4 of the Constitution of Missouri.

"(7) Because said execution and judgment violate section 34 of article 4 of the Constitution of Missouri.

"(8) Because said judgment and execution violate section 4 of Act of Admission to the Union.

"(9) Because said judgment and execution violate the Constitution of the United States and Amendment 14 thereof, and if said execution is not quashed defendant will be deprived of its property without due process of law.

"(10) Because said judgment and execution violate the Constitution of the United States and Amendment 14 thereof, and deny to defendant the equal protection of the laws.

"(11) Because said judgment does not follow the petition in said cause, or the prayer thereof, and is not supported by the allegations of said petition.

"(12) Because there is no finding of fact upon which any judgment can be entered.

"(13) Because there is no inquiry, but judgment was entered on motion of relator, and the court had no jurisdiction to enter a final judgment on motion of relator.

"(14) Because said judgment is so vague and uncertain that it cannot be determined what is decided or adjudged therein.

"(15) Because said execution recites that state of Missouri, at the relation of Seebert G. Jones, circuit attorney of the city of St. Louis, is plaintiff; that said Seebert G. Jones is not now, and has not been since the first Monday in January, 1913, circuit attorney of the city of St. Louis; that Hon. Thomas B. Harvey is now, and has been since said date, circuit attorney of said city.

"(16) Because said execution is void.

"(17) Because said execution is so vague and uncertain that it cannot be determined in whose favor it is issued.

"(18) Because said execution does not follow the judgment, under which it purports to be issued.

"(19) Because said execution violates the Constitution of the state of Missouri and section 8 of article 11 thereof, and directs the said sheriff to cause said judgment to be made for other than the school fund of the city of St. Louis. The city of St. Louis is a separate political subdivision and treated as a county. The school fund of said city is the school fund of a county within the meaning of said section of the Constitution. The board of education of the city of St. Louis is the trustee and custodian of said school fund, and is the only person entitled to receive any moneys belonging to said school fund. The judgment in said cause assessed a fine which by said section belongs to said school fund. No one is entitled to receive any fine except said board of education.

"Wherefore defendant moves the court to set aside, stay, quash, and for naught hold said execution, and that the court grant defendant such other and further relief as it may be entitled to."

The motion to quash the execution was overruled, and defendant was granted an appeal to this court.

B. A. Wood and Anderson, Gilbert & Hayden, all of St. Louis, for appellant.

Frank W. McAllister, Atty. Gen., and John T. Gose, Asst. Atty. Gen., for the State.

WILLIAMS, P. J. (after stating the facts as above). [1, 2] The first question for de-

termination is whether the constitutionality of a statute, upon which a judgment in a case is based, can be raised for the first time by a motion to quash the execution.

Appellant contends that such may be done, and in support thereof cites cases of this court holding that a question concerning the constitutionality of a criminal statute, upon which a conviction has been had, may be raised for the first time after judgment in a proceeding under the habeas corpus act.

We are not now called upon to discuss or determine the soundness of the line of cases to which reference is above made, because the present proceeding was clearly a civil action. *State ex rel. Jones v. Scale Co.*, 253 Mo. 63, loc. cit. 67, 161 S. W. 789, same case 182 Mo. App. 658, 166 S. W. 328.

The rule now firmly fixed on this state concerning the time for raising constitutional questions in civil cases was stated by Lamm, J., in the case of *Lohmeyer v. Cordage Co.*, 214 Mo. 685, loc. cit. 689, 690, 113 S. W. 1108, 1110, as follows:

"But it must be taken as settled law that in so grave a matter as a constitutional question it should be lodged in the case at the earliest moment that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived"—citing cases.

To the same effect are the following cases: *Ross v. Grand Pants Co.*, 241 Mo. 296, loc. cit. 299, 145 S. W. 410, and the many cases therein cited; *Dubowsky v. Binggell*, 258 Mo. 197, loc. cit. 202, 167 S. W. 999.

In the case of *Lohmeyer v. Cordage Co.*, supra, the statute, the constitutionality of which was sought to be assailed untimely, formed the very basis of the action, as is likewise true of the statute in the case at bar, and the case is for that reason very much in point.

It is also well settled by the foregoing cases that unless the constitutional question is timely lodged this court does not acquire jurisdiction of the appeal.

In the case at bar it is very apparent that the defendant first had the opportunity of raising the numerous constitutional questions, attacking the validity of the statute which forms the basis of the action, when the action upon the merits was pending and before judgment upon the merits.

Applying the above rule, it follows that the failure of appellant to thus timely raise the constitutional questions constituted a waiver of the same, and that said questions are therefore not involved upon this appeal.

Since the grounds, other than the alleged constitutional ones of the motion to quash also do not present questions which will confer jurisdiction upon this court, it follows that we are without jurisdiction over the

cause, and that the same must be transferred to the St. Louis Court of Appeals.

It is so ordered.

All concur.

WALKER, J., not sitting.

(277 Mo. 380)

CLAPP v. KENLEY et al. (No. 19482.)

(Supreme Court of Missouri, Division No. 2  
March 4, 1919. Motion for Rehearing  
Denied March 17, 1919.)

1. FRAUDULENT CONVEYANCES ⇨208—SUBSEQUENT CREDITORS.

A subsequent creditor will not be heard to complain about what his debtor did with his property before accrual of indebtedness, except where at time debtor conveyed his property he harbored fraudulent intent to become indebted and to so hide and smuggle his property as to prevent collection of such debt.

2. TRUSTS ⇨44(1) — EVIDENCE — HUSBAND AND WIFE.

In action to subject land of which wife had legal title to debt of husband, evidence *held* not to show that property was held in trust for husband.

3. FRAUDULENT CONVEYANCES ⇨24(1) — CONVEYANCES TO WIFE OF DEBTOR.

That father of judgment debtor conveyed land to his daughter-in-law, knowing at time that his son had a judgment outstanding against him, did not create a trust in the gift in favor of the husband's creditors.

4. FRAUDULENT CONVEYANCES ⇨104(3) — SEPARATE PROPERTY OF WIFE—CONTROL BY HUSBAND.

A husband may manage separate property of his wife without necessarily subjecting it or profits arising from his management to claims of his creditors.

5. EVIDENCE ⇨76—PRESUMPTIONS—FAILURE TO TESTIFY.

Rule that there is a presumption unfavorable to one charged with fraud, who, though personally present in court, fails to testify, can have no application in a case wherein adverse party sees fit to offer a deposition of party charged with fraud.

Appeal from Circuit Court, Sullivan County; Fred Lamb, Judge.

Action by John W. Clapp against Lena Kenley and another. Judgment for defendants and plaintiff appeals. Affirmed.

D. M. Wilson, of Milan, for appellant.

J. M. Wattenbarger, of Milan, and E. B. Fields, of Browning, for respondents.

FARIS, J. This is a bill in equity by which it is sought to subject certain lands, the legal title to which is in defendant Lena Kenley,

to the payment of a judgment against defendant John Kenley.

Plaintiff is the purchaser at a sale under an execution of the 159-acre tract of land in controversy. The salient facts leading up to this sale run briefly thus: On the 4th day of January, 1900, one Ransom obtained judgment in the circuit court of Sullivan county against defendant for the sum of \$1,000, on account of the alleged seduction in May, 1898, of his infant daughter. Shortly thereafter Ransom assigned this judgment to one D. M. Wilson, now counsel for appellant herein. In 1908 Wilson sued on this judgment in order to prevent its lapse by reason of the statutes of repose, and got judgment therein for \$1,528. In February, 1913, Wilson caused execution to issue, levied on the land in controversy, and sold it to plaintiff herein, who thereupon brought this action, and being cast below, appealed in conventional form.

The facts upon which plaintiff relies to fasten in his favor as a creditor the trust upon the land are neither lengthy nor complicated. Defendants were married to each other in December, 1898, and ever since have been and now are husband and wife. In 1901 Hiram Kenley, the father of defendant John Kenley, conveyed to defendant Lena Kenley 40 acres of land. This conveyance was a gift, and was bottomed on no valuable consideration whatever. At the same time Hiram gave and conveyed to his daughter Anna and to each of his other sons and daughters a 40-acre tract of land. Giving his reasons for this conveyance to Lena, Hiram said upon the trial this:

"On December 2, 1901, I conveyed the east 40 acres of what is known as the Jim Kenley farm to the defendant Lena Kenley. She is the wife of my son John. I conveyed it to her because I thought she would take care of it and John wouldn't. I think they had one or two children at that time. Prior to that time my son had been gambling and somewhat reckless. He had nothing when I deeded this to his wife that I recollect of. I had given him property along. He had fooled it away and gambled it off, and it was all gone. I give him four good horses, two at one time and two at another, a good span of coming two year old colts and a span of gray horses that were nice, and they were all gone, and I gave him money besides. I gave her this land in order that she and John Kenley's family might have the benefit of it and he couldn't run through with it."

Afterwards defendants lived and farmed for a few years upon this 40-acre tract, which was given to Lena by Hiram. Later Lena bought the tract of 40 acres, which Hiram had given to his daughter Anna, and after holding it a while sold it at a profit of \$1,000. This profit, together with the proceeds of a sale of live stock from their farm, and the purchase price, or barter price, of the original 40 acres were used in acquiring the 159

acres of land here in dispute. On the latter tract there was outstanding at the time of the trial a mortgage for the sum of \$3,800. This mortgage was for money which went to purchase the land. As these various parcels of land were purchased, the titles thereto were taken in the name of Lena, in whose name all deals were made and the farming business carried on.

While these trades were making and farming operations being carried on and live stock being bought and sold and reared, defendant John Kenley lived on the farm with Lena as her husband, and acted for her in carrying on and managing all these operations, matters, and things. The bank account was carried at all times in the name of Lena, and checks were always made to her for live stock and other products sold. Lena owned, she says, all of the property, both real and personal, and John had nothing and has never had anything, except certain horses, which he says were used up and lost by him before his marriage in gambling and riotous living. Both Lena and Hiram testify that they knew that the judgment on which this proceeding is bottomed was outstanding and unpaid.

There was no showing upon the trial on the part of plaintiff as to the present value of the 159 acres of land in dispute. Defendant John Kenley says in his testimony that the equity of Lena in this land is worth less than the 40-acre tract of land which his father gave to Lena.

Some other of the facts may become pertinent in the course of the discussion, in which event they will be stated in connection with the matters to which their pertinence is apposite.

[1] I. As we understand the contentions of learned counsel for plaintiff, they are three in number: (a) The conveyance to defendant Lena Kenley by Hiram Kenley of the original 40-acre tract was a mere conveyance in trust for his son John Kenley; (b) but if the evidence should not disclose the existence of this trust, then the mere fact of the conveyance to a daughter-in-law, with knowledge in the donor and donee of the son's indebtedness, is sufficient to create a trust in favor of the debtor which will inure to creditors; and (c) that the fact that the debtor labored, managed, and dealt with his wife's property so that it increased in value, caused such increment to so far become the property of the husband as to render it liable for his debts. Other contentions may be made, but we think all such as may in fairness arise upon the record, and all such as are raised in plaintiff's brief, may be easily considered within the compass of the points above set forth. Some faint suggestion is made of equities accruing to this creditor of John from the fact that on the 6th day of June, 1896, the latter reconveyed to Hiram, his father, 40 acres of land, which the father had, for pur-

poses of his own, theretofore conveyed to John. Since, however, the seduction out of which arose the damage suit, and the judgment here sought to be liquidated, did not occur till May, 1898, it is useless to follow up this suggestion. For the general rule is that a subsequent creditor will not be heard to complain about what his debtor did with his property before the accrual of the indebtedness. *Coleman v. Hagey*, 252 Mo. 102, 158 S. W. 829. The only exception is that at the time the debtor conveyed his property away, he harbored the fraudulent intent to become indebted and to so hide and smuggle his property as to prevent the collection of the specific debt. In other words, the conveyance must be part and parcel of the accrual of the indebtedness, a linked conspiracy in a manner of speaking. Of this there is not among the proof in the record even the faintest suggestion.

[2] II. Neither is there any evidence in the record that the conveyance to Lena Kenley by Hiram of the original 40-acre tract was intended to be held by her in trust for her husband. The conveyance by which she took title conveys the land to her (so far as the record before us discloses) absolutely, without any reservations or conditions whatever. All of the testimony in the case shows that Hiram intended to give her the land outright as a home for her and her family. Both Hiram and John give as a reason for thus placing the title that John was disposed in his more youthful years to drink and gamble. So it is clear that any contention that a trust was created in John, or intended so to be, must be disallowed in so far as such trust is shown by any evidence in this record.

[3] III. But it is suggested that the very fact itself that this land was conveyed to Lena, the daughter-in-law, rather than to John, the son, had the effect to create a trust in favor of John's creditors, if Hiram knew at the time he conveyed to Lena that John had a judgment outstanding against him. There is no doubt (for he frankly admits it) but that Hiram knew when he made the conveyance to Lena that John had this identical judgment "hanging over him," and that he knew and fully appreciated the fact that if he gave the land to John instead of giving it to Lena, it would be taken instantaneously to pay this identical debt. But would the possession of this knowledge on the part of the donor create a trust in the gift in favor of the creditors? Clearly not. Hiram owed neither debt nor duty to John's creditors. Indeed, the land was his till he gave it to Lena, and he was under no obligations to give it either to John or to Lena. If he saw fit, as he did, to give it to Lena, and thus to provide a home for his daughter-in-law and her family, the creditors of John are not in a position to object or complain upon any legal or equitable basis.

This proposition seems so clear as to render

either authority or exposition unnecessary. The Supreme Court of Nebraska had before it this identical question, however, in the case of *Wells v. Kindler*, 96 Neb. 233, 147 N. W. 687. In this case the court said:

"Numerous authorities are cited on the question of transactions between relatives, and that, where a deed is made by third parties to the wife of a judgment debtor, the law will presume that the consideration was paid by the husband, and that the burden rests upon the wife to prove the bona fides of the transaction; that is, that the consideration was paid by her, or by some person other than her husband. There is no doubt about the soundness of the rule contended for as a general rule, and the authorities cited cannot be questioned; but this rule, like all other general rules, has its exceptions. That a father may make a gift of his land to his children cannot be doubted; and if, when he desires to distribute a part of his estate among his children, he knows that one of his sons is in debt, and that if he gives the land to him it can be taken by his creditors, he has an undoubted right to convey the land to the son's wife, thereby securing to the family of his son the fruits of his patrimony."

[4] IV. The third ground urged upon our attention as a reason for overturning the judgment of the learned chancellor who tried this case is that the 40-acre tract was, if we may so mix our metaphors as to thus express the idea, only "the nest egg from which was hatched" and grew the 159 acres of land here in dispute, and that such and all growth and increment are due to the labor and management of John in dealing with and handling the land given by his father to Lena. There are two answers to this contention: one of fact, and one of law. The answer which the facts make is that the purchase price of this 159 acres is made up: (1) Of a mortgage for \$3,800 now on this land; (2) of the value of the original 40-acre tract of land given by Hiram to Lena; and (3) of the \$1,000 profit in the sale of the Anna Kenley land, which Lena bought and sold at a profit, which profit went into the land in dispute. Whether there is any equity remaining after these three items are deducted from the present value of the 159 acres, we do not know, because neither the value of the 40-acre tract, nor the value of the 159-acre tract in controversy, is shown by the record. When these relative values are known, there may prove to be a loss from the labor and dealing and management of John, and not an increment or gain therefrom. In fact, John swears that there is such a loss.

The answer which the law gives to the condition presented by the facts is, however, equally decisive against the contentions of the plaintiff. Dealing with a similar situation in the case of *Gruner v. Scholz*, 154 Mo. loc. cit. 424, 55 S. W. 443, Gantt, J., said:

"If, then, as we hold it was, the property was hers, could she employ or accept her husband's

services in running a business, to which he had been trained, and could he lawfully give her his services to aid her in supporting her family? It would seem that in this jurisdiction the question is settled that he could.

"In *Wait on Fraudulent Conveyances and Creditors' Bills* (3d Ed.) § 303, it is said: 'It is settled beyond controversy that a husband may manage the separate property of his wife without necessarily subjecting it, or the profits arising from his management, to the claims of his creditors. The wife, being vested with the right to hold and acquire property free from the control of her husband, the legitimate inference seems to result that she can employ whomsoever she desires as an agent to manage it. To deny her the right to select her husband for that purpose would constitute a very inequitable limitation upon her right of ownership, compelling her to resort to strangers for advice and assistance, and would perhaps seriously mar the harmony of the marriage relation.' In *Tresch v. Wirts*, 34 N. J. Eq. 129, the vice chancellor said: 'A man's creditors cannot compel him to work for them. A debtor is not the slave of his creditors. The marital relation does not disqualify a husband from becoming the agent of his wife. All the property of a married woman is now her separate estate; she holds it as a feme sole, and has a right to embark it in business. She may lawfully engage in any kind of trade or barter. If she engages in business, and actually furnishes the capital, so that the business is in fact and truth hers, she has a right to ask the aid of her husband, and he may give her his labor and skill without rendering her property liable to seizure for his debts.'"

"In the same work, section 304, the following language is used: 'And where the wife was the owner of a farm upon which she resided, and which the husband carried on in her name, without any agreement as to compensation, it was held that neither the products of the farm, nor property taken in exchange therefor, could be attached by creditors of the husband.' *Gage v. Dauchy*, 34 N. Y. 293.

"In *Seay v. Hesse*, 123 Mo. loc. cit. 457 [24 S. W. 1019], this court said: 'In *Webster v. Hildreth*, 33 Vt. 457 [78 Am. Dec. 632], it is said: "Equity has no jurisdiction \* \* \* to compel men to work for their creditors who may perversely prefer to work for their wives and children and leave honest debts unpaid."'"

[5] V. Lastly, it is contended that a presumption is to be entertained unfavorable to Lena Kenley, for that, being charged with fraud, she, though personally present in court, failed to testify. We need not go into this point extensively. The presumption urged exists in a proper case. *Schooler v. Schooler*, 258 Mo. 83, 167 S. W. 444; *Stephenson v. Kilpatrick*, 166 Mo. 262, 65 S. W. 773; *Leeper v. Bates*, 85 Mo. 228. But the record before us shows that the plaintiff took the deposition of Lena Kenley and offered it, together with her cross-examination upon the trial. This deposition covers some 16 pages of the printed record. In it she answered many questions which were wholly incompetent and which she ought not to have been

compelled to answer, which, however, went in without objection at the trial. The rule relied on can have no application in a case wherein the adverse party sees fit to offer the deposition of a party charged with fraud. Certainly this is so in a case wherein, as here, the witness in her deposition fully purged herself of fraud. Plaintiff in such a case ought not to have the benefit both of the testimony of the party and of the presumption arising from the failure of the party to testify.

While conceding that no special effort has been made by defendant John Kenley to pay the judgment against him, and while in no wise apologizing for a situation with the moral phases of which we are not here concerned, we are yet constrained to rule that the learned chancellor who tried this case reached the only possible conclusion, the present status of the law regarded.

It follows that the judgment ought to be affirmed. Let it be so ordered.

All concur.

(277 Mo. 443)

HENSON v. KANSAS CITY. (No. 19512.)

(Supreme Court of Missouri, Division No. 2. March 4, 1919. Motion for Rehearing and to Transfer to Court in Banc Overruled March 17, 1919.)

**1. APPEAL AND ERROR ¶891 — AFFIDAVIT FILED SUBSEQUENT TO APPEAL—CONSIDERATION.**

Affidavits as to physical condition of plaintiff subsequent to trial of his suit for injuries filed in court on appeal may not be considered when they contradict the evidence upon which the verdict was rendered.

**2. APPEAL AND ERROR ¶767(2)—STRIKING BRIEF—GROUNDS.**

Motion to strike appellant's brief because containing affidavits as to physical condition of plaintiff subsequent to appeal will be denied, where there is nothing to indicate that counsel acted in any other spirit than attempt to do justice.

**3. MUNICIPAL CORPORATIONS ¶767 — DEFECTIVE STREET—DANGEROUS PLAN — LIABILITY.**

Where plan adopted by city is manifestly dangerous and unsafe or leaves the street in an obvious, dangerous and unsafe condition, the city is liable for an injury produced as the proximate cause of such patently dangerous plan.

**4. MUNICIPAL CORPORATIONS ¶733(2) — KEEPING STREETS IN REPAIR—MINISTERIAL DUTY.**

While there is lodged in a city discretion as to time at which and place through which it makes improvements, yet when discretion has been exercised and a street has been made, the duty of maintaining it in repair so that it will

not become a menace to the public is not governmental, but ministerial.

**5. MUNICIPAL CORPORATIONS ¶762(1)—DEFECTIVE STREETS—INJURIES—LIABILITY.**

Action will lie for injuries caused by dangerous defects in street which city suffers to remain after reasonable notice of existence thereof, although such defects developed from well-understood physical laws operating upon the conditions produced by the plans which the city adopted.

**6. MUNICIPAL CORPORATIONS ¶798 — DEFECTIVE STREETS—DUTY OF CITY.**

Although perpendicular bank of earth left after grading of street did not at once cave in, where after it had been subjected to the weather for several weeks it began to cave, it became the duty of the city to either take steps to remedy defects or advise those using street of existence thereof.

**7. MUNICIPAL CORPORATIONS ¶800(1) — INJURIES DUE TO DEFECTIVE STREET—DEFENSE.**

That plaintiff while chaperoning her sister, who was coasting, stood by a fire built by others in violation of ordinance when she was injured by perpendicular wall of earth, left after grading street, caving in, would not bar recovery; the coasting not being the proximate cause of the injury.

**8. MUNICIPAL CORPORATIONS ¶821(25) — INJURY DUE TO DEFECTIVE STREET—CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.**

In action for injuries due to high bank of earth along side of street caving in while plaintiff was chaperoning her sister coasting on the street, whether plaintiff saw, or ought to have seen, potential menace held for the jury.

**9. EVIDENCE ¶503 — INVADING PROVINCE OF JURY.**

To ask plaintiff's family physician who had treated her for injury in controversy whether there was any evidence of her "feigning these tears" was an invasion of the province of the jury.

**10. APPEAL AND ERROR ¶1004(1)—REVIEW —EXCESSIVE DAMAGES.**

Whether the damages were excessive depending on the demeanor of the witness and whether or not plaintiff was malingering and feigning as to symptoms of her injuries were questions for the jury, and not the Appellate Court.

**11. EVIDENCE ¶474½ — OPINION — CREDIBILITY.**

One witness may not pass upon the credibility of another.

**12. EVIDENCE ¶506—OPINION EVIDENCE.**

An expert witness may not give his opinion upon the existence or nonexistence of the very matters and conditions which are vital issues in the case.

**13. TRIAL ¶260(8) — INSTRUCTIONS SUFFICIENTLY GIVEN—REFUSAL.**

In action for injuries due to high wall of earth along side of street caving in while plain-

tiff was chaperoning her sister coasting on the street, defendant's requested instruction with reference to accident being due to building of fire close to bank *held* sufficiently covered by given instruction.

**14. TRIAL**  $\Leftarrow$ 191(1) — INSTRUCTIONS — CONTESTED ISSUE—ASSUMING AS TRUE.

An instruction which assumes as true one of the vital contested issues in the case is erroneous.

**15. DAMAGES**  $\Leftarrow$ 132(6) — AMOUNT — PERSONAL INJURIES.

For injuries consisting of a comminuted fracture of the femur near the hip, fractures of both bones near the ankle, and the crushing of muscular tissues of both legs, necessitating confinement in a hospital for seven weeks and thereafter in bed at home for about ten weeks, and resulting in a permanent shortening of one leg and possible permanent nervous condition, a verdict of \$20,000 is excessive.

Williams, P. J., dissenting in part.

Appeal from Circuit Court, Jackson County; William O. Thomas, Judge.

Action by Katherine Henson against Kansas City. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

E. M. Harber and Francis M. Hayward, both of Kansas City, for appellant.

Platt & Marks, of Kansas City, for respondent.

**FARIS, J.** Plaintiff sued defendant for personal injuries accruing to her, it is averred, from defendant's negligence. On a trial had before a jury she had judgment for damages in the sum of \$20,000, and therefrom defendant appealed in due and ancient form.

The salient facts are few and simple; while the details may to an extent be left for statement in connection with the discussion of the points urged for reversal. The outstanding facts run thus: Defendant pursuant to solemn ordinance had by contract caused to be graded a street called Forty-Ninth street, where this street traverses an addition known as "Prospect Hill Addition." This grading was completed in October, 1914, some six weeks or two months before plaintiff was injured, on December 14, 1914. In grading this street pursuant to the plans adopted and carried out by the defendant, a uniform cut was made the width of the whole street, including the sidewalk space, to the property line, so that when the grading was done there were left along the property line perpendicular banks or walls of earth, or clay from 10 to 12 feet high. A wagon-way 26 feet wide had been improved at the point of the injury on Forty-Ninth street, for vehicular traffic, though the sidewalks had not been made. Spaces on both sides of the street called

"sidewalk spaces" in the record, and which were each 17 feet wide, had been left. These sidewalk spaces were at the time of plaintiff's injury being used by pedestrians living in the vicinage to go to and from their homes, to work, to the street car lines, and to stores in the neighborhood, whereby a path was trodden out. Prior to the time of plaintiff's injury a part of this perpendicular clay wall had caved off and fallen across the sidewalk space and across the path made by pedestrians and above mentioned, at a point thereon only a few feet from the place whereat plaintiff was hurt.

Plaintiff, a young woman 19 years of age, then working for a real estate concern in a minor clerical capacity at a salary of \$6 a week, had gone to a point on Forty-Ninth street between Prospect avenue and Wabash avenue to chaperon her sister, who with other young persons had resorted to this part of Forty-Ninth street to coast on sleds thereon. There was another party of young folks there also coasting. The night was cold—only three degrees above zero—and some of the latter party had made a fire on the sidewalk space for the purpose of warming. In the making of this fire plaintiff had no part. The size and location of the fire were disputed questions, since the chief defense of the city upon the facts is that this fire thawed the frozen clay bank and caused it to fall. The evidence of plaintiff tends to prove that this fire was about a foot in diameter and a foot or a foot and a half in height; that it was from 3 to 5 feet distant from the perpendicular wall of the cut, and of negligible intensity. The defendant's evidence tends to show that it was from a foot to 3 feet and 7 inches from the wall (the city's measurements showed 3.6 feet, exactly) and that it was some 2 feet in height and 20 inches in diameter, and of such heat and intensity as to convert the clay of the wall which fell into burnt clay of a bricklike hardness and consistency.

Plaintiff, just a few seconds before she was hurt, had been in the middle of the street with a sled for her young sister. After delivering this sled to the sister she stepped back on to the sidewalk space near the fire for the purpose of warming, or of observing her sister and the other young people while they were coasting. Almost instantly thereafter a frozen section of the clay wall caved and fell and struck plaintiff, hurling her to the ground and breaking her right leg in two places. The upper fracture was a comminuted fracture of the femur near the hip, and the lower consisted in fractures of both bones near the ankle. It is averred that the muscular tissues of both legs was seriously crushed and bruised, and the testimony tends to sustain this averment.

Plaintiff was confined in a hospital for



some seven weeks as a result of the injuries she sustained, and thereafter was confined to her bed at her home for some 10 or 11 weeks. Her right leg was permanently shortened an inch and a half, and other conditions appeared which were nervous in character, and which are averred to be incidents of shock and nerve injury and to be permanent. There was as stated some crushing, or mashing and bruising of the fibers of the muscles of both legs, which the evidence tends to prove has (at least till an operation shall correct it) permanently affected movements in certain ways of both of plaintiff's legs, and causes her, and will continue to cause her, to limp. Upon the question of whether the nervous condition was permanent the medical experts were dubitante. It was agreed by the expert testimony, as we read it, that the shortening of the right leg would cause a permanent limp, which, however, might be largely taken care of by the adjustments in the bones of the pelvis, at the expense of some slight distortion of the spine in the adjustment process. On this single phase of injury to the right leg the medical expert for defendant said that "there ought not to be anything more than a little limp, possibly not that."

Some further facts will be found set out in the course of the expression of our views upon the divers contentions of error urged.

[1, 2] I. We are met with a motion by respondent to strike the brief of appellant from the files, for that it contains as exhibits thereto three certain affidavits purporting to set forth the physical status and condition of plaintiff, as of a date long subsequent to the trial and the taking of this appeal. This motion, coming in too near the day of argument to allow time for careful consideration, was by us taken with the case. Meeting it therefore on the threshold of the case, we must needs dispose of it before reaching the merits.

It is so plain that we may not consider affidavits filed here in an action at law after the appeal is taken, when such affidavits contradict the solemn evidence upon which the verdict was rendered, that neither authority nor exposition is necessary to bolster up the assertion. Lately, in a case more flagrant by far than that made by the showing in the instant case, and one in which the extrajudicial showing of conditions subsequent to appeal were presented formally in a common-law proceeding and not ex parte as here, we refused to be bound thereby in the case appealed. *Callicotte v. Railroad*, 204 S. W. 528, not yet officially reported. We therefore refuse to consider the affidavits filed, and content ourselves with striking them from the files. But, we overrule the motion to strike the brief of defendant from the files, since there is nothing to indicate that the objectionable matter therein contained was interpolated in any other spirit

than that of bringing about counsel's conception of the doing of justice in the case. Counsel's client ought not to be penalized on account of counsel's making every effort consistent with honesty and a proper respect for the courts to protect their client's interests and obviate what they may honestly deem to be a gross miscarriage of justice. That counsel may in doing so, and in an effort to prevent justice from becoming "a hissing and a by-word," sometimes go out of the beaten paths which justice now treads is not to their discredit.

Neither, on the other hand, are we saying that if we could consider these affidavits they show any fraudulent overreaching of the courts. They do not necessarily comport any such thing. They would merely—even if they be true—tend to show the ordinary errors in prophecies of future physical conditions, due to mistaken expert evidence and to the psychological phases of the situation presented.

II. Coming to the strenuously urged contention of defendant that plaintiff made out no case for the jury, and that the demurrer of the city to the evidence ought to have been sustained, we meet a close and difficult question. As we understand defendant's several contentions upon this point, they are: (a) That the falling of the wall or bank of the cut or excavation was due to a defect in the plan of the work, and not to any negligent or defective execution of the work itself, which per contra was done precisely according to the plan; (b) that plaintiff, in standing by a fire built by other persons in violation of the city ordinances, was doing an unlawful act, and therefore cannot recover; and (c) that, the danger of the clay bank's falling being equally as apparent to plaintiff as it was to defendant, she was guilty of contributory negligence as a matter of law in assuming the position she was in when she was injured.

There is no doubt that the doctrine of a city's nonliability when the injury is directly caused by a defective plan, in contradistinction to a defective or negligent execution of that plan, exists in the law. The books are fairly full of cases holding this view. *Vide*, *Hays v. Columbia*, 159 Mo. App. 431, 141 S. W. 8; *Lansing v. Toolan*, 37 Mich. 152; *Davis v. Jackson*, 61 Mich. 530, 28 N. W. 526; *McIntyre v. Pittsburg*, 238 Pa. 524, 86 Atl. 300; *Urquhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 91, note; *Hoyt v. Danbury*, 69 Conn. 341, 37 Atl. 1051; *Watters v. Omaha*, 76 Neb. 855, 107 N. W. 1007, 110 N. W. 981, 14 Ann. Cas. 750; *Foster v. St. Louis*, 71 Mo. 157. Nor is the doctrine bottomed on unstable or unsound legal foundations; for when the city has, through its officers in good faith exercised its best judgment in devising a plan of doing a given work, this judgment ought not to be subjected to the incongruous and changeable rules

of alleged safety arbitrarily devised by shrewd counsel to fit the actionable necessities of every casualty.

[3, 4] But the rule has its limitations; and where the plan adopted by the city is so manifestly dangerous and unsafe, or leaves the street in so obviously a dangerous and unsafe condition that a court can so say as a matter of law, then the city is liable for an injury produced as the proximate cause of such patently dangerous plan. *Hinds v. Marshall*, 22 Mo. App. 208; *Gould v. Topeka*, 32 Kan. 485, 4 Pac. 822, 49 Am. Rep. 496; *Teager v. Flemingsburg*, 109 Ky. 746, 60 S. W. 718, 53 L. R. A. 791, 95 Am. St. Rep. 400; *Healy v. Chicago*, 181 Ill. App. 183; *Conlon v. St. Paul*, 70 Minn. 216, 72 N. W. 1073. But we do not think this rule has any application to the facts shown by this record. No one was hurt from the city's following the mere plan of grading the street by so excavating it as to leave a perpendicular wall of clay 10 feet, or more, in height. The negligence consisted in leaving this clay bank overhanging the pathway used by pedestrians, for some six weeks, or two months, without bracing it, or without in some wise giving notice to the public of its dangerous character. For, while as forecast above there is lodged in the city a discretion as to the time at which and the place through which it makes improvements, yet when this discretion has been exercised and the street has been made, the duty of maintaining it in repair so that it will not become a menace to the public is not governmental, but ministerial. *Hines v. Lockport*, 50 N. Y. 238; *Twist v. Rochester*, 165 N. Y. 619, 59 N. E. 1131; *Collins v. Council Bluffs*, 32 Iowa, 324, 7 Am. Rep. 200; *Jones v. Henderson*, 147 N. C. 120, 30 S. E. 894; *Circleville v. Sohn*, 59 Ohio St. 285, 52 N. E. 788, 69 Am. St. Rep. 777; *Hand v. Brookline*, 126 Mass. 324.

[5, 6] And an action will lie for injuries caused by dangerous defects in a street, which defects the city suffers to remain after reasonable notice of the existence thereof, although such defects developed from well-understood physical laws operating upon the conditions produced by the plans which the city adopted. Here the perpendicular bank did not at once cave. It might indeed never have caved. But when it had been subjected to the mutations of the weather for some six weeks, it began to cave in other near and similar places, and thus gave notice to the city of its dangerous condition. Thereupon it became the duty of defendant city either to take steps to remedy the defect or to advise those using the street of the existence of such defect, so that they might protect themselves against it.

[7] III. Coming to the next urged reason of nonliability, we are likewise of the opinion that it is untenable under the facts in this record. Plaintiff had nothing to do with

making the fire; none of the party whom she was chaperoning had anything to do with this violation of the ordinance. The fire had been made by others, and she was standing near it for a few seconds, observing her sister and others coasting, when the bank fell and she was hurt. Cases called to our attention by learned counsel, wherein the facts were that persons were hurt while unlawfully coasting upon streets by alleged obstructions in such streets, are clearly not in point. If it be urged that her act in chaperoning these young people who were coasting at a place forbidden by ordinance made her as guilty as they were, or that she aided and abetted this violation of an ordinance by bringing a sled to her young sister, the obvious answer is that the coasting was not the proximate cause of her injury. Since plaintiff was lawfully upon the street and when hurt was not engaged in any unlawful act, the duty *ceteris paribus* was owed her by the city to make the street on which she stood reasonably safe for her use.

[8] IV. Lastly, upon this phase, it is urged that since plaintiff was *sui juris*, she could and should have seen this overhanging bank, and have realized its potential danger, which danger, it is urged, was just as apparent to her as it was to the defendant. The record shows that plaintiff had never been along this street or sidewalk space since it was graded; that she had not seen the patent evidences of its recent caving at other near points, because she had at the instant before she was hurt approached this wall from the center of the street; that it was night, and except for the fire in question, very dark, so that she saw only some 5 or 6 feet of the wall, and this portion but dimly, and only by the light of this small fire.

On her evidence on this point, of which there was some corroboration, and some contradiction, it became a question of fact for the jury, and not a question of law for the court, as to whether the danger was apparent to her, or whether she saw, or ought under the circumstances to have seen, the potential menace of the situation. We are, upon the whole, of the opinion that there was a case made for the jury, and that each of the defendant's three contentions to the contrary should be disallowed.

[9] V. In the course of the examination of Dr. Hamilton (who was a witness for plaintiff and who, as plaintiff's family physician, had attended her professionally and treated her for the injury in controversy here) he was asked, over defendant's objection, this question: "Do you see any evidence of Miss Katherine's (plaintiff) feigning these tears?" After some discussion on the point of the admissibility of this question, it was held by the trial court to be a proper one. Whereupon counsel repeated it to the witness, changing the verbiage thereof slight-

ly, thus: "Answer, what, if any, evidence you found of her feigning these tears?" The witness answered, "I could not say that there was any evidence that she is feigning."

[10-12] It is difficult to ascertain from the record whether counsel for plaintiff was asking the above question with reference to plaintiff's attitude upon the witness stand, or as to her condition while the witness was treating her, or as to her attitude while sitting in court and observing and taking part in the trial. And while the sequence with which the witness testified in the case would seem to exclude the first hypothesis, there are yet indicia in the record that the question had reference to the attitude of the witness while taking part in the trial. For counsel for defendant had before asked that the jury be discharged on account of the behavior of the plaintiff. Regardless of these hypotheses, the question invaded the jury's province. There was a general denial in the case; the extent of plaintiff's injuries and the question of their permanence vel non were sharply contested, and it is here and now most strenuously contended that the verdict herein is excessive. The evidence in the case, the demeanor of the witness on the stand, and the question whether or not plaintiff was malingering and feigning as to the symptoms of her injuries were questions solely for the jury. Clearly, one witness may not pass upon the credibility of another witness. *Hunt v. Gas Co.*, 8 Allen (Mass.) 169, 85 Am. Dec. 697; *Holliman v. Cabanne*, 48 Mo. 568. Neither may an expert witness give his opinion upon the existence, or nonexistence of the very matters and conditions which are vital issues in the case. *Deiner v. Sutermeister*, 266 Mo. 505, 178 S. W. 757. The question was improper, and the answer probably contributed largely to the swollen verdict in the case.

[13] VI. Defendant asked, and now complains that the court refused, the below instruction, to wit:

"The court instructs the jury that although you may find from the evidence that plaintiff was injured at the time and place claimed by her, yet if you further find from the evidence that the bank of clay which fell upon her had, before the accident, been frozen and thereby rendered the north side of Forty-Ninth street, between Prospect and Wabash avenues, reasonably safe for travel, and that said bank was thawed loose at the time of such accident by the building of a fire, the evening of the accident, and that it thereupon fell on plaintiff, you are instructed that a sufficient time had not elapsed before the accident to impart to the city notice of such condition of the bank, and that plaintiff cannot recover, and your verdict must be for the defendant, Kansas City."

However, since the court gave sua sponte the below instruction, in all material substance similar to that which was refused, no error inures from the failure of the court

to give the above instruction. For the instruction given by the court on this theory of defense reads thus:

"The court instructs the jury that if they believe from the evidence that on and before December 15, 1914, the embankment in question was reasonably safe for persons to pass on and along the north side of Forty-Ninth street, and if you find from the evidence that on said date a fire was maintained adjacent to the part of the embankment which fell, and that [sic] the direct result of such fire, if any, said bank was caused to fall, then the defendant city had no notice thereof, and you must find for defendant Kansas City."

While there is a patent, but harmless, clerical error in the above instruction, the meaning of it is plain. It is also plain that it presents to the jury the identical defense presented by the instruction refused. We disallow this contention.

VII. Defendant asked and the trial court refused the below instruction, to wit:

"The court instructs the jury that, although you may find from the evidence that plaintiff was injured at the time and place claimed by her, yet if you find from the evidence that plaintiff, by standing near the embankment which fell upon her while the bank was subjected to the heat of a fire built near it, and that said fire caused said bank to fall, did not exercise ordinary care under the circumstances, and that such lack of care directly contributed to her injury, then plaintiff cannot recover, and your verdict must be for defendant, Kansas City."

We think this was error. There were both plea and proof upon defendant's part of contributory negligence. Plaintiff was sui juris; and, while she says that she could not see the clay wall, except by the light of the bonfire, which illuminated only some 4 or 5 feet of it, and thus as we have ruled made a case to go to the jury, there was countervailing testimony adduced on defendant's part which tended to prove that this fire was of such size and character that it so lighted up this clay bank as to make its menace apparent.

[14] VIII. It is also urged that instruction C2, which was the chief and (except for a mere formal instruction withdrawing certain evidence from the jury) the only instruction asked by plaintiff, is erroneous, for that it assumes as true one of the vital, contested issues of the case. That is to say, that it tells the jury that the clay wall in question was reasonably certain to fall. It is a close and difficult question whether the language and grammatical construction of this instruction makes it susceptible or not to the criticism urged. The law is well settled in favor of defendant's abstract contention. *Crow v. Houck's Ry.*, 212 Mo. 589, 111 S. W. 583; *Coffey v. Carthage*, 186 Mo. 573, 85 S. W. 532; *Miller v. Busey*, 186 S. W. 983; *Ganey v. Kansas City*, 259 Mo. 654, 168 S. W. 619. It is only the language of the

instruction, therefore, which makes the point doubtful. The instruction is, to say the least of it, ambiguous. Since the case must be reversed upon other grounds, we need not say more upon the question, for doubtless learned counsel for plaintiff will be advised upon another trial to so recast this instruction as wholly to obviate the criticism urged.

[15] IX. We are also of the opinion that the verdict is excessive. This condition can also be corrected upon a new trial, in the event that the triers of fact do not see fit to do so of their own initiative. For the errors pointed out, let the case be reversed, and remanded for a new trial not inconsistent with what we have herein ruled.

All concur; WILLIAMS, P. J., in result and in all except paragraphs 1 and 9.

(277 Mo. 90)

**LEFRIDGE v. WESTERN UNION TELEGRAPH CO. (No. 20108.)**

(Supreme Court of Missouri, Division No. 1. March 1, 1919.)

**1. COMMERCE §28—“INTERSTATE COMMERCE”—TRANSMISSION OF TELEGRAMS.**

The transmission of messages from state to state is commerce among the several states, and therefore subject to regulation by Congress under Const. U. S. art. 1.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

**2. COMMERCE §59—INTERSTATE COMMERCE—TELEGRAPH COMPANIES—OPERATION OF STATE LAWS.**

The interstate commerce character of messages transmitted from one state to another does not relieve telegraph company from operation of laws of states enacted by the states in the exercise of their power over men and things situated within their jurisdiction.

**3. CONTRACTS §144, 325—CONSTRUCTION—LAWS APPLICABLE.**

Contracts are construed and enforced according to the laws of the state within which the contract was made.

**4. CRIMINAL LAW §1—LAWS APPLICABLE.**

The criminal character of an act is determined by the laws of the state within which the act was committed.

**5. COMMERCE §10—INTERSTATE COMMERCE—STATE LEGISLATION.**

Failure of Congress to legislate upon subject of interstate commerce does not leave states without jurisdiction to enforce civil rights and redress civil wrongs incident to its prosecution within their borders.

**6. COMMERCE §8(7)—INTERSTATE COMMERCE—TELEGRAPH COMPANIES.**

Rev. St. 1909, § 3330, making the delivery of an altered telegraph a penal offense, is inap-

plicable to transmission of message from one state to another, having been abrogated in its application to such messages by Act Cong. June 18, 1910, c. 309, placing telegraph companies, in the transmission of interstate messages, under the control of the Interstate Commerce Commission, though such act made no provision as to delivery of messages without material alteration.

**7. COURTS §97(5)—DECISIONS—FEDERAL DECISIONS.**

In action in state court involving the question of whether a state law regulating transmission of telegrams has been superseded by the federal statute, a decision of the Supreme Court of the United States *held* controlling on the state Supreme Court.

Appeal from Circuit Court, Macon County; Nat Shelton, Judge.

Suit by J. M. Leftridge against the Western Union Telegraph Company, a corporation. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Franklin Ferriss and Geo. F. Haid, both of St. Louis (Albert T. Benedict, of New York City, of counsel), for appellant.

**BROWN, C.** This is a suit against the Western Union Telegraph Company, a corporation, to recover the penalty of \$300 imposed by the terms of section 3330 of the Revised Statutes of this state (1909), for failure to transmit and use due diligence to deliver into the hands of the addressee at McComb, Ill., without material alteration, a telegram delivered to it by plaintiff on May 21, 1915, at its office in Clarence, Mo., for that purpose, all charges being paid. The telegram was materially altered before delivery by the substitution of the word "dead" for the word "bad."

No fault is found with the form of the petition except as indicated in a general demurrer filed thereto, with the following specification:

"And for the further reason that said petition on its face shows that the message upon which this suit is based was filed at the town of Clarence, in the state of Missouri, and destined to the town of McComb, in the state of Illinois, and is therefore interstate commerce, so that the statute of Missouri (section 3330) under which this suit is brought, if construed as authorizing the recovery of the penalty therein provided in respect to such message, would be unconstitutional, null, and void and in violation of article 1, § 8, of subdivision 3 of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states, and would also be in violation of and in opposition to the acts of Congress passed and approved in pursuance of said article 1, § 8, of said subdivision 3, and especially the act of Congress passed and approv-

ed June 18, 1910, being the Thirty-Sixth Statutes at Large of the United States, at page 539."

The demurrer was overruled, and, the defendant declining to plead over, judgment was entered for plaintiff, from which the defendant prosecutes this appeal.

The only question presented is whether the provision of the state statute imposing the penalty sued for was, at the time this message was delivered to the defendant for transmission, valid and operative under the provisions of the interstate commerce clause of the Constitution of the United States and the acts of Congress upon the same subject.

[1-5] That the transmission of messages from state to state by means of telegraph is commerce among the several states, and therefore subject to regulation by Congress under the power granted in section 8 of the first article of the federal Constitution, is unquestioned. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 24 L. Ed. 708; *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187; *Western Union Telegraph Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105. It is equally well settled that the character of these carriers as instruments of interstate commerce does not relieve them from operation of laws enacted by the states in the exercise of their power over men and things situated within their jurisdiction. This control covers the entire field of human activity, both civil and criminal, within their borders. Contracts made within the state are construed and enforceable according to its laws, and acts are adjudged crimes by the same standard. Congress, by failing to legislate upon the subject of interstate commerce, did not leave the states without jurisdiction to enforce civil rights and redress civil wrongs incident to its prosecution within their borders.

The enactment by Congress of the Interstate Commerce Law in the exercise of the constitutional power changes this condition materially with respect to interstate carriers by rail and placed them under the control of the commission it created in many respects. This control was extended by laws enacted from time to time in the interest of safety and uniformity, until the instrumentalities of interstate transportation were controlled in their operation by federal laws applying to every detail in the relation of these carriers to the public as well as to their own employés, leaving no room for the intervention of the state, which still retained, in most respects, the power to regulate telegraphic agencies in their relation to the public. *Western Union Telegraph Co. v. James*, supra; *Western Union Telegraph Co. v. Milling Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815; *Western Union Telegraph Co. v. Crovo*,

220 U. S. 364, 31 Sup. Ct. 399, 55 L. Ed. 498.

The only question in this case is whether Congress has now, by the act of June 18, 1910 (36 Statutes at Large, 544) occupied the field covered by this suit so as to exclude the power of the state to impose upon the telegraph company a penalty for its failure to deliver a message received by it in this state to the addressee in another state without material alteration. It would be difficult to imagine a clearer illustration, not only of the interstate character of the transaction, but also the interstate character of the control assumed by this state, in which the only act necessarily performed is the harmless one of receiving the message and payment for its transmission. The act or failure to act which incurs the penalty is to be performed in another state. It is not contemplated that the law should hold its ear to the instrument receiving it in the foreign state to ascertain whether it gives forth the proper sound. The operator who writes it down is the one who puts it in words which it did not contain, for delivery.

If the duty of the telegraph company in receiving and handling this message is completely covered by the Interstate Commerce Act (Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379) as amended in 1910, it is plain that the state law prescribing the performance of the duty and imposing the penalty for its non-performance is thereby abrogated; for, when it had performed its entire duty under the paramount law, there was no room for further control. This principle has been so often applied in cases involving the acts of Congress relating to Employers' Liability and Safety Appliances that it would be futile to cite the many cases in the federal and state courts which have placed it outside the region of legitimate debate. In the late case of *Holloway v. Missouri, Kansas & Texas Railway Co.*, 208 S. W. 27, not yet officially reported, this court said:

"When Congress, in the exercise of its plenary constitutional power, enacts a law relating to a particular subject, the statute so enacted is not only paramount to all state legislation upon that subject, but the legislative power of the state to occupy the same field ceases."

It only remains to state whether Congress has occupied the field we are now traversing.

By the first paragraph of section 1 of the act to regulate commerce as amended by the act of June 18, 1910 (36 Statutes at Large, 545 [United States Compiled Statutes 1916, § 8563]), it is provided as follows:

"That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from

one state, territory, or district of the United States, to any other state, territory, or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act: \* \* \* Provided, however, that the provisions of this act shall not apply to \* \* \* nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one state and not transmitted to or from a foreign country from or to any state or territory as aforesaid." The amendatory words are in italics.

Paragraph 8 of the same section as amended, provides:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *Provided, that messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeatd, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages:* And provided further, that nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services."

Section 8 (Comp. St. § 8565) makes it unlawful for any common carrier subject to the provisions of the act to give any unjust or unreasonable preference. Section 10 (Comp. St. § 8574) provides that any common carrier subject to the provisions of the act who shall violate any of its provisions shall be guilty of a misdemeanor and subject to a fine not to exceed \$5,000. Section 15 of the act gives the Interstate Commerce Commission upon investigation plenary power to prescribe what shall be reasonable rates to be charged by telegraph companies as well as of other common carriers under its jurisdiction.

If there is anything provided in this act or in any other congressional legislation covering the same field, it has not been called to our attention. The provisions of the Interstate Commerce Act imposing the penalties being limited to cases of violation of the terms of the act, which contains no provision to which our attention has been directed regulating or expressly requiring the delivery of interstate messages promptly and without material alteration to the addressee at the place of destination, it may be contended that the subject has been deliberately left by Congress to the exercise of the police power of the several states having cognizance of the wrong. There is plausibility in the argument; for it is not to be presumed that Congress would withdraw from the state the

right to protect persons and property within its limits otherwise than by the expression of a clear intention to that effect. This argument in its application to this case has been met by the Supreme Court of the United States in the case of *Western Union Telegraph Co. v. Brown*, 234 U. S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457, in which it was sought to recover damages authorized by a statute of South Carolina for the nondelivery of a telegram transmitted from that state to the addressee in the District of Columbia. The court held the statute to be unconstitutional as an attempt to regulate commerce among the states in so far as it attempted to determine the conduct required of the telegraph company in transmitting a message from South Carolina to the District of Columbia, by determining the consequences of not pursuing such conduct. This case was followed in *Western Union Telegraph Co. v. Billisoly*, 116 Va. 562, 82 S. E. 91. That case like the one at bar was a suit for a penalty imposed by the state of Virginia for nondelivery of a message filed for transmission in that state. The same question afterward came before the United States Circuit Court of Appeals of this circuit on appeal from the Western District of Oklahoma. *Gardner v. Western Union Telegraph Co.*, 231 Fed. 405, 145 C. C. A. 390. The action was by the addressee for delay in delivery to him in Oklahoma of a message transmitted from Kansas. The question arose upon the validity of the following agreement printed upon the back of the message:

"That the company should not be liable for damages or statutory penalties in any case where the claim was not presented in writing within sixty days after the message was filed with the company for transmission."

The Constitution of Oklahoma made this limitation as to time null and void. The court held that this constitutional provision was not applicable to interstate messages.

These three cases together stand upon the theory that, although the amendment of 1910 contains no provision directly controlling the action of the respondent with respect to the delivery of this message, it was an exercise of the constitutional authority of Congress by which the company was placed under the control of the Interstate Commerce Commission with respect to its rates, rules, and classification of its contracts, including the equality and fairness of its service and charges, that by imposing certain penalties for violation of its duties in these respects it exercised its undoubted prerogative to control the conduct of this class of business by penal process, and that, having occupied this field of legislation, the state was excluded. If Congress chose to let the rights and duties of the company rest upon the common law, the state could not complain.

[8, 7] This is the foundation upon which

these cases stand. We think it is sound even without the authority of the Brown Case, which controls us.

The judgment of the circuit court for Macon county is reversed, and the cause remanded, with directions to enter judgment in accordance with these views.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

(277 Mo. 167)

CITY OF ST. LOUIS v. CHAS. F. QUERL LUMBER CO. (No. 19759.)

(Supreme Court of Missouri, Division No. 2, March 4, 1919.)

**1. JUDGMENT  $\S$  650 — RES ADJUDICATA — FINALITY OF DETERMINATION—CONDEMNATION PROCEEDINGS—EXCEPTIONS TO REPORT.**

Where appellant took no exception, no appeal, or term bill of exceptions to action of circuit court in sustaining exceptions filed to first report of commissioners in condemnation proceeding, he is precluded from having the identical issues decided at subsequent term upon exception to second report.

**2. COURTS  $\S$  99(1)—LAW OF CASE—EXCEPTIONS TO COMMISSIONERS' REPORT.**

Where appellant took no exception, no appeal, or term bill of exceptions to action of circuit court in sustaining exceptions filed to first report of commissioners in condemnation proceeding, he would be precluded from having reviewed in the Supreme Court the action of the circuit court, although he sought to raise the identical issue at a subsequent term by exception to second report.

Appeal from St. Louis Circuit Court; Kent Koerner, Judge.

Condemnation proceedings by the City of St. Louis against the Chas. F. Querl Lumber Company and others. From judgment of condemnation, the named defendant appeals. Affirmed.

Geo. W. Lubke and Geo. W. Lubke, Jr., both of St. Louis, for appellant.

Charles H. Davies, City Counselor, and Lambert B. Walther, both of St. Louis, for respondent.

**FARIS, J.** The city of St. Louis, pursuant to an ordinance duly passed in that behalf, instituted proceedings against appellant and others as defendants to condemn certain parcels of land for the purpose of widening a street called Blase avenue.

To this end a board of commissioners was appointed by the circuit court, who proceed-

ed pursuant to law to ascertain and report their findings of the damages which would be sustained by the appropriation of the property of defendants in the proceedings for the use stated. These commissioners found, and so reported to the circuit court, that appellant was the owner of a certain parcel of the land sought to be condemned for street purposes, and that it would sustain damages in the sum of \$2,429.46 by the appropriation thereof. The above report was filed in the circuit court on the 20th day of September, 1913.

Thereafter certain persons, who were the owners of property in the benefit district (which property was liable to assessments for the payment of the awards in favor of appellant and others), filed exceptions to the report of the board of commissioners. The grounds of these exceptions are self-explanatory, and, so far as the same are pertinent to the questions raised on this appeal, read thus:

"That the commissioners erred in awarding to the Charles F. Querl Lumber Company any damages because a strip of land twenty-five feet in width, and having a depth of five hundred twenty feet one and three-eighth inches eastwardly from the east line of Broadway, for the taking of which damages were awarded to the said company by the commissioners, had been dedicated to public use for highway purposes, and had been continuously used as a public highway for more than ten years prior to the institution of this suit."

The above exceptions came on for hearing before the circuit court on the 28th day of January, 1914, and at the December term, 1913, of the circuit court, and were tried by the court sitting as a jury. On said trial the court sustained the exceptions of the special taxpayers upon the specific ground that the reasons therefor above set out were as a matter of fact true, and thereupon set aside the report of the commissioners. To this action of the trial court appellant neither excepted at the time nor filed any term bill of exceptions. On setting aside the report of the commissioners, the circuit court, as he is by the charter of St. Louis in his discretion permitted to do, ordered "that a new appraisalment and assessment be made herein," and to this end appointed a new board of commissioners, who duly qualified, and on June 4, 1914, and at a term subsequent to that at which the exceptions supra were sustained, filed their report. The latter report, following and being governed by the finding of the circuit court, touching the dedication by prescription of appellant's land, awarded to appellant only nominal damages, to wit, one dollar, for the appropriation thereof.

Upon the coming in of the latter report appellant filed exceptions thereto, which, so far as they are pertinent to the point confronting us, read thus:

"That said commissioners also erred unjustly and illegally in holding and finding that the parcel of ground twenty-five feet in width and five hundred and twenty feet and one and three-eighths inches in depth, belonging to this defendant, and adjoining Blase avenue, thirty feet wide, is a public highway by virtue of adverse user and prescription; and that said commissioners also erred and unjustly and illegally held and found that this defendant was and is entitled to damages of only one dollar for the appropriation thereof, whereas said parcel of ground was not and never has been a public street, but is the property of this defendant, and is of a value largely in excess of one dollar; and the said commissioners also erred and unjustly and illegally found that the benefits derived by this defendant to other property owned by it by said proposed opening amounts to sixty dollars and forty-eight cents, for that said property of this defendant was not and will not be benefited to that extent."

To the above exceptions an answer was filed by those property owners whose property situate in the benefit district was liable for the payment of the award made. This answer set up as an estoppel the action had by the court at the preceding term, wherein, as above set out, exceptions were sustained to the report of the first board of commissioners, for that the court found that title to the strip of land in controversy had passed from appellant to the public by prescription. Appellant moved to strike out so much of this answer as bottomed estoppel upon the action of the court in sustaining, upon the ground stated, the exceptions first filed, and, its motion being overruled, duly excepted. Afterwards, the exceptions of appellant to the report of the second or last board of commissioners coming on to be heard, appellant offered to prove that the land in controversy had never been used as a street, and that the same had not become a street by prescription; in short, that said strip of land was not in fact already a public highway, as the court had at the preceding term found and adjudged upon the hearing of exceptions to the first report. Objections being made to this offer of proof, upon the same ground of alleged estoppel by judgment, the same were sustained, and defendant lumber company appealed.

[1] Appellant contends that the action of the trial court in sustaining at a former term of court the exceptions filed to the first report, for that the court found the land was a public highway, did not conclude appellant, nor preclude, upon the hearing of exceptions filed to the second report, the offering of evidence to prove that the said land was not a public highway. It is obvious that while this point is saved in two ways (if not three) in the record, it is the sole question up for decision.

The identical issue whether or not the strip of land the value of which is in dispute is a public highway was, so far as appellant was

concerned, the only question before the court at the hearing of the exceptions which were filed to the report of the first board of commissioners. Presumably, all evidence possible to be adduced by appellant upon that issue was in fact presented by it upon that hearing. Nevertheless, the court's finding was adverse to appellant upon this issue, in that the court found that the strip of land was already a public highway, and that appellant had no title thereto. To the order of the court sustaining these exceptions upon the ground last above stated, no exceptions were taken by appellant, nor was any appeal taken, nor any term bill of exceptions filed preserving for review the alleged erroneous order of the court in sustaining the exceptions. In this situation the term ended and a new term began.

Appellant contends that an appeal following the order sustaining the exceptions first filed would have been premature, because it could not appeal till final judgment was rendered, and that it did not take this appeal till this contingency occurred. All this may be, and probably is, true; likewise it may be true that a term bill of exceptions, since the amendment of 1911, performs no office. Neither of these questions is in this case for obvious reasons. The trial upon the exceptions, which set out that the land in dispute is a public highway, and the question whether said land was a public highway *vel non*, was had at a term preceding the one at which the instant appeal was taken, and it was then and there adjudged that the land was already a public highway.

[2] It is obvious (a) that the trial had upon the grounds of the special taxpayers' exceptions to the report of the first board of commissioners was the trial by which appellant was prejudiced; (b) that appellant is not entitled to two trials at different terms of court upon the same question; and (c) that appellant's failure to except to the action of the trial court, at the time at which the court sustained the exceptions first filed, precludes upon this appeal any review of the court's action thereon. *St. Louis v. Lawton*, 189 Mo. 475, 88 S. W. 80; *Richardson v. Schuyler Co.*, 156 Mo. 407, 57 S. W. 117; *Moran v. Stewart*, 248 Mo. 463, 151 S. W. 439.

The cases cited by appellant are cases wherein it was held that an appeal may be taken only from the final judgment. These cases are undoubtedly correct, not only because the statute so prescribes, but because, among other reasons, it might well develop in the end that appellant would be helped, and not hurt, by the second report, or by the final result or judgment. But here the identical question upon which by the second report the case rode off was tried and ruled against appellant at a former term, without an objection or an exception. Clearly, therefore, it was the duty of appellant to have excepted then and there to the court's action



(*St. Louis v. Lawton*, *supra*) and finding, and, upon final judgment being rendered, to have appealed for errors occurring upon the hearing of the special taxpayers' exceptions at which the point was ruled against it. This it did not do. On the contrary, it appealed from the hearing upon exceptions taken at the term subsequent to the ruling by which it was prejudiced. The hearing upon which it ought to have bottomed its appeal, had it properly preserved the points for review, is not before us at all. It results that the case must be affirmed. Let it be so ordered.

All concur.

(277 Mo. 122)

ANDERSON et al. v. JOHNSON et al.  
(No. 19820.)

(Supreme Court of Missouri, Division No. 2.  
March 4, 1919.)

**CLUBS — 14 — DISSOLUTION — SALE OF PROPERTY — VALIDITY.**

Defendants, five of whom had been designated as a committee to reorganize a golf and country club, which had been incorporated as a business corporation, *held* to have acted in good faith in purchasing property of club on its dissolution, and to have owed no duty to stockholders inconsistent with right to purchase, so that court was warranted in declining to set aside sale, or decreeing that defendants hold property in trust for stockholders.

Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

Action by J. Arthur Anderson and others against Clarence D. Johnson and others. Decree dismissing bill, and plaintiffs appeal. Affirmed.

This is an action instituted by 25 stockholders of the Glen Echo Country Club, which seeks to set aside a sale of the club's property to the nine individual defendants, or to have a decree declaring that defendants hold said property in trust for the plaintiffs and other stockholders of said club.

Trial was had in the circuit court of St. Louis county, which resulted in a decree dismissing plaintiffs' bill.

Plaintiffs have duly perfected an appeal to this court.

The voluminous record before us tends to establish the following facts:

The Glen Echo Country Club was incorporated in 1900 under the laws authorizing the incorporation of business corporations. The purpose of the corporation was to own, operate, and maintain a golf and country club. Its capital stock was \$35,000, divided into 350 shares of the par value of \$100 each.

In 1905 the corporation purchased, for the sum of \$100,000, about 150 acres of land lying in St. Louis county, near the corporate limits of the city of St. Louis. Upon this

land the club built a clubhouse and a very excellent golf course.

Each member of the club was required to own one share of the stock. The money with which to operate the club was derived from annual dues, which each member was required to pay, and from charges made to the members for different services. Some years additional assessments were made against the membership for the purpose of making some improvements or to meet some deficiency in the revenue.

Several years before the club property was sold the club, in order to raise some needed funds, sold to about 25 of its members, at the price of \$1,000 each, certificates known as "Life Memberships," which exempted the purchasers thereof from payment of dues and assessments during the life of the club. These holders of life certificates are referred to in the testimony as "perpetual members."

For several years prior to the sale of the club's property the business affairs of the club appeared to have been handled in a very loose manner. New certificates of stock in the corporation would be issued to persons who claimed to be the purchasers of outstanding shares of stock and in many instances the old certificates were not surrendered for cancellation. On some occasions the officers of the club neglected to issue shares of stock to persons entitled thereto. Sometimes, upon the death of a stockholder, the share of stock would pass into the hands of some one who did not care to use the club. Some of the members failed to pay their annual dues and assessments.

An attempt was made by the club to discipline some of its members for such failure by threatening to refuse them the privilege of the grounds. One of the members who was thus sought to be disciplined brought a suit in the local circuit court to enjoin the club from excluding him from the use of the grounds, and, on the theory that the club was a business corporation, the circuit court held that the stockholders could not be excluded from the use of the grounds for the failure to pay the annual dues and assessments. The case was appealed to an appellate court, but the final result of the case does not appear in the record.

The club ran behind each year, and in November of 1914 a financial report of the club's treasurer showed its liabilities to total \$85,210. Among its liabilities was a \$58,000 bonded indebtedness secured by a deed of trust on the club's property. This bonded indebtedness was to become due on December 27, 1914. On this bonded indebtedness the club had defaulted on the interest to the amount of \$1,400. This bonded indebtedness was held by a trust company in the city of St. Louis. Another item was \$20,000, evi-

denced by unsecured promissory notes of the club held by the same trust company. The notes were payable on demand. At this time the club had on hand \$2,200 in cash, and there was due the club from its members, for unpaid dues, assessments, and accounts, the sum of approximately \$11,000. Of this amount, \$5,000 was charged off by the treasurer as doubtful. In the fall of 1914 the property was in need of considerable repairs. The officers of the club were under the impression that they could not discipline the club membership for the nonpayment of dues and assessments. It was also charged that the privilege of using the club by non-members was trafficked in by a few of the members. Some considerable dissatisfaction existed among the members concerning the manner in which the club was being conducted.

October 27, 1914, the officers of the club, for the purpose of seeing what could be done for the relief of the club's troubles, gave what was called a "get-together" dinner at the clubhouse. Each of the 350 members were invited to this free dinner, and about 48 members attended. The financial conditions of the club were explained to those present, but the stockholders present were unable to agree upon any plan. It was then suggested that the directors formulate a plan for financing the club and call a meeting of the stockholders later.

Pursuant to this suggestion they called a meeting of the stockholders for December 15, 1914. All the stockholders were notified of this meeting, and a financial statement was mailed to each stockholder. About 86 stockholders attended. At this meeting a committee, which had been theretofore appointed by the president to outline plans for financing the club, made its report. This committee recommended the following action by the stockholders, to wit: First, that an assessment of \$75 be made against each member of the club for the purpose of liquidating its current liabilities; second, that the annual dues of the club be increased from \$100 to \$150 per year; third, that the club sell 23.4 acres of its land lying west of the Wabash Railroad tracks; fourth, that a second bond issue be made sufficient to meet the present requirements of the club, and that said bond issue be secured by a second deed of trust on the club's property, and the bonds be sold to the club members. All of the foregoing propositions were voted down by the stockholders, and thereupon a motion was made that an entire reorganization of the club be had. This proposition was also rejected by the stockholders. Thereupon a motion was made authorizing the officers of the club to execute and deliver a deed of trust on all of the club property not included in the first mortgage; this second deed of trust to be given to secure the \$20,000 in

notes held by the trust company. The trust company was demanding that these notes be secured. This latter proposition was unanimously adopted and the deed of trust was later executed.

About this time, or shortly thereafter, the trust company refused to make further loans to the club unless the directors would personally indorse for the club. This the directors declined to do.

After the stockholders' meeting had refused to adopt any substantial part of the plans for financing the club, certain stockholders, including the secretary of the club, believing that the club would not be able to finance itself, and that the club's property would likely be sold under the first mortgage, and in order to meet the contingency of a sale of the club's property, formed what is known in the record as a "Syndicate Agreement." By this agreement the signers thereof agreed to contribute \$1,000 each to a fund with which to purchase the club's property in the event the club's property should be sold at public sale. Approximately 200 persons, including both members and non-members of the club, were invited to sign this agreement, and approximately 92 of those invited signed the agreement. It does not appear, however, that this agreement was ever used in the purchase of the club's property.

Some of the perpetual members heard of the "Syndicate Agreement," and, fearing that the club's property would be sold and their rights as perpetual members jeopardized, called a meeting of the perpetual members, January 9, 1915. At this meeting of the perpetual members a committee was appointed to call upon the board of directors to ascertain why the old club should not be continued, and to further see if suitable concessions would be made to the perpetual members if a new club were formed. Some of the perpetual members testified that they had agreed among themselves that they would raise the money with which to finance the club, but no definite plan was at that time agreed upon.

A committee representing the perpetual members called upon the secretary of the club, and he requested them to put their proposition in writing. On January 28, 1915, the committee representing the perpetual members wrote a letter addressed to the board of directors, stating that they would be pleased to see the club continued as it then was, and that if the present board of directors "fear that they cannot finance or manage the club under the present conditions, that they resign and permit the perpetual members to attempt to finance and manage the same"; and further stated that, if the board accepted this proposition, the perpetual members would be glad to have any members of the old board join the new board to aid in

some manner to run and finance the club upon a sound financial basis.

The secretary of the club replied to this letter, stating that there had been no regular meeting of the directors to discuss the proposition, but that his own view, and those of the directors with whom he had talked, was that the proposition was too indefinite to be considered.

Some of the perpetual members then called an informal stockholders' meeting to meet on February 6, 1915. At that meeting a voluntary association of some of the stockholders was formed, and is referred to in this record as the "Glen Echo Protective Association." It was also provided that a committee of 10 be appointed by the chairman, which committee should take steps to raise necessary money for the "temporary extension and partial payment of the club's debts," and "to prepare and submit to all the members a plan of reorganization which will take care of every member and preserve the equity and rights of every class of membership."

Upon the request of the members of this committee the directors called a meeting of the stockholders to be held at the Washington Hotel, at eight o'clock p. m., February 15, 1915. At this meeting, on February 15th, two plans were submitted for the solution of the club's troubles. One plan, having been prepared by the committee of the Protective Association, provided that certain receivership proceedings which had been instituted against the club February 10, 1915, should be vigorously defended by counsel not connected with the "Syndicate Agreement." (It appears from the evidence that the receivership proceedings were caused to be instituted by the secretary of the club and other stockholders who had been instrumental in promoting the "Syndicate Agreement.") This plan also contemplated that the club's total indebtedness of \$85,000 should be taken care of as follows: \$60,000 would be obtained as permanent loans, secured by deeds of trust on the club's property; \$25,000 to be raised by voluntary loan subscriptions from the stockholders. The committee said that it would raise any part of the \$25,000 which the remaining stockholders were unwilling to raise. It was further pointed out that the club's equity in the property was worth \$75,000, and that the capital stock should be increased \$35,000, and this increased stock should be issued to the subscribers in payment of their loan. It was further recommended that a social club be organized which would lease the club property for a term of 10 years at a certain annual rental. Another feature of this plan was as follows:

"Each member of this club has not only social rights incident to club membership, but also property rights, evidenced by his stock ownership. Of the latter he should not be un-

justly deprived without compensation; the former he is not entitled to retain unless he is socially a fit person, and it is entirely within the power of the social organization to determine the social qualities of its members.

"So that no inequity may result, provision should also be made that any member of the present corporation excluded from membership in the social organization shall have, in cash, the equitable value of his stock." (Italics ours.)

Another plan, known as the Thompson plan, was offered at the meeting. This plan provided that the club should go through a receivership proceeding, and that the president and treasurer of the old club solicit subscriptions for a stock in a new real estate corporation to be incorporated for \$125,000, for the purpose of purchasing the club's property at a receivership sale, and that every stockholder in the old club should have a right to own a share of stock in the new real estate corporation; that the majority of the stockholders of the real estate corporation pass a resolution authorizing the leasing of the real estate to a golf club, which should be organized under article 10, c. 33, R. S. 1909; that the real estate company first offer to lease the real estate to a golf club organized "by a majority of the old members of the Glen Echo Country Club." (Italics ours.) The plan also suggested the terms of the lease and the yearly rental, and provided that after the receivership sale the Glen Echo Country Club should be dissolved. Considerable discussion was had at this meeting, but no definite agreement was reached, and the meeting was adjourned to meet again February 23, 1915.

On February 23d the stockholders again met, and at this meeting a resolution to authorize the officers to enter the appearance of the corporation to the receivership suit then pending, and to file an answer admitting the allegations of the petition, failed to receive the vote of a majority of the stockholders then present.

There appeared to be two strong factions at this meeting, and a resolution which was in the nature of a compromise between the two factions was adopted, as follows:

"Resolved, that the following committee, H. M. Pfleger, C. D. Johnson, James C. Jones, John C. Roberts, and E. A. Faust, be appointed a committee with power to take such steps as the majority of the committee may deem best to reorganize this club, adopting so much of Mr. Thompson's plan as may be necessary or advisable."

The above resolution was carried by a vote of 211 for and 1 against. Seventy-six stockholders were present in person; the remaining votes were cast by proxies.

Two members of the above committee were friendly to the views held by the perpetual members and the Glen Echo Protective Association. Two of the members were friendly

to the "Syndicate Agreement" faction, and the fifth member was thought to be neutral. This committee, for the sake of brevity, will hereinafter be referred to as the "committee of five."

After the appointment of this committee of five, the committee theretofore appointed by the perpetual members and the committee of 10, appointed by the Protective Association, ceased to function, and threw their influence back of the committee of five.

The committee of five thereafter organized and employed an able attorney to advise them, the attorney employed having no connection whatever with the Glen Echo Country Club. The counsel so employed was requested by the committee to go into the affairs of the club fully, and to suggest to the committee a solution of the club's troubles. The counsel employed reported to the committee that he had examined into the matter, and talked to different members of the club had examined the club's charter, and that it was his opinion that under the law any reorganization of the old club must necessarily entitle every member to be recognized equally with every other member in the reorganization; that if this were done, a large part of the membership would refuse to come in because some of the old members were permitted to come in. In other words, he was of the opinion that it would be impossible to get all of the old stockholders to agree on a plan of reorganization. The counsel therefore advised the committee that the only practical solution of the club's troubles was to have a real dissolution of the old club, sell its property at public sale to the highest bidder for cash, pay the club's debts, distribute the remainder among its members, and procure a statutory dissolution of the old corporation.

The question as to the rights of the perpetual members in the assets of the old club, if its property should be sold, was one which was constantly coming up throughout this entire controversy, both before and after the appointment of the committee of five. The committee therefore requested the counsel to employ expert accountants, and to ascertain, first, who were the real stockholders of the club; and, second, the values of the equity of the so-called perpetual memberships. This was done, and the expert accountant reported that the equity of each perpetual member was worth \$385.27.

On March 31, 1915, the committee of five mailed to each member of the Glen Echo Country Club the following letter:

"St. Louis, March 31, 1915.

"To the Members of the Glen Echo Country Club:

"Your committee submits herewith, first, a plan for dissolution of the Glen Echo Country Club; second, a tentative plan for the organization of a new club.

"Inclosed find:

"1. Form (A). Plan for dissolution of old club.

"2. Form (B). Resolution to be voted in favor of said dissolution.

"3. Form (C). Proxy to vote in favor of said resolution.

"4. Form (D). Receipt for stock.

"5. Form (E). Tentative plan for organization of a new club.

"6. Form (F). Request on the proposition to organize a new club.

"The plan for the dissolution of the present Glen Echo Country Club contemplates a public sale of all the property of the present club for the best price obtainable, a distribution of the proceeds of such sale among the present members on an equitable basis, and the final dissolution of the present corporation.

"The plan submitted in its various details does not have the entire approval of all of the members of the committee, but each member of the committee has concluded to recommend it to the members of the club as the best course that can be adopted in the circumstances that confront us.

"Whatever is done should be promptly done, as delay will result in loss, deterioration of the property, and postponed enjoyment of it. Everything is now at a standstill; so respond at once. Vote on every proposition as you want, but vote, and return immediately to the undersigned.

H. M. Pfleger,

"E. A. Faust,

"C. D. Johnson,

"James C. Jones,

"John C. Roberts,

"Committee.

"Respond in inclosed stamped envelope."

"Form (A)" inclosed in the foregoing letter was as follows:

"Form (A).

"Plan for the Dissolution of the Present Glen Echo Country Club.

"Whereas, the Glen Echo Country Club is indebted to various persons in various amounts as appears by the following:

Part of a bond issue of \$60,000.00 due the Mississippi Valley Trust Company secured by first mortgage on the land and buildings of the Glen Echo Country Club, amounting to.....	\$60,000 00
Interest on same to December 27, 1914.....	1,400 00
Accrued interest on same after maturity at the rate of 8 per cent. per annum to March 15, 1915.....	970 32
Taxes due December 31, 1914.....	1,202 00
Penalties on same at the rate of 1 per cent. per month to March 15, 1915.....	85 80
Notes at the Mississippi Valley Trust Company bearing 6 per cent. interest, secured by chattel and real deed of trust.....	20,000 00
Bills due for labor and supplies to April 1, 1915 .....	1,000 00

(The daily expense is about \$150.00. Last year the deficit was \$6,271.07.)

"And whereas, all of said obligations are past due, and the club is in default regarding the same; and whereas, the only sources of income are from dues and assessments from its members; and whereas, they are insufficient to meet the above obligations, or, in fact, to pay the current expenses of the club; and whereas, a

large number of the members have refused and declined to pay dues and assessments; and whereas, a suit has been instituted and is now pending in the circuit court of St. Louis county, Missouri, for the appointment of a receiver; and whereas, there is an irreconcilable divergence of views among the members as to the method of conducting and carrying on the affairs of the Glen Echo Country Club—your committee is of the opinion that said club should be dissolved.

"The property should be sold as soon as possible at public sale to the highest bidder, after being appraised, and after twenty days' published notice the debts paid, and the residue, if any, divided among the stockholders.

"In view of the fact that certain stockholders have heretofore purchased from the club exemptions from dues and others have not, it would seem fitting that said first-mentioned stockholders should be favored to the amount of the excess paid by them to the club. In this belief the committee has had the equity of said exemption holders calculated by Price, Waterhouse & Company, certified public accountants, and they report that it amounts to \$385.27. This should be given to said exemption holders out of the net assets, if any, available for distribution, after payment of debts and expenses. The remainder, if any, should be distributed equally among all the stockholders, including exemption holders, deducting from any stockholders' share any liability to the club for dues, assessments, supplies, fines, or penalties or any account whatever.

"As an illustration of what the stockholders may expect if the property shall sell for \$120,000.00, each share of ordinary stock will be allotted about \$60.00 per share. If the property sells for \$140,000.00, each share of ordinary stock will be allotted about \$120.00 per share.

#### "Dissolution.

"The club can be dissolved if the holders of two-thirds of the stock so vote in a meeting duly assembled for that purpose.

"It is not necessary for the sale to await the dissolution of the club, as that can be effected subsequently.

"To effect the proposed sale and subsequent dissolution of the present club, it will be necessary for the club, at a special meeting called for that purpose, to pass the proper resolution authorizing such sale and dissolution. To this end there is inclosed herewith:

"1. A resolution to be offered at a special meeting of the stockholders, authorizing sale and distribution of the property of the club and dissolution of the corporation.

"2. A proxy authorizing this committee or any of its members to vote in favor of said resolution at said meeting.

"If you are in favor of such dissolution, sign and return to the undersigned chairman the inclosed proxy, and indorse, in the presence of a witness, your certificate of stock, and also send this to the committee in the inclosed stamped envelope.

"The special meeting will have to be called at the club for 9 a. m., on the day to be selected, as it is necessary under the law that the formal meeting be held at that hour and place.

"On receipt of favorable replies from two-

thirds of the stockholders, a meeting will be called and notice given.

"H. M. Pfleger, Chairman.

"E. A. Faust,

"C. D. Johnson,

"James C. Jones,

"John C. Roberts."

"Form (B)," inclosed in the foregoing letter, was a resolution authorizing the directors to have all of the property of said club sold at public sale to the highest bidder for cash, and directed that the proceeds of such sale should be applied to the payment of the expenses of said sale, payment of the debts of the corporation, payment of the costs of dissolving the corporation, the payment of \$385.27 to each of the perpetual members, and the residue to be distributed equally among all the shareholders, including shares held by perpetual members. This resolution also provided for a statutory dissolution of the corporation, and authorized the directors to take the necessary court action to that end.

On the back of "Form B" was printed "Form C," which was a proxy for each shareholder to sign if he so desired. This proxy, when signed, authorized the committee of five to vote said proxy at a stockholders' meeting in favor of said resolution.

"Form D" was a form of receipt which the committee promised to send to every stockholder who would send in his share of stock.

"Form E" inclosed in said letter was as follows:

#### "Form E.

##### "Tentative Plan for a New Club.

"It has been suggested that a new golf and country club be organized along the following lines:

"1. Said club to be organized as a social club under chapter 33, article 10, Revised Statutes of Missouri 1909, and acts amendatory thereof, relating to 'Benevolent, Religious, Scientific, Educational, and Miscellaneous Associations.'

"2. Said club to have a membership of not more than four hundred (400) regular members.

"3. There to be five (5) classes of members: Regular members, who shall have the power to vote; junior, associate, nonresident, and honorary members, who shall enjoy all the privileges of the club, but have no power to vote; junior members, to be unmarried, and between twenty-one (21) and thirty (30) years of age; associate members, to be officers of the army and navy; nonresident members, persons who live more than fifty (50) miles from the city of St. Louis; honorary members, ministers of the gospel. Ladies and minor children of a member's family shall be entitled to the privileges of the clubhouse and grounds.

"The initiation fee of regular members to be four hundred (\$400.00) dollars, with proviso that on the retirement, suspension, or death of a regular member, and the re-election of a new member in his place, fifty per cent. (50%) of the initiation fee received from the new mem-

ber to be paid to the retiring member or his estate. Associate and honorary members to pay an enrollment fee of one hundred (\$100.00) dollars.

"Dues of regular, junior and associate members to be not more than one hundred (\$100.00) dollars a year; nonresident members, fifty (\$50.00) dollars a year; honorary members, fifty (\$50.00) dollars a year. Sons of active members of the club between the ages of twenty-one and thirty years of age, on the payment of fifty (\$50.00) dollars initiation and fifty (\$50.00) dollars a year, shall be entitled to enjoy the privileges of the club, but shall not be entitled to vote.

"No memberships of any kind to be transferable.

"The club to be governed by a board of nine (9) directors, three (3) of whom shall be elected each year to serve three (3) years and until their successors are elected. Of the first board of directors, three (3) are to serve until November, 1916, three (3) until November, 1917, and three (3) until November, 1918. The directors shall elect from their member a president, two vice presidents, secretary, and treasurer, provided the office of secretary and treasurer may be held by the same person, to serve until November, 1916, and until their successors are elected. The officers and remaining directors shall be known as the "board of governors," and shall exercise such powers and perform such duties as usually attach to their respective offices. The board of governors are to make the by-laws with power to amend or repeal the same not inconsistent with by-laws made by the members.

"The club to have the right to buy, lease, rent, and otherwise acquire, and to sell, mortgage, and pledge property, both real, personal, and mixed, for the legitimate purposes of the club, said power to be exercised by the board of governors until the first election of directors by the club, and thereafter by the board of governors under direction and authority of the association or club.

"The club to have the right to pass on the qualifications of its members and to suspend or expel its members for cause.

"The club to have the right to provide and maintain golf course, polo grounds, tennis courts, clubhouse, stables, and other proper and necessary appurtenances of a country club.

"Members to vote in person or by proxy.

"If you are in favor of the undersigned organizing such a club, doing the necessary things therefor, and selecting the board of governors, sign the inclosed request and authority for them to do so, and if two hundred (200) or more requests are received to this effect they will set about carrying out said plan, it being understood that none of the undersigned will be named on said initial board.

"It is distinctly understood, that the undersigned are not proposing to form a new country club, and are not soliciting applications for a country club, and that the above is no more than a willingness to serve on the unsolicited request of each person signifying his desire that the undersigned act. It is also distinctly understood that the signing and forwarding of such a request to the undersigned is no assurance that the person so forwarding a request will be admitted to the club if formed, and the un-

*dersigned give no such assurance, and do not obligate themselves or assume any responsibility for a new club if formed, or that any requestor will be accepted in said new club if one is formed."* (Italics ours.)

"Form E" was signed by each member of the committee of five.

"Form F" inclosed in the letter was a printed form addressed to the committee of five, whereby each stockholder by signing the same could express the approval of the plan for forming a new club; and it stated that the signer signified his desire to join such club, and "if elected" the signer agreed to pay the fees and abide the regulations of the new club.

Replies began to come in from the stockholders after the above documents were sent out, and on May 1, 1915 (more than two-thirds of the stockholders having approved the plan for sale of the club property and the dissolution of the club), the committee of five requested the board of directors to call a stockholders' meeting for the purpose of voting on the above proposition which had been submitted to the individual stockholders.

The board of directors thereupon called a meeting of the stockholders for May 22, 1915. At this stockholders' meeting the resolution to sell the club's property and dissolve the corporation, being the same resolution contained in "Form B," was adopted by the stockholders; 271 stockholders voting for the resolution, and 2 stockholders voting against the resolution. Among those voting for the resolution were 268 stockholders represented by proxies, who had returned their signed proxies to the committee of five in response to the letter which the committee of five had sent the stockholders on March 31st.

It further appears from the evidence that only 115 of the stockholders signed "Form F," requesting the committee of five to organize a new club.

On June 8, 1915, the board of directors, at a meeting duly called, passed resolutions directing the officers of the company to carry out the resolution which had been adopted by the stockholders. The officers of the company, following a suggestion which had been made by the committee of five, employed three disinterested and responsible real estate men of the city of St. Louis to appraise the club's property prior to the sale. The three appraisers appraised the property at \$125,840.

Notices of the sale were duly published, and the sale occurred on July 10, 1915. A week or ten days prior to the sale the president of the corporation caused to be posted on the bulletin board at the clubhouse, and in other public places upon the premises, notices notifying the members of the club that upon the consummation of the sale of the property on July 10, 1915, "the members of the club will cease to have any rights in

the property. \* \* \* Members must arrange to remove all of their property from the clubhouse, as it is only through the courtesy of the purchasers that they can remain after the purchase of the clubhouse and grounds."

The sale was conducted at the clubhouse by a disinterested and competent public auctioneer, and the property was sold for \$181,288.65. The property was bid in by defendant Lambert, bidding for himself and eight associates, the nine purchasers being the first-named nine individual defendants in this suit.

The purchase price was paid, and after the mortgage indebtedness was paid the balance, to wit, \$48,172.25, was deposited by the club's officers in a local bank to the credit of the Glen Echo Country Club.

Several people attended the sale. Mr. Buder, one of the perpetual members and who appears to have been interested, at least, in protecting the financial rights of all the members, appeared at the sale, and inquired of Mr. Lambert and his crowd if they were going to bid the property in for all of the old club members. On being informed that they were not, Mr. Buder replied that under those conditions he would bid the property in for all the club members if they wanted to come in. Mr. Buder and Mr. Lambert were the only bidders at the sale. After the sale Mr. Buder appeared to be satisfied because of the fact that the property had brought enough so that the old stockholders would be paid par for their stock, and enough would remain out of which the perpetual stockholders would be paid the sum fixed by the expert accountants.

It appears from the evidence that the committee of five, if requested by as many as 200 of the old stockholders, had in contemplation a plan of organizing a new club under chapter 33, art. 10, R. S. 1909, relating to "benevolent, religious, scientific, and educational associations." Some time during the latter part of May, 1915, however, the counsel for the committee discovered the case of *Prairie Slough Fishing & Hunting Club v. Kessler*, 252 Mo. 424, 159 S. W. 1080, and, after reading that opinion, entertained much doubt as to the power of a corporation organized under that act to acquire and hold the real estate needed for a club of this kind, and recommended in lieu thereof a plan known as the "Massachusetts land trust," under which plan the property would be held and controlled by trustees.

Later, when it was definitely known that there would not be 200 requests from the old stockholders for the organization of a new club, discussion arose in the committee of five as to what they should do. The committee's counsel advised them that there was no way by which the committee could

hold even the 115 stockholders who had requested the organization of a new club, because, by the terms contained in the literature which had been sent out to the stockholders, the offer to organize a new club was contingent upon at least 200 stockholders signing a written request for the same. After discussing the matter the members of the committee of five concluded that they had no authority from the stockholders to organize a new club.

The members of the committee, however, as individuals, were desirous of having a new club organized, and, for the purpose of forming a plan of their own, decided to invite four other gentlemen to join with them in the purchase of the property, and if they were successful in purchasing the property they would attempt to organize a new club upon their own responsibility. Four additional men, upon invitation, agreed to join with the five, and arrangement was made to raise the money with which to purchase the property. This was done by each of the nine men signing a note at a local bank. It appears from the evidence of Mr. Jones, one of the committee of five, that he did not attend many of the meetings held by the committee of five during the month of June, 1915.

Immediately after the sale the property was conveyed to the nine purchasers, "as trustees of the New Glen Echo Club."

Two days after the purchase the nine purchasers met for the purpose of perfecting the organization of a new club under the "land trust" plan. At this meeting the question arose as to how they would determine who would be invited into the new membership. Mr. Lambert, who, by agreement among the purchasers, had been chosen president of the new club, produced a list of names. In this list were the names of the greater number of the members of the old club (if not all) and many new names. It was finally decided by the nine purchasers (Mr. Jones and Mr. Lambert voting to the contrary) that each of the nine purchasers should take one of these lists, and go over the names, and, when he came to a name of any person whom he did not desire to have immediately invited to join the new club, he should put a check mark opposite such name. It was agreed that the further consideration of all those names which received as many as two check marks should be postponed to some future date, and the other names upon the list should be immediately invited to join the new club. Mr. Jones demurred to this action, contending that they should at once invite all the members of the old club to become members of the new club.

In a few days thereafter Mr. Jones resigned as a trustee, and he was relieved of his obligations under the purchase.

It appears from the evidence that newspaper publicity was given to this list with the check marks on it, and thereafter some of the stockholders of the old club organized a litigation committee and this suit resulted.

After the sale of the property the officers of the old club, under the authority of the meeting of stockholders and of the board of directors (more than two-thirds of the stockholders having voted in favor thereof), instituted in the circuit court of St. Louis county a proceeding under the statutes to dissolve the old corporation. The final determination of the dissolution proceeding was stayed to await the result of this suit.

Each of the 25 plaintiffs in this suit voted, either in person or by proxy, for the plan providing for a sale of the old club's property and dissolution of the corporation. About 16 of the plaintiffs sent in written requests to the committee of five for the organization of a new club, and it appears that a few of the plaintiffs were requested by the defendants to join the new club, but the greater number of the plaintiffs had not been so invited at the time this suit was instituted.

Manton Davis and Frank H. Sullivan, both of St. Louis, for appellants.

W. Christy Bryan, of St. Louis, and A. E. L. Gardner, of Clayton, for appellees.

S. T. G. Smith, of St. Louis, pro se.

WILLIAMS, P. J. (after stating the facts as above). Appellants contend that the court erred in refusing to decree that the defendants purchased the property of the Glen Echo Country Club as trustees for the club and its members.

In the above behalf it is insisted that five of the defendants were appointed by the stockholders as a "committee of five" to reorganize the club; that by reason of such appointment a fiduciary relation existed between the defendants and the Glen Echo Country Club and its members; that the subsequent purchase of the club's property at the public sale by defendants (five of whom were members of the committee of five) was a violation of said fiduciary relation; and that the property so purchased should now be charged with a trust in favor of the club and its members.

In support of their contention the appellants cite cases of which the following are fair types: *Life Ins. Co. v. Smith*, 117 Mo. 261, loc. cit. 295, 22 S. W. 623, 38 Am. St. Rep. 656; *Grumley v. Webb*, 44 Mo. 444, loc. cit. 451, 100 Am. Dec. 304.

We have no fault to find with the legal principles announced by appellants and by the cases cited; but, after a very careful and painstaking examination of the evidence offered upon the trial, we are unable to discover facts sufficient to call for the appli-

cation in the instant case of the rule announced.

On March 31, 1915, over three months prior to the public sale of the property by the duly authorized officers of the club, the five defendants comprising the committee of five made a full and detailed report to each member of the club, asking each member to make a written return indicating his views upon the solution of the club's troubles. More than two-thirds of the stockholders (including all of the plaintiffs) sent in their proxies, authorizing their respective votes to be cast in favor of the very sale of the club's property which was afterwards in fact made, and further authorizing a statutory dissolution of the corporation and a distribution of its assets. It must not be overlooked that this resolution, which was authorized by these very plaintiffs, provided for a *public sale of the property for cash to the highest bidder*. At the time this report was sent to the stockholders, the committee of five also inclosed a "tentative plan for organization of a new club," asking those stockholders who desired to obligate themselves to apply for membership in a new club to signify their desire by signing and returning a printed request therewith inclosed. This tentative plan contained, among other things, the following:

"If you are in favor of the undersigned organizing such a club, doing the necessary things therefor, and selecting the board of governors, sign the inclosed request and authority for them to do so, and, if two hundred (200) or more requests are received to this effect, they will set about carrying out said plan, it being understood that none of the undersigned will be named on said initial board.

"It is distinctly understood that the undersigned are not proposing to form a new country club, and are not soliciting applications for a country club, and that the above is no more than a willingness to serve on the unsolicited request of each person signifying his desire that the undersigned act. It is also distinctly understood that the signing and forwarding of such a request to the undersigned is no assurance that the person so forwarding a request will be admitted to the club if formed, and the undersigned give no such assurance, and do not obligate themselves or assume any responsibility for a new club if formed, or that any requestor will be accepted in said new club if one is formed." (Italics ours.)

From the foregoing it is clearly apparent that the committee of five were not at that time acting as the trusted agents of the members of the club for the purpose of procuring the club's property and the organization of a new club, but the very purpose of that communication was to ascertain if a sufficient number of the old membership desired to confer a portion of that power upon the committee. The committee in clear language told the stockholders that if as many as 200 of their members signed such



written requests they would set about carrying out said plan. Only 115 of the members, however, sent in their requests for a new organization.

Under the terms of the proposition made, it therefore clearly appears that the defendants, nor any of them, ever became the agent of all the stockholders, or of any of the stockholders, for the purpose of purchasing the property or organizing a new club. And even though 200 members had sent in their written request for the organization of a new club under the terms proposed in the tentative plan, it would have strained the powers of a court of equity to have been able to ascertain what specific stockholders, if any (absent more specific provisions), would have had the right to demand the privilege of becoming a member of the new organization, this because the very plan proposed, provided that "it is also distinctly understood that the signing and forwarding of such a request to the undersigned is no assurance that the person so forwarding a request will be admitted to the club if formed."

The reason for this provision becomes very apparent from a reading of the record. Hostile factions had developed in the club. None of the plans presented by the different factions at any time contemplated that all of the members of the Glen Echo Country Club should be permitted to join any new club or organization which might thereafter be formed for the purpose of conducting a golf club on said property.

The existence of factionalism and lack of harmony among the members of the old club were no doubt the important factors which induced the stockholders to vote for a sale of the property and a dissolution of the old club.

The notice of sale was properly advertised in the press, and notices were posted at several conspicuous places on the club grounds. By these notices, and the resolution which the stockholders had themselves adopted, they were clearly informed that this was to be a public sale to the highest bidder for cash, and that after the sale the members of the club would "cease to have any rights in the property."

The committee of five would no doubt have displayed a wiser discretion in the matter, and one less likely to have produced subsequent litigation, had they sent each stockholder a written notice that the requisite 200 had not requested an organization of a new club, but, absent a showing that such failure caused the plaintiffs to be misled or that such failure was occasioned by bad faith upon the part of the committee, we are unable to see wherein such failure can affect the result of this case. Nothing appears to have been concealed from the stockholders by the committee, and each faction of the

club was ably represented upon said committee.

We are convinced by the evidence that the defendants as individuals acted in good faith in purchasing the property, and that they purchased the property upon their own responsibility, because they were not authorized to purchase it for any one else. Nor are we able to discover any duty owed by the defendants, or any of them, to the stockholders which was inconsistent with the right of defendants to become purchasers at the public sale of the property.

We are therefore unable to discover any facts in this record which would justify a court of equity in decreeing that plaintiffs have any rights in the property purchased by defendants, and for that reason we are of the opinion the judgment dismissing the plaintiffs' bill should be affirmed.

It is so ordered.

All concur.

#### PIERCE CITY v. HENTSCHEL

(Supreme Court of Missouri, Division No. 1.  
March 1, 1919.)

##### 1. STATUTES $\S$ 231—CONSTRUCTION.

A law as first enacted, with provisions of which it originally formed a part, should be considered in ascertaining its meaning, rather than other laws with which it may be grouped in revised statutes.

##### 2. LICENSES $\S$ 6(2)—POWER OF CITY—OCCUPATION TAX—PLUMBERS—ELECTRICIANS.

In view of Rev. St. 1909,  $\S$  9580, a city of the fourth class has no authority, under section 9399, to require electricians or plumbers to pay an occupation tax; although such a city has power to license and regulate such occupations.

Appeal from Circuit Court, Lawrence County; Carr McNatt, Judge.

Proceedings by the City of Pierce City against G. F. Hentschel. There was a judgment for defendant, which was reversed and remanded by the Court of Appeals (180 S. W. 1027), which certified the case to this court. Judgment of the Court of Appeals reversed, and judgment of circuit court affirmed.

This case reaches us upon due certification by the Springfield Court of Appeals. Majority and minority opinions are before us.

In the municipal court of Pierce City the defendant was, in two cases, charged with violating two ordinances of that city, Ordinances Nos. 1399 and 1400. Upon a trial in the municipal court he won in each case, and the city appealed both cases to the circuit court of Lawrence county. There the two cases were consolidated and tried together. Defendant again won, and the consolidated

case was taken, by appeal of the city, to the Springfield Court of Appeals. By the majority opinion of the Court of Appeals the judgment of the circuit court was reversed and remanded, but the case certified here as aforesaid.

In the trial in the circuit court the evidence consisted of the two ordinances, and agreed facts and testimony. Much of the agreed statement of facts may be considered useless, as the case turns upon a construction of the ordinances, and the power of the city to enact them. The first section of Ordinance No. 1899 reads:

"Section 1. That no person, firm or corporation shall engage in the business of installing electric lights or electric power of any sort in the city of Pierce City, or wire any house or building or other premises for like purposes, without having first procured a license from the city therefor, and shall pay for each license the sum of ten dollars (\$10) per annum, such license to expire with the calendar year in which the same is issued."

And the first section of Ordinance No. 1400 reads:

"Section 1. No person, persons, firms or corporations shall carry on or engage in the plumbing business or trade within the corporate limits of the city of Pierce City without first having obtained a license therefor, and shall pay for such license the sum of ten (\$10.00) dollars, which license shall expire at the end of the calendar year in which it is issued."

Other portions of the ordinance and other facts agreed to by the parties can be noted in the opinion, so far as required.

Theodore Alvord, of Pierce City, for appellant.

W. Cloud, of Pierce City, for respondent.

GRAVES, J. (after stating the facts as above). I. It is quite clear from the ordinances that the city in requiring these licenses is levying a tax upon the occupation. In other words, there is created by these ordinances an occupation tax of \$10 upon both plumbers and electricians. The wording of the ordinance so shows. Whilst in each ordinance, in other sections, there is found some regulatory matters, yet the city does not dispute the idea that it is providing for an occupation tax by these two ordinances. The sum demanded would so indicate, in addition to the wording of the ordinance.

Pierce City is a city of the fourth class. Its powers are found in section 9899, R. S. 1909. This section does not specifically mention either plumbers or electricians, or the business of either. There is, however, at one place in said section, after a long enumeration of trades and avocations, where we find the words "and all other business, trades, and avocations whatever," which said clause is followed by this clause "and fix the rate

of carriage of persons and wagonage, drainage, and cartage of property."

Under article 9, R. S. 1909, relating to "Cities and Towns under Special Charters," we find section 9580, which reads:

"No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

This section is urged upon us by defendant, and discussed by the Court of Appeals. It is urged as a limitation upon the power of the city to fix a license tax upon these two occupations. This statute is in plain language, and it certainly does limit the power of cities to which it applies. It goes to the single question of taxation of occupation and business, but has no reference to regulations under the police power.

There was an evident purpose in this statute. It was a new section in R. S. 1889. See 1 R. S. 1889, page 509. It is there section 1900 of article 1 of chapter 31, entitled "Cities and Towns, Miscellaneous Provisions." It was not, when thus enacted in 1889, under the title of "Cities and Towns under Special Charters," but was applicable then to all municipal corporations, whether under general or special charter. The shift of position occurred ten years later in 2 R. S. 1899, as section 6256, c. 91, R. S. 1899, entitled "Cities, Towns and Villages," is made up of 23 articles. But two of these articles (7 and 23) were passed as revised bills. All others are the handiwork of the revision committee. Whilst this revision committee in 1899 placed the original section, as first enacted in 1889 as section 6256, under article 11, entitled "Laws Applying to Cities Organized under and Having a Special Charter," this act of the committee did not change the force and effect of the statute from what it was when first enacted. So too its position in the R. S. 1909 does not alter its meaning. In fact section 8086, R. S. 1909, provides as to former laws of a general nature, in such revision, that "so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments."

[1] A law as first enacted, with the provisions of which it originally formed a part, should be considered in ascertaining its meaning, rather than other laws with which it may be grouped in the Revised Statutes, *Timson v. Coke Co.*, 220 Mo. 580, 119 S. W. 565; *Paddock v. Railway Co.*, 155 Mo. 524, 56 S. W. 458; *Aloe v. Ass'n*, 164 Mo. 675, 55 S. W. 998. So that this section 9580, R. S. 1909, having been enacted as one of the general provisions of the law of municipal corporations, must be so construed, and, when so construed, it clearly places a limitation

upon the power to tax occupations. It, however, has no reference to regulations which may be prescribed under the exercise of the general police power, if such power has been committed to the municipality by the state. It follows that this section 9580, R. S. 1909, must be reckoned with in the determination of this case.

[2] II. The majority opinion of the Court of Appeals indicates that the judges concurring therein are of the opinion that Pierce City was without power to impose this tax as a condition precedent to a license, but they were impressed with the idea that this court had announced a different view in *Ex parte Robert C. Smith*, 231 Mo. 111, 132 S. W. 607. In this we think that they are mistaken. Judge Gantt clearly puts this case on the ground of a proper exercise of general police power in the city of St. Louis. At page 122 et seq. of 231 Mo., at page 610 of 132 S. W. he says:

"We regard the business of plumbing as so intimately connected with the public health and the comfort of the citizens that there ought not to be any doubt that its regulation falls within the power of the Legislature in the exercise of its police power. The ordinance does not restrain individuals from working as plumbers; it simply requires that the man who holds himself out to do this important work shall be fitted for it, and the ordinance imposes no unreasonable burden upon him. In this connection it need only be stated that it has been decided in various cases in this court that a charter power of a freehold city, like Kansas City and St. Louis, under our Constitution, has all the sanction of a legislative enactment by the Legislature. We are of the opinion that the ordinance was clearly within the powers of the city conferred upon it by its charter, and that it is perfectly reasonable regulation.

"That the fee in this case is a mere license fee, being \$1 per year, we think is too obvious for any discussion. It is not a tax in any sense of the word, nor is it intended as such. Its amount on its face demonstrates that it is simply enough to cover the proper charges for the issuing of the license certificate. The ordinance was not intended as a revenue measure, and hence section 6256, Revised Statutes 1899, has no application to it."

On page 120 of the same opinion (231 Mo.) on page 609 of 132 S. W., he says:

"While there may be some cases to the contrary, the great weight of opinion in this country is to the effect that the business of plumbing is so intimately connected with the public health, especially in large centers of population where scarlet fever, typhoid fever, diphtheria, and other diseases are apt to become epidemic, as to be the proper subject of police regulation. *People ex rel. v. Warden*, 144 N. Y. 529 [89 N. E. 688, 27 L. R. A. 718]; *State v. Gardner*, 58 Ohio St. 599 [51 N. E. 186, 41 L. R. A. 689, 65 Am. St. Rep. 785]; *Douglas v. People ex rel.*, 225 Ill. 536 [80 N. E. 341, 8 L. R. A. (N. S.) 1116, 116 Am. St. Rep. 162]; *State ex rel.*

210 S.W.—3

*v. Justus*, 90 Minn. 474, 97 N. W. 124; *State ex rel. v. Benzenberg*, 101 Wis. 172 [78 N. W. 845]; *Caven v. Coleman*, 96 S. W. 774. The right of a citizen under our Constitution to follow any legitimate business, occupation, or calling which he may see fit to engage in, and to use such right as a means of livelihood, is fully secured, but it is subject to the paramount right of the state to impose upon the enjoyment of such a right a reasonable regulation which the public welfare may require."

Note, in the first quotation, *supra*, what he says about section 6256. This is the present section 9580. He says that his case was not affected by section 6256, now section 9580, because the fee in his case was a mere license fee of \$1, and not a tax upon the occupation. He clearly indicates, however, that if the ordinance had been intended as a revenue measure, and not as a police regulation, then section 6256, now section 9580, would have been a barrier to the ordinance.

The Court of Appeals concedes that but for this case the judgment *nisi* was correct. In our judgment this case does not change the rule as heretofore announced in such case as *State v. Butler*, 178 Mo. loc. cit. 313, 77 S. W. 560, and *City v. Cleveland*, 187 Mo. loc. cit. 388, 67 S. W. 216. We find no case where section 9580 is discussed, save the mention of it in *Smith's Case*, *supra*.

This statute must be given some effect. It is not meaningless. It had its purpose. That purpose was to limit the power of municipalities to tax occupations. This power to tax cannot (under this statute) be exercised unless the trade or occupation is specifically mentioned in the city charter. Not so as to ordinances purely in the exercise of the police power. As to such, this statute is not a limitation. By its very terms it fixes its application to the taxing power and not to the regulating power under the general police power.

Viewing these ordinances as laws exercising the power to tax occupations, the ordinances are void, and the trial court was right in so holding. The judgment of the circuit court is therefore affirmed.

BLAIR, P. J., concurs in separate opinion.  
WOODSON, J., concurs.  
BOND, J., not sitting.

BLAIR, P. J. (concurring). Section 9580, R. S. 1909, was first enacted in 1889 (section 1900, R. S. 1889), and reads:

"No municipal corporation \* \* \* shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

The revised bill of 1889 refers to all cities incorporated thereunder as incorporated "un-

der the general laws of the state," and makes frequent reference to cities otherwise incorporated as "incorporated under special charter."

The word "charter" has now come to be used as including the statutory provisions applicable to cities incorporated under general law. Section 1900, R. S. 1889 (section 9580, R. S. 1909) did not use the word in this sense. It was used in reference to special charters existing and with respect to cities which might frame their own charters under provisions of our Constitution. If this is not true, then the word "charter" as used in the section includes the general statutes under which cities might incorporate. If given this construction, the last clause is rather remarkable since all statutes applying to a city incorporated under the general laws constitute its charter. It would put the Legislature in the position of having said that no city could impose a license tax upon any "business avocation, pursuit or calling unless such business avocation, pursuit or calling is specially named as taxable in the charter [including statutory charter] \* \* \* or unless such powers be conferred by statute," which statute would be a part of the city charter of all such cities incorporated under general law.

The fact that we term the general statutes relating to cities incorporated under general law the "charter" of such cities does not prevent them from continuing to be statutes. In my opinion the section means that a city under special charter cannot, by virtue of its charter, impose the taxes mentioned, unless the business, etc., is specially named as taxable in such charter; but that any city may do so if "such power be conferred by statute," whether such statutes are commonly referred to as parts of the city charter or are but statutory provisions in aid of and in addition to special charters. It seems to me no other construction gives effect to all the provisions of the statute. So construed, the section really affects no cities except those under special charter. It leaves the others exactly where they would have been had no such law been passed. This was the intent.

The question in this case then is whether the statute (section 9399, R. S. 1909) confers power upon cities of the fourth class to impose a license tax upon plumbers and electricians. These trades are not expressly mentioned in the sections. Neither are these ejusdem generis with those named. *City v. Laughlin*, 49 Mo. 559. *City v. Baskowitz*, 273 Mo. 543, 201 S. W. 870, is inapplicable because it is based upon peculiar charter provisions.

The judgment is right, and I concur in the result reached.

# REID v. MOULTON. (No. 19861.)

(Supreme Court of Missouri, Division No. 1.  
March 1, 1919.)

## 1. APPEAL AND ERROR ⇐985(1) — SETTING ASIDE JUDGMENT—JUSTIFICATION — PRESUMPTION.

The court on appeal must presume, in the absence of anything appearing to the contrary, that the circumstances justified the exercise by the trial court of its control in the interest of justice over its judgment during the term at which it was entered.

## 2. APPEAL AND ERROR ⇐496 — RULES OF TRIAL COURT—SHOWING BY BILL OF EXCEPTIONS.

The court on appeal is not required to go to the records of the trial court to ascertain whether there be some rule limiting time within which plaintiff may reply to an amended answer filed without notice; it being appellant's duty to bring such rule into the court on appeal by bill of exceptions, in view of Rev. St. 1909, §§ 1809, 1810.

## 3. APPEAL AND ERROR ⇐496—SPECIAL ORDER TO PLEAD—BILL OF EXCEPTIONS.

If, on appeal from order setting aside judgment for want of reply, defendant appellant relies upon the violation of a special order to plead, he must have the order before the court on appeal by bill of exceptions, in view of Rev. St. 1909, §§ 1809, 1810.

## 4. JUDGMENT ⇐138(3)—DEFAULT — SETTING ASIDE.

Where defendant filed amended answer without notice, and his motion for judgment for want of reply was sustained on the day it was made, which was the day that the cause was assigned to a division, *held*, court did not err in setting aside judgment at the same term.

## 5. JUDGMENT ⇐298, 341—CONTROL OF JUDGMENTS DURING TERM.

During the term at which they are rendered, the courts retain jurisdiction of their judgments and may set them aside or modify them as justice requires, and the interposition by the unsuccessful party by motion may furnish the suggestion, which operates as an incentive to such action.

## 6. PLEADING ⇐350(2) — JUDGMENT ON PLEADINGS—TIME OF RENDERING.

Judgment on the pleadings rendered on the same day that motion therefor was filed was irregular on its face, where it did not recite that it was determined by consent, and it was the duty of the court to take judicial notice of the irregularity, correct the error, and permit argument when called upon by a timely motion in the same term.

## 7. MOTIONS ⇐32—TIME FOR DETERMINATION —APPEARANCE—WAIVER.

Appearance of counsel for the very purpose of asserting the right of their client, under Rev. St. 1909, § 1842, providing that motions in term shall be filed at least one day before they may be argued or determined, was not a waiver of the statutory right.

Appeal from Circuit Court, Jackson County; Thomas B. Buckner, Judge.

Suit by John B. Reid against C. F. Moulton. From an order setting aside judgment for want of reply, defendant appeals. Affirmed and remanded.

John A. Showen, of Kansas City, for appellant.

Bowron & Burrus, for respondent.

**BROWN, C.** This is an appeal from an order of the Jackson circuit court in division No. 1, setting aside a judgment for want of reply in the above-entitled cause, which is a suit for a money judgment within the jurisdiction of this court. The date of its institution is not given in the record, nor is the date of the filing of the original answer. Afterward, while the cause was pending upon petition and answer and still unassigned to a division for hearing, it being the nineteenth day of the November term of the court, the defendant filed an amended answer in which he set up substantially an accord and full satisfaction of the demand.

On the twenty-sixth day of the succeeding March term, no reply having been filed, he filed his motion for judgment on the pleadings on that ground. The cause was then, on the same day, assigned to division No. 1. He followed it, and the motion was, on the same day, taken up and sustained by a judgment for the defendant reciting the presence of the parties by their attorneys. On the twenty-ninth day of the same term, the plaintiff filed his motion to set aside this judgment on the pleadings for want of replication, which was, on the thirty-fifth day of the term, overruled. The plaintiff on the thirty-seventh day of the term filed another motion, as follows:

"Comes now the plaintiff and moves the court to set aside the order overruling the motion to set aside the judgment rendered on the pleadings herein on the 11th day of April, 1916, and to set aside and vacate the judgment so rendered on the pleadings herein on the 11th day of April, 1916, and for a new trial and hearing herein.

"For the following reasons:

"First. Because the court erred in granting a judgment on the pleadings in above-entitled case, as there had been no notice given to plaintiff of such application for judgment on the pleadings.

"Second. Because defendant was not entitled to a judgment on the pleadings and did not ask or take a judgment on any new matter set up in his answer, but only took a judgment for costs.

"Third. Because no docket, had been set and plaintiff did not know said case had been assigned, but one of plaintiff attorneys saw in the record that said case was awaiting assignment, and on making inquiries of Mr. Oflarity was informed that said case was in division 1 and at once went to said division 1 and there found defendant with his attorney,

and the court was just about to render a judgment on the pleadings; that said attorney, J. H. Bowron, requested the court to let the matter stand over till the following day that he had not been notified of the proceedings, and knew nothing about the matter.

"Fourth. Because said case was not called for trial and had not been assigned out of division 1; that no jury had been called; and that plaintiff yet had time and a legal right to yet file a reply.

"Fifth. Because this motion directs itself to the sound discretion of the court, and the earnings of a life time of the plaintiff are involved, and involves some \$16,000, and is a jury case, and each item has merit, and denial to a trial on the merits forever closes the door to plaintiff, and deprives him of all his property.

"Sixth. Because said judgment is against the law and the evidence.

"Seventh. Because the judgment is not supported by the law or the evidence and is not warranted by the pleadings, that said judgment as rendered is irregular."

This was taken up on the fortieth day of the same term and sustained by the following order:

"Now on this day, plaintiff's motion to set aside the judgment on the pleadings heretofore rendered in this cause is taken up, heard and considered and is by the court sustained, and it is ordered by the court that the said judgment on the pleadings be and the same is hereby set aside and for naught held, to which action and ruling of the court the defendant excepts."

[1] This record with the affidavit and order for granting the appeal was signed by the judge as a bill of exceptions and transcript and so appears in the appellant's abstract. It will be seen that there is nothing in it which shows any general rule of the court or order with reference to the filing of the reply as provided in section 1800, Revised Statutes of 1900. So far as appears from this record, the plaintiff might have been ignorant of the filing of the amended answer, which raised the issue calling for replication. The cause was not docketed in division, where only it could be tried, and when it was sent to division the defendant followed it and took judgment on the same day. The motion to set it aside was promptly filed. This proved insufficient and was overruled. Another motion immediately followed it, which was sufficient to call into action the discretion of the court, and was sustained. If evidence was introduced, it is not preserved in the record. We must presume, in the absence of anything appearing to the contrary, that the circumstances justified the exercise by the court of its control in the interest of justice over its judgment during the term at which it was entered. One of the most salutary offices of this control is to prevent the miscarriage of justice by accident or inadvertence. It is frequently a protection against the stealthy suitor who waits and watches for the time

when his adversary is off his guard. Even the most careful lawyer is not expected to mount guard over all avenues to the records for fear his opponent may gain access to them by ways outside the ordinary practice of the court.

[2-4] There is nothing in this record showing that the plaintiff was in default in his pleading. We are not required to go to the records of the Jackson circuit court to ascertain whether there may be some general rule limiting the time in which the plaintiff may plead to an amended answer filed without notice. If such a rule exists, the appellant desiring to take advantage of it must bring it into this court by proper proceeding, which in this case is his bill of exceptions. If he stands on the violation of a special order to plead, he must have the order before us by the same process. He must stand on the statute alone, which provides that the plaintiff may plead to new matter in the answer within such time as the court by rule or otherwise shall require. Sections 1800, 1810. Judged by this rule, the plaintiff was not in default, and the final judgment was erroneously entered. There was no course open to the court other than to set it aside.

There is another reason equally binding upon this court which forbids us to disturb this order. In *Rottmann v. Schmucker*, 94 Mo. loc. cit. 144, 7 S. W. 119, we said:

"That a court of general jurisdiction, proceeding according to the course of the common law, has unlimited power during the whole of the term over its judgments rendered at such term, is a rule of universal application. *Freeman on Judgments*, § 90. Until the end of the term its judgments are in the breast of the court, and may be modified, vacated, or set aside, as justice demands, becoming absolute only upon the adjournment of the court for that term, and no good reason is perceived why the same rule should not apply to those judgments of the probate court, whose verity is as unquestionable after they become absolute as those of the circuit court."

This was quoted with approval by us in *Ewart v. Peniston*, 233 Mo. loc. cit. 710, 136 S. W. 422. In the latter case the court (at page 712 of 233 Mo., at page 426 of 136 S. W.), in speaking of the act of the court in setting aside a judgment during the term of its rendition in pursuance of a motion for a new trial filed out of time, said:

"But trial courts have permitted motions for new trial filed out of time to remain on file, and the court of its own motion granted a new trial. If trial courts are to exercise their common-law rights in protecting the sanctity and justice of their judgments, such courts must acquire knowledge in some manner as to wherein injustice has been done."

[5] The *Ewart* Case presents a wealth of authorities upon this question to which we refer the curious. They fully sustain the conclusion of the court that during the term at which they are rendered the courts retain jurisdiction of their judgments and may set them aside or modify them as justice requires, and that the interposition by the unsuccessful party by motion may well furnish the suggestion which operates as an incentive to such action.

[6, 7] There is still another reason which forbids our interference. The judgment on the pleadings was rendered the same day the motion therefor was filed. It recites that the plaintiff came into court by its attorneys. The motion upon which it was set aside states that in searching for the cause the plaintiff's attorneys went to division 1 just as the court was about to render the judgment and asked that the matter be permitted to stand over until the next day for investigation, which the court erroneously refused, and thereupon entered the judgment, which was irregular upon its face in the absence of any recital that it was determined by consent. It was the duty of the court to take judicial notice of this error, and, to correct it, permit argument when called upon by a timely motion in the same term. The appearance of counsel, for the very purpose of asserting the right of their client under the provisions of section 1842 of the Revised Statutes of 1909, is not a waiver of the statutory right. It only emphasizes and makes more definite the error of the court in refusing it.

The order appealed from is affirmed, and the cause remanded to the Jackson county circuit court for further proceedings.

BAILEY, C., concur.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court.

All concur; BOND, J., in result.

(277 Mo. 209)

**NON-ROYALTY SHOE CO. v. PHOENIX ASSUR. CO., LIMITED, OF LONDON, ENGLAND. (No. 19281.)**

(Supreme Court of Missouri, Division No. 2, July 16, 1918. Rehearing Denied Dec. 28, 1918. On Filing of Remittitur, March 4, 1919. Motion to Transfer to Court in Banc Overruled March 17, 1919.)

**1. JURY ⇐13(7)—FIRE INSURANCE—FRAUD BY APPRAISERS—TRIAL BY JURY—STATUTE.**

Under Rev. St. 1909, § 1812, issue of fraud upon holder of fire policy in award of appraisers of loss appointed pursuant to policy is not triable by the court sitting as a chancellor, but by a jury.

**2. INSURANCE ⇐608(14)—FIRE INSURANCE—FRAUD OF APPRAISERS OF LOSS—QUESTION FOR JURY.**

In suit by holder of fire policy against insurer, whether award of appraisers of loss appointed pursuant to the policy was tainted with such fraud as would avoid it held for the jury.

**3. INSURANCE ⇐574(3)—FIRE INSURANCE—CONSTRUCTIVE FRAUD OF APPRAISERS.**

Carelessness or ignorance of appraisers of loss to holder of fire policy, which entailed a loss of \$25,000 upon the holder, of itself constituted such constructive fraud as to justify relief to holder against insurer.

**4. EVIDENCE ⇐113(1)—VALUE—FIRE INSURANCE.**

In action on fire policy, evidence of price for which whole of salvaged machines and machinery was sold held admissible on question of value after fire, though such evidence, standing alone, is merely an opinion of value, but insurer was entitled to show that machines were of sort for which demand was negligible, or any other fact affecting price.

**5. INSURANCE ⇐494 — FIRE INSURANCE — ELECTION OF POLICY HOLDER—STATUTE.**

Rev. St. 1909, § 7022, confers upon holder of policy of fire insurance option to elect whether to accept from the insurer the repair of the property damaged or a sum of money equal to the damage done.

**6. INSURANCE ⇐569 — FIRE INSURANCE — STIPULATION AS TO DAMAGE—AVOIDANCE BY FRAUD.**

Stipulation by holder of fire policy, in agreement to submit question of damages to arbitration, that damages should not exceed what it would cost insured to repair or replace with material of like kind and quality, was avoided by the fraud of appraisers of loss appointed pursuant to the policy; such fraud avoiding, not only the agreement to arbitrate, but also the stipulation contained therein.

**7. INSURANCE ⇐494 — FIRE INSURANCE — STIPULATION LIMITING DAMAGES—STATUTE.**

In absence of election by holder of a fire policy, pursuant to Rev. St. 1909, § 7022, to have repairs made instead of to accept a money payment for loss, policy provision that damages shall in no event exceed what it would cost insured to repair or replace is inapplicable.

**8. INSURANCE ⇐494—FIRE INSURANCE—PERSONALITY—PARTIAL LOSS—STATUTE.**

Rev. St. 1909, § 7022, relative to a partial destruction of property covered by insurance, may be applied to a partial fire damage of insured personality.

**9. INSURANCE ⇐670—FIRE INSURANCE—VEXATIOUS REFUSAL TO PAY LOSS—FINDING—STATUTE.**

In action on fire policy, there should be unambiguous finding of fact of insurer's vexatious refusal to pay loss before infliction of either penalty of Rev. St. 1909, § 7068, by way of attorney's fees or 10 per cent. damages, should be allowed to stand; that is, either a general verdict assessing both the penalty and the attorney's fee, or an affirmative finding that the refusal to pay was vexatious.

**10. INSURANCE ⇐665(1)—FIRE INSURANCE—VEXATIOUS REFUSAL TO PAY LOSS—SUFFICIENCY OF EVIDENCE.**

In action on a fire policy, evidence of insurer's vexatious refusal to pay loss held insufficient to warrant verdict for attorney's fees pursuant to Rev. St. 1909, § 7068.

**11. INSURANCE ⇐602 — FIRE INSURANCE — VEXATIOUS REFUSAL TO PAY LOSS—DEDUCTION FROM ADVERSE VERDICT—STATUTE.**

Vexatious refusal to pay fire loss justifying award of attorney's fees and infliction of penalty on insurer, under Rev. St. 1909, § 7068, is not deductible from the mere fact that on suit the verdict is adverse to defendant.

**12. COURTS ⇐281(19)—SUPREME COURT—JURISDICTION—CONSTITUTIONAL QUESTION.**

Where Supreme Court has once determined precise constitutional question raised in case wherein Courts of Appeals would otherwise have jurisdiction, it will not thereafter assume jurisdiction of case on account of constitutional question, if determination thereof was had before date at which appeal was taken.

Appeal from Circuit Court, Pike County; Edgar B. Woolfolk, Judge.

Action by Non-Royalty Shoe Company against Phoenix Assurance Company, Limited, of London, England. From judgment for plaintiff, defendant appealed to the Court of Appeals (178 S. W. 246), which, after reversing and remanding, certified the case up to the Supreme Court. Judgment reversing and remanding set aside, and judgment for plaintiff affirmed on filing of voluntary remittitur of attorney's fees.

This is an action on a contract of insurance for a loss sustained by fire. Jurisdiction herein by reason of the amount involved lay originally in the St. Louis Court of Appeals, but that learned court, after filing an opinion reversing and remanding it for errors, certified it up to us (178 S. W. 246) because Reynolds, P. J., deemed the holding in the opinion upon the point of allowing an attorney's fee as damages for an alleged vexatious refusal to pay the loss in conflict

with the decisions both of the Kansas City Court of Appeals and of this court.

The facts of the case, so far as concern the pleadings and issues, are carefully and clearly stated by the Court of Appeals thus:

"This is an action on one of 11 policies insuring the plaintiff for one year against all direct loss or damage by fire, the total amount of insurance being \$28,500, the amount carried by plaintiff in the defendant company \$3,000. The property insured was personal property, machinery, power appliances, etc., contained in and on the brick building occupied by plaintiff and situated in the city of St. Louis. Insurance in companies other than the defendant is permitted in the policy. Alleging the total loss of all the property insured, in the amount of at least \$31,981.35, plaintiff asked judgment against defendant in the sum of \$3,000, with 6 per cent. interest, and for reasonable attorney's fees, and 10 per cent. damages for vexatious refusal to pay, as provided by statute.

"The answer, admitting the execution and delivery of the policy, sets up a provision in it that the company 'shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable 60 days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy.'

"It is further provided that, in the event of the disagreement as to the amount of loss, it shall, 'as above provided,' be ascertained by two competent and disinterested appraisers, each party selecting one, and the two so chosen first selecting a competent and disinterested umpire, the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss, each party paying the appraiser respectively selected by them and bearing equally the expense of the appraisal and umpire; it being further provided that 'the loss shall not become payable until 60 days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers where appraisal has been required,' and that the insuring company shall not be liable under the policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount insured shall bear to the whole insurance. The answer, setting up these clauses in the policy, avers that after the occurrence of the fire plaintiff and defendant entered into an agreement for submission to appraisers, the agreement dated

March 24, 1913; that under this agreement William Fay and Chester T. Drake were appointed appraisers; that they selected Fred E. Briner as umpire; that Fay and Drake qualified as appraisers and Briner as umpire, and proceeded to, and did, estimate and appraise the loss caused by the fire, stating separately sound value and damage in conformity with the provisions of the policy, and on April 7, 1913, made their award in writing, placing the sound value of the property at \$34,732.80, and the loss and damage at \$9,547.08. Claiming that this fixed the amount of the total loss, and as the total amount of insurance was \$28,500, it is averred that the amount due under this policy by this defendant was \$1,004.95, which sum, it is averred, defendant has always been ready and willing to pay, but that plaintiff, notwithstanding the agreement above set out, had failed and refused to receive that sum, and which sum defendant now, by its answer, again tenders.

"The reply, taking issue on the amount of the loss, admits the stipulations in the policy set out, but denies that, pursuant to the provisions of the policy, plaintiff and defendant entered into an agreement for submission to appraisers as set forth in the answer, and alleges that under the provisions of the policy plaintiff and defendant undertook to have the loss and damage fixed as hereinafter stated and as provided in the policy. It is then averred that after the fire and loss a disagreement arose between plaintiff and defendant as to the amount of loss, and that under the terms of the policy plaintiff selected Fay, a competent and disinterested person, as appraiser, to act for it, and defendant selected Drake, and these two selected Briner as umpire, but it denies that either Drake or Briner were competent or disinterested or unbiased, alleging the contrary, specifically alleging that Briner was ignorant, inexperienced, and incompetent. It further denies that either Fay or Drake or Briner, or any of them, ever correctly or fairly estimated or appraised the loss caused by the fire to the property; denies an award was made in writing on April 7, 1913, or at any time, and denied that by any award made the total amount of loss caused by the fire was only \$9,547.08; avers that after these appraisers and umpire had been selected and started in to investigate and appraise the loss, and after they had been at that work for some time, Fay was of the opinion, and so declared to Drake and Briner, that the sound value of the property was \$35,981.65, and that the amount of loss and damage which was directly caused to the insured property by the fire was at least \$28,904.72, but that defendant's appraiser, Drake, and the umpire, Briner, wrongfully, fraudulently, and illegally proceeded and together pretended to come to an award in which they pretended to fix the loss at \$9,547.08, which award Fay refused to sign or agree to. It is further alleged that Drake and Briner failed to take into consideration a large amount of property lost, which was of the value of \$1,800, and of which the appraiser Drake and the umpire, Briner, were notified by Fay, but which they excluded from any award. Repeating the charges of the incompetency, unfairness, and partiality of Briner and Drake, and alleging, among other things, that Briner had consulted his own attorney and outside parties, and averring that in arriving at their conclusion neither



Briner nor Drake ever ascertained or knew, or were able or competent to know or to find, nor did either of the them ever exercise any independent judgment or opinion as to what loss and damage was occasioned by the fire, but that they 'guessed' at the amount of loss and damage; had taken opinions thereon secretly and privately given by parties and attorneys who were not informed in regard to the matters and who were unknown to plaintiff, and before whom plaintiff was unable to appear. Hence it is alleged that the pretended award, by reason of these facts, was wholly inadequate and insufficient to express or cover the amount of loss and damage which plaintiff suffered by reason of the fire having damaged the insured property, and that this loss was never ascertained by any competent or disinterested appraiser or umpire, and was never ascertained or known by either Drake or Briner, and that, by reason of these facts, and of the facts before alleged, plaintiff alleges that the plaintiff's award is void and of no effect.

"It is further averred that neither Drake nor Briner notified or permitted Fay or plaintiff to know the parties from whom they were seeking private advice, and upon whose opinion they were acting in the matter, so that this plaintiff could, as it would have done, have proven by competent and disinterested parties that the loss which was occasioned to the property was the amount stated in the petition.

"The cause was tried before the court and a jury, and resulted in a verdict for plaintiff, vacating the award and assessing the damage for loss sustained on the policy in the sum of \$2,829, with interest in the amount of \$74.95, and attorney's fee for services in this action in the sum of \$500."

So far as the facts shown upon the trial are concerned, it is enough to say that the evidence offered by plaintiff tended to prove the allegations of the petition and the reply; while that offered by the defendant tended to prove the allegations of the answer and to contradict the evidence offered on plaintiff's part. Further facts will be found in the opinion of the Court of Appeals (*Non-Royalty Shoe Co. v. Phoenix Assurance Co.*, 178 S. W. 246), and, if necessary, we shall refer in our discussion to any additional matters which are pertinent.

Reynolds & Harlan, of St. Louis, and Hostetter & Haley, of Bowling Green, for appellant.

Virgil Rule and Fauntleroy, Cullen & Hay, all of St. Louis, for respondent.

FARIS, J. (after stating the facts as above). I. Many grounds of alleged error are called to our attention by defendant. Such of these as under the view which we take of the case demand discussion are: (a) That the issue of fraud in the procurement of the appraisal and award was triable to the court sitting as a chancellor, and not to a jury; (b) that there was no substantial evidence upon which to set aside the appraisal, and that the finding of the jury upon this question was erroneous; (c) that

error occurred in giving certain instructions for plaintiff and in refusing certain instructions offered by defendant upon the measure of damages; (d) that there was no substantial proof of vexatious refusal to pay the loss, therefore an allowance of an attorney's fee upon this ground was error; and (e) that the statute permitting an award of damages for vexatious refusal to pay a loss upon a contract of insurance is unconstitutional and void.

[1] II. The contention that the issue of fraud in the award of the appraisers is to be tried by the court sitting as a chancellor, and not by a jury, is in the opinion of the writer a serious and interesting one. It is obvious, however, that a solution of it involves only the construction of section 1812, R. S. 1909; for the rule for which defendant contends was unquestionably the law before section 1812 was passed. *Hancock v. Blackwell*, 139 Mo. 440, 41 S. W. 205. If the provisions of section 1812 are applicable to an appraisal made by appraisers and an umpire pursuant to the terms of a policy of insurance (or, as here, pursuant to an agreement to so submit the question of amount of loss incurred), then the above section settles the point. Division 1 of this court very recently gave the most careful consideration to this question, and upon the view that such an award is a settlement, and also a release, at least in part, of the cause of action, it was ruled that section 1812 is applicable. *Young v. Insurance Co.*, 269 Mo. 1, 187 S. W. 856. Passing the thought that such an award of appraisers is not always a release in part (e. g., when the appraisers find that the loss equals the full amount of the policy, and the company should for fraud seek annulment), we are disposed to agree with the view that such an award is so far a settlement as to come within the purview of said section 1812. 35 Cyc. 1443. Moreover, no good is accomplished by a constant change in the rulings upon questions of practice. The reasons given in the *Young Case* are plausible, and the conclusion reached therein is wholesome; therefore, and since we see no compelling reason why we should unsettle the rule, we disallow this contention of defendant.

[2, 3] III. Another close and serious question is presented by the contention that there was no substantial evidence whatever of the existence of such fraud as would avoid the award. Divers shreds and patches of evidence are urged as making up the requisite quantum of proof to constitute substantial evidence. Among these are: (1) The fact that the umpire was selected by flipping a coin; (2) that the appraiser for defendant resided in Chicago, where for a period of some 20 years he had occasionally acted as an appraiser for the defendant; (3) that the umpire privately took legal advice as to his

acts and duties and the law under which he should proceed; (4) that the umpire privately consulted an engineer as to matters of damage and values; (5) that the umpire refused to disclose to the appraisers the names of these persons so secretly consulted by him; (6) that the appraiser for defendant and the umpire refused to take into consideration in reaching the value of the damaged machines the cost of the installation thereof, or the cost of wiring the building for electricity; and (7) that the discrepancy between the amount of loss and damage as found by the appraiser for defendant and the umpire and the actual damage and loss as found by the plaintiff's appraiser and witnesses for plaintiff is of itself substantial evidence of fraud. Upon the last of these several contentions there was much proof adduced pro and con by the respective parties; the others were either admitted or proved conclusively.

If the case were one sounding in equity, we might hesitate to agree that the evidence adduced is sufficient. But we are of the opinion that there was substantial evidence from which unbiased jurors could draw inferences to sustain the charge of fraud. The triers of fact might well have deduced such an inference from the discrepancy between the appraisers as to damage and loss alone; for it is almost incredible that impartial men at all acquainted with machines and machinery should differ so widely in opinion and in testimony as the record shows was the case here. The obvious inference to be deduced from these facts is that the appraisement was either the result of prejudice and overreaching, or it was begotten of carelessness, or the most stupendous ignorance. A difference of a few thousand dollars in a total of an alleged loss of approximately \$35,000 might be expected, but a difference of more than \$25,000 in the respective figures is seemingly incompatible with impartiality, and argues inferentially in favor of carelessness, circumvention, or ignorance. We do not know, and we are not saying, on which side the truth lies. Whether the view taken by Fay, and in consequence his testimony, are the correct and true view and testimony, or whether in these behalves verity attaches to Drake and Briner, we cannot say and do not say. But nothing is clearer than that one side or the other has grievously erred. Carelessness or ignorance, we think, which (to take, arguendo, the view which favors plaintiff) entailed a loss of \$25,000 upon the latter would of itself constitute such constructive fraud as to justify relief. The evidence adduced upon the trial both by plaintiff and defendant touching the condition of the machinery seems upon the cold record to be "fair upon its face." But the fact remains that the colossal discrepancy in the figures indicates a condition wholly in conflict with any theory of verity or fair

dealing attributable simultaneously to both sides. These obvious conclusions arise as inferences, which we think were for the triers of fact (*Knorpp v. Wagner*, 195 Mo. loc. cit. 362, 93 S. W. 961; *State ex rel. v. Elliott*, 157 Mo. loc. cit. 618, 57 S. W. 1087, 80 Am. St. Rep. 843), and, when considered in connection with the other charges noted (which were conceded in effect), made a jury question of this point.

[4] IV. Cognate to this question of the sufficiency of the evidence is the point vaguely raised in the briefs that evidence of the price for which the whole of the salvaged machines and machinery was sold was inadmissible upon the question of their value after they had passed through this fire. We think that this contention must be overruled. While evidence of this sort, when standing alone, is in the last analysis merely an opinion of value deduced from the act of another in a situation wherein the compelling reasons for that act are unknown and undisclosed, and which reasons may be ascribable to facts utterly foreign to the issuable fact of actual value, yet such testimony, while not conclusive, is ordinarily some evidence of value. 2 *Sutherland, Damages*, 1453. Cases can be conceived wherein from the very nature of the commodity, no other sort of evidence of value is available. *Brinkerhoff-Farris Trust Co. v. Lumber Co.*, 118 Mo. 447, 24 S. W. 129; *State ex rel. v. Dickson*, 213 Mo. loc. cit. 101, 111 S. W. 817. In explanation of the price brought by these salvaged machines when thus sold, the defendant was, of course, entitled to show, if it could, that these machines were of a sort for which the demand was negligible whether they were damaged or sound, or indeed any other fact which might have affected the price for which the machines were sold.

[5-8] V. Upon the question of the measure of damages under the policy a serious contention is made. For the plaintiff, on the measure of damages, the trial court gave this instruction, to wit:

"If, under the evidence and instruction No. 1, the jury concludes to disregard the award returned by Drake and Briner and concludes to find a verdict for plaintiff in excess of said award, then, in estimating the amount of loss and damage for the loss sustained under the policy, you should first ascertain from all the facts and circumstances given in evidence the fair cash value of the insured property immediately before the fire, and then from the evidence you should ascertain the fair cash value of the property not totally destroyed immediately after the fire, and from the value before the fire subtract the value after the fire, and the difference will be the total amount of loss and damage sustained."

The jury did see fit to set aside and disregard the appraisement of the arbitrators, as instruction 1 (referred to in the instruction copied above) advised them they

were authorized to do if they found the facts upon which instruction 1 was hypothesized. Defendant urgently insists that the above instruction is erroneous for that the measure of damages therein set forth is incorrect. And this is so, says defendant, because the policy of insurance sued on here provides, touching the measure of damages, thus:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deductions for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality."

Plaintiff's answer to this suggestion of error is that the above provision of the policy is in conflict with our statute (section 7022, R. S. 1909), and that, being so in conflict, the provision of the policy must yield to the provisions of the statute. The statute relied on reads thus:

"Whenever there is a partial destruction or damage to property covered by insurance, it shall be the duty of the party writing the policies to pay the assured a sum of money equal to the damage done to the property, or repair the same to the extent of such damage, not exceeding the amount written in the policy, so that said property shall be in as good condition as before the fire, at the option of the insured." Section 7022, R. S. 1909.

We think there is a conflict between the statute and the terms of the policy, so far as concerns the application of the statute here contended for by defendant. For it will be noted that section 7022, *supra*, provides that the insurer, in case of a partial loss (and this was a partial loss only), shall pay to the assured a sum of money equal to the damage done to the property by the fire, or repair the damage, so that the property shall be in as good condition after the fire as it was before the fire. There are therefore in this statute two alternative duties, which are either (a) to pay in money a sum equal to the damage done to the property, or (b) to repair the property in such wise as to restore it to the condition it was in before the fire. It is to be noted that this statute does not require the assured either to repair or to accept from the insurer money with which to repair, but it requires the insurer to repair. Nor does the option to elect which one of these things shall be done rest with the insurer, but, on the contrary, this option of election is plainly conferred on the assured. *Branigan v. Insurance Co.*, 102 Mo. App. 70, 76 S. W. 643. It is true that in the instant case the assured stipulated in the agreement to submit the question of damages to arbitration that the measure of its damages should be computable pursuant to the terms of the policy; that is, to quote from this stipulation, that the damages "shall in

no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality." If this stipulation be binding upon the plaintiff, even if the agreement to arbitrate be found void for fraud, then, of course, it would constitute an election on plaintiff's part of the statutory duty of the insurer to repair. But we do not think the agreement can be void as to the arbitration and valid as to this stipulation. Such a view would seem wholly to preclude the maintenance of any action at all upon the policy, and confine this suit to a mere setting aside of the award, and thereafter relegate plaintiff to another arbitration. It is obvious that, if the agreement to arbitrate and the arbitration had thereunder should not be set aside, no reason exists why any instruction of any sort on the measure of damages should be given. For a majority of the arbitrators, acting under the agreement to arbitrate and the stipulation therein that the cost to repair should be the measure of damages, found the total damages to plaintiff were \$9,547.08, while the minority, proceeding upon the theory of compensation in money for actual damage done, fixed these damages at approximately \$80,000. Be this as may be, so far as concerns the matter of instructions on the measure of damages, the instructions given became pertinent after the jury had found in favor of setting aside the arbitration.

The books are full of cases which hold that a contract of insurance which fixes the measure of damages in case of loss at the cost of repairing the damaged property is enforceable pursuant to its terms. But such cases merely construe the provision of the policy, unmodified by a statute such as ours (section 7022, *supra*), which, lacking an election by the assured to have repairs made, renders the policy provision inapplicable. *Branigan v. Insurance Co.*, 102 Mo. App. 70, 76 S. W. 643. While it is somewhat novel to apply the partial loss statute to a fire damage on personal property, neither reason nor authority has been called to our attention forbidding such application, nor have we been able to find any such after a somewhat careful search. We are of the opinion, therefore, that this contention of defendant should be disallowed.

The converse of this whole question is presented upon a consideration of instruction numbered 13, which the court below gave for the defendant. This latter instruction, following the terms of the policy and the stipulation in the agreement to arbitrate, fixed the measure of damages at the cost of repairing the damaged machines. Clearly, if the award of the arbitrators should be upheld, then the stipulation contained therein that the cost of repairs should constitute the measure of damages is valid and binding.

and in such event, if any instruction upon the measure of damages be necessary or enlightening, the one given for defendant would not be improper, provided there were antecedently postulated, apt recitals to the effect that the jury should not apply the measure of damages recited in the instruction, save in the event of upholding the award of the arbitrators. Absent such a recital, obviously defendant's instruction 13 is in conflict with plaintiff's instruction 2.

[8-11] VI. This brings us to the question whether there were any sufficient facts shown in evidence to warrant the verdict for attorney's fees bottomed upon an alleged vexatious refusal to pay the loss. Ancillary to this point are the cognate questions whether under the statute (section 7068, R. S. 1909), there must be: (1) An express affirmative finding by the jury in their verdict that the refusal to pay was vexatious; and (2) whether the jury is allowed by the statute *supra* to assess an attorney's fee on the ground of a vexatious refusal to pay the loss, unless they also assess the 10 per cent. penalty likewise permissible upon the finding of a vexatious refusal to pay. In this case the jury neither affirmatively found that there was a vexatious refusal to pay, nor did they assess the permissible 10 per cent. damages. They merely stated in their verdict, without more, that plaintiff was entitled to an attorney's fee of \$500, without setting forth upon what ground they based such finding.

This is a penal—indeed a highly penal—statute, and so it ought to be strictly construed. No one ought to be allowed to profit by it, unless he brings himself strictly within the letter of its provisions. While, for other reasons which readily suggest themselves, we apprehend that defendant could not bottom reversible error upon the single fact that the jury had not seen fit to assess against it the permissible penalty of 10 per cent. damages, yet in the statute the penalty and the attorney's fee are connected by the conjunctive, and not the disjunctive. This interlinking, and the fact that the statute is highly penal, leads to the conclusion that there ought to be an unambiguous finding of the fact of vexatious refusal to pay the loss before the infliction of either penalty should be permitted to stand. Either there should be a general verdict assessing both the penalty and the attorney's fee, or there should be an affirmative finding that the refusal to pay was in fact vexatious. While, as we suggest above, it is technical error to assess one penalty without the other, the error is in favor of defendant and against plaintiff, and defendant may not complain. If the wind is to be tempered to the shorn lamb, however, the lamb ought to be advised that the temperature has risen merely as an act of grace, and not of merit. Some such view seems to have been held by

the learned Kansas City Court of Appeals (*Strawbridge v. Insurance Co.*, 193 Mo. loc. cit. 603, 187 S. W. 79), though in the end that case rode off on another point.

But these considerations, while important (since for error the case must be tried again), are yet afield from the point most strenuously urged, which is, to wit: Was there any substantial evidence of a vexatious refusal to pay this loss? We are of the opinion that there was not. One fact alone, which is not disputed, is decisive of this question. The policy is apparently of the standard form, and, in common with contracts of this sort, provided that—

"The loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

The appraisal was agreed to by a stipulation in writing; so the question whether section 868, R. S. 1909, has or has not "killed" the clause in the policy (*Young v. Insurance Co.*, *supra*) which provides for appraisal is not involved in this case. This appraisal was completed and filed on the 7th day of April, and on the 28th day of April next thereafter, only 21 days after the appraisal was completed, this action was commenced. There was, it is true, a sharp dispute over the amount payable as damages for the loss accruing, but defendant in its answer admitted that a loss had accrued, and admitted its liability to pay such loss, and tendered by answer the amount it believed such loss to have been, and averred its continuing willingness to pay such sum. During the interim of 21 days defendant, it is to be inferred, was relying upon the correctness of the appraisal, and was (as it pleaded without serious contradiction upon the trial) ready and willing to pay without delay the full sum of such award. But plaintiff was not willing to accept this amount. Nevertheless it did not see fit to investigate the reasons underlying the attitude of the umpire, Briner, as that attitude was foreshadowed by his figures upon the appraisement, but, assuming that he was hostile and prejudiced, neglected or refused to consult him, and brought suit without any apparent effort to adjust the dispute.

We are convinced that a vexatious refusal to pay an insurance loss is not to be deduced from the mere fact that upon suit the verdict is adverse to the defendant. *Patterson v. Insurance Co.*, 174 Mo. App. 44, 160 S. W. 59; *Keller v. Insurance Co.*, 198 Mo. 440, 95 S. W. 903. If the fact of an adverse decision is to constitute the sole and decisive test, it would be fairly plain that this court was in error when it held the statute to be constitutional; for it is only upon the fundamental ground of a vexatious refusal to

pay that the penalty inflicted by the statute can be upheld. The defendant is to be allowed to entertain an honest difference of opinion as to its liability, or as to the extent of such liability under the contract of insurance, and to litigate that difference; otherwise the provision of the statute is obviously so shot through with duress as to be invalid upon any view. It is from the very nature of the case, and from the protean form which the facts of the case assume, difficult, if not impossible, to frame any general rule for use in determining when a refusal to pay is vexatious and when it is not. Judge Trimble, of the Kansas City Court of Appeals, has announced a rule, which commends itself to us so far as it goes, and it goes as far as it is wise or safe to go in announcing a rule to govern cases wherein the facts are as variant as we find them in insurance cases upon this question. This rule reads thus:

"And while affirmative proof is not required to show vexatious refusal, yet the penalty should not be inflicted unless the evidence and circumstances show that such refusal was willful and without reasonable cause as the facts appeared to a reasonable and prudent man before the trial; and merely because the judgment, after trial, is adverse to defendant's contention, is no reason for inflicting the penalty." *Patterson v. American Ins. Co.*, 174 Mo. App. loc. cit. 44, 160 S. W. 62.

In the case at bar there was no refusal to pay after the time at which, by the terms of the policy, defendant became bound to pay. And while lapse of such time would not, of course, always be the true test, since the vexatious and recalcitrant attitude of the defendant might by the proof be shown to be such as that a delay to sue for the 60 days allowed would be futile, yet there is not in this case any showing of any such attitude. *Young v. Insurance Co.*, 269 Mo. 1, 187 S. W. 856; *Fay v. Insurance Co.*, 268 Mo. loc. cit. 389, 187 S. W. 861. We are constrained to say that there was not in evidence any substantial facts upon which to base a finding of any penalty for vexatious refusal to pay the loss, and if upon a new trial none be offered, this issue ought not to be submitted to the jury.

[12] VII. We are urged in an able argument to re-examine the question of the constitutionality of said section 7068, R. S. 1909. We passed upon this question in the case of *Keller v. Home Ins. Co.*, 198 Mo. 440, 95 S. W. 903, and held this statute constitutional. This holding we approved in *State v. Railroad*, 242 Mo. loc. cit. 360, 147 S. W. 118. Both of the above cases were decided before

the instant case was appealed. As a rule of convenience, at least (regardless of the technically correct logic and strict accuracy thereof), and to prevent a sort of constructive fraud upon the courts, in that an appellant may not be allowed arbitrarily and for his own ends nicely to pick and choose his appellate forum, we have ruled uniformly since the case of *Dickey v. Holmes*, 208 Mo. 664, 106 S. W. 511, that, when we have once determined the precise constitutional question raised in a case wherein the Courts of Appeals would otherwise, absent such constitutional question, have jurisdiction, we will not thereafter assume jurisdiction of the case on account of the constitutional question mooted, provided such determination of the constitutional question was had prior to the date at which the appeal was taken in the case. *State v. Campbell*, 214 Mo. 362, 113 S. W. 1081; *Bank v. Glass Co.*, 243 Mo. 409, 147 S. W. 1030; *Richmond v. Creel*, 258 Mo. 256, 161 S. W. 794; *State v. Finley*, 259 Mo. 414, 168 S. W. 921; *State v. Wild*, 190 S. W. 273. Though the case is here, and we have jurisdiction upon another ground, we yet see no reason to change our ruling.

Other alleged errors are urged in the briefs of counsel, but, since these are such as will not of necessity occur upon a new trial, we shall not take up space in discussing them.

For the error noted, let the case be reversed and remanded for a new trial not inconsistent with what we have herein written. It is so ordered.

All concur, except WILLIAMS, J., not sitting.

#### On Filing of Remittitur.

PER CURIAM. Pending the term respondent comes and enters as of the date of the judgment nisi a voluntary remittitur in the sum of \$500, being the amount adjudged in favor of respondent for attorney's fees, and thereupon moves the court to set aside the judgment reversing and remanding the case and to affirm it. Since all of the errors for which the reversal was ordered were bottomed upon the single matter of the unwarranted allowance of attorney's fees, the court is of the opinion that the remittitur should be allowed and ordered entered, and the motion of respondents to affirm be thereupon sustained. It is therefore ordered that the judgment reversing and remanding this case be set aside, and the judgment in favor of respondents, except as to the sum of \$500 allowed as attorney's fees, be affirmed. Let this be done.

**TITUS v. DELANO et al. (No. 19402.)**

(Supreme Court of Missouri, Division No. 1.  
March 1, 1919.)

**1. DEATH ¶49(1) — RIGHT OF ACTION — PLEADING.**

A petition for recovery for wrongful death, alleging plaintiff's intestate was "an unmarried man and left surviving him no minor child or children, neither natural born nor adopted," does not allege a surviving child or next of kin competent to take under the laws of descent which is essential to recovery.

**2. RAILROADS ¶398(2) — DUTY TO KEEP LOOKOUT—EVIDENCE.**

In an action against a railroad company for the death of plaintiff's intestate at a place where the track was used by pedestrians, evidence that it was used "morning, noon, and night," and to same extent as a sidewalk, and the fireman's testimony that he knew thereof and was on the lookout, was sufficient to show defendant's duty to keep a lookout.

**3. RAILROADS ¶397(7) — INJURIES TO PERSONS ON OR NEAR TRACKS—DUTY TO KEEP LOOKOUT.**

Where a railroad company is required to keep a lookout, it is not important what position the injured person was in, except as it affects the question of fact whether he would have been discovered.

**4. RAILROADS ¶398(4)—INJURY TO PERSONS ON OR NEAR TRACK — NEGLIGENCE — EVIDENCE.**

In an action to recover for the death of plaintiff's intestate killed by a train, *held*, that there was substantial evidence tending to prove the correctness of the jury's finding that intestate was in such a position that he could have been seen had a proper lookout been kept.

**5. APPEAL AND ERROR ¶1001(1)—TRIAL—VERDICT—SETTING ASIDE.**

The fact that a theory might be constructed which possibly would explain what happened in a way showing defendant not liable is not enough to justify overturning a verdict for plaintiff resting upon substantial evidence.

Appeal from Circuit Court, Adair County;  
Charles M. Stewart, Judge.

Action by Benjamin Titus, administrator of the estate of Silas Titus, deceased, against Frederic A. Delano and others, receivers of the Wabash Railroad Company. Judgment for plaintiff, and defendants appeal. Judgment reversed, and cause remanded.

J. L. Mianis and N. S. Brown, both of St. Louis, and Higbee & Mills, of Lancaster, for appellants.

J. E. Rieger and Campbell & Ellison, all of Kirksville, for respondent.

BLAIR, P. J. This cause was certified here because one of the judges of the Kan-

sas City Court of Appeals deemed the majority opinion in conflict with certain decisions of this court.

In the view we take of the case, a full statement of the facts is not necessary. The cause was tried on the humanitarian doctrine. Titus was struck and killed by a Wabash train in the city of Kirksville at a place on the track where the evidence tended to show it was used in such manner by the public as to require a lookout to be kept. The engineer testified the headlight enabled him to see the track for 300 feet and the train could have been stopped in 60 feet. There was judgment for \$2,000.

[1] I. The petition alleges that Silas Titus was "an unmarried man and left surviving him no minor child or children, neither natural born nor adopted." It does not allege he left surviving him any child or children or next of kin competent to take under him under the law of descents in this state. It has been decided by this court and the Courts of Appeals that such a petition states no cause of action. *Kirk, Adm'r, v. Railroad*, 265 Mo. loc. cit. 344, 177 S. W. 592, and cases cited; *Lyons v. Railway*, 190 S. W. 859, and cases cited; *Johnson v. Mining Co.*, 171 Mo. App. 184, 156 S. W. 33. It is suggested the evidence tends to show Titus left a son, and that the defect in the petition might be cured thereby. The same contention was presented in the motion for rehearing in *Lyons v. Railway*, *supra*, and overruled. Further, this view could not save the judgment in this case. The question whether Titus left next of kin was an issuable fact. Respondent's instructions authorized a verdict without a finding on the point. This, alone, would preclude an affirmance.

[2] II. In the brief it seems to be contended there was no showing of such user of the track at the place of injury as to require a lookout to be kept. There is direct testimony that the track at the place in question was used "morning, noon, and night," as one witness put it; and that it was used to the same extent as a sidewalk in the street. The fireman testified he knew of the user by pedestrians and was on the lookout for that reason. Both Court of Appeals opinions decided this question against appellant.

[3] III. It is contended the law does not require railroad employes to be on the lookout for persons sitting or lying on or beside the track, even at a place at which a lookout must be kept for persons walking on the track. The consequence of a continued use of the track by the public is that a lookout must be kept. If the requisite lookout would disclose the presence of a man in a situation of danger, it is not, so far as concerns the question of law, very important what position he is in. It is quite important on the question of fact whether he would have been discovered. In *Murphy v. Railroad*, 228

Mo. 33, 128 S. W. 481, Murphy was sitting beside the track in almost exactly the same position some of the evidence tends to show Titus to have taken a few minutes before he was struck.

[4, 5] IV. In the Court of Appeals the majority opinion held there was substantial evidence tending to show Titus was in such a position that he could have been seen had a proper lookout been kept. The minority opinion takes the position that there is no evidence tending to prove with any degree of definiteness that he (Titus) "was where the trainmen should have seen him if they were exercising reasonable care." This is the point of difference.

After a consideration of the record and both the opinions, we conclude that the view of the majority is correct. In case there are two views of the evidence, one of which would render appellant liable and one of which would exculpate it, it is sufficient to support a finding if there is substantial evidence tending to prove the correctness of the view the jury took, as opposed to that which they discarded. We think this record shows such evidence. The character of the wound inflicted is not evidence of negligence, but is evidence of the manner in which the injury was produced. *Hatchett v. United Railways*, 175 S. W. 2d, 880. When last seen, Titus was in a sitting position, leaning his head upon his hand, his elbow upon the rail. His face was turned toward the northwest. The train approached from the south. One wound was in the back of his head. The skull was fractured at its base. His face had been driven against the cinders just outside the west rail of the track. When found, he was lying face down, and his nose was broken. The arm which had rested upon the rail had been crushed nearly or quite off between the elbow and shoulder and was lying between the rails. These facts show Titus was sufficiently near the rail for the back of his head to be struck and that his arm was over the rail far enough to be cut off above the elbow. As the majority opinion points out, if Titus was struck while in substantially the position in which he was when last seen, the injuries are such as would have been expected. If he was in such a position, there is evidence tending to show he could have been seen if reasonable care had been used in keeping a lookout along the track. The suggestion that he might have been down beside the track where he could not have been seen, and was aroused by the arrival of the train at the spot, and then attempted to arise and threw his arm over the rail and was struck by overhanging parts of the engine or cars, seems to us to be mere speculation. The fact that a theory might be constructed which possibly would explain what happened is not enough to justify overturning a verdict resting upon substantial

evidence. In our opinion the majority reached the correct conclusion on this point.

The judgment is reversed and the cause remanded.

WOODSON, J., concurs.

BOND, J., concurs in result.

GRAVES, J., concurs in paragraph I and result and expresses no opinion as to remainder.

### HUSKEY v. DAVIS et al. (No. 19532.)

(Supreme Court of Missouri, Division No. 1.  
March 1, 1919.)

#### APPEAL AND ERROR 1011(1)—FINDING OF TRIAL COURT.

On diametrically conflicting evidence, the appellate court will defer to the finding of the trial court, which had the advantage of having the witnesses before it.

Appeal from Circuit Court, Phelps County; L. B. Woodside, Judge.

Suit by James Huskey against Jessie Davis and another. Decree for plaintiff, and defendants appeal. Affirmed.

This suit was in two counts, and brought by the plaintiff against the defendants in the circuit court of Phelps county. The first count was to reform a deed executed by the defendant Mary A. Davis, a widow, and afterwards married to ——— Scanlan, who will hereafter be called Scanlan, conveying to plaintiff certain described real estate situate in said county, and the second count was to cancel a certain warranty deed made by said Scanlan to the defendant Jessie Davis, her daughter, conveying the same land.

The decree of the court was for the plaintiff, and the defendants duly appealed the cause to this court.

The facts charged in the first count are substantially these:

In 1911 the defendant Scanlan was the owner of the land in question, and on that day she sold the land to the plaintiff, which was correctly described as follows: Northeast quarter of the southeast quarter, less five acres, also the southeast quarter of the southeast quarter of section twenty-four (24), all in township thirty-six (36) north, of range nine (9) west, 5th P. M., containing 75 acres, more or less. That through mutual mistake of the parties and inadvertence on the part of the scrivener in drawing the deed described the land as lying in range 8 instead of 9, the proper range. That he paid defendant Scanlan a valuable consideration for said land, and took immediate possession of the same, and continued in possession thereof ever after. The prayer was for a reformation of the deed.

And the second count charged that after the defendant Scanlan executed the deed to the plaintiff described in the first count of this petition, by which she intended to convey him the lands described in the first count, and before the plaintiff had his warranty deed recorded, and before he had discovered the mistake in said deed as alleged, she entered into a corrupt agreement and conspiracy with the defendant Jessie Davis, whereby it was agreed by and between the said defendants, both of whom had actual knowledge of all of the facts stated in the first count of this petition, that the defendant Scanlan would convey to the defendant Davis, by warranty deed, the said lands, and that the said defendant Jessie Davis would accept said warranty deed, and immediately have the same recorded in the deed records of Phelps county, Missouri.

Plaintiff further alleges that, in furtherance of said design and conspiracy so entered into by the defendants to cheat, wrong, and defraud the plaintiff of his real estate hereinbefore described, the said defendant Scanlan did on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, make, execute, and deliver to the defendant Jessie Davis a purported warranty deed by which she purported and pretended to convey to the defendant Jessie Davis, said lands which plaintiff had theretofore purchased from the said defendant Scanlan for a valuable consideration, for which the defendant Scanlan had undertaken and intended to convey to the plaintiff by the warranty deed described in the first count of this petition, all of which was well known to the defendant Jessie Davis at the time the defendant Scanlan made, executed, and delivered to her said warranty deed.

Plaintiff further alleges that in furtherance of the said design to cheat, wrong, and defraud the plaintiff, entered into as aforesaid by the defendants, the defendants caused said warranty deed so made and executed as aforesaid to be recorded in the office of the recorder of deeds of Phelps county, Mo., and that the said deed is now recorded in Book \_\_\_\_\_, page \_\_\_\_\_, in deed records of Phelps county (a certified copy of which is herewith filed, marked "Exhibit A," and made a part hereof).

Plaintiff further states that the deed so made as aforesaid from the defendant Scanlan to the defendant Jessie Davis was without any consideration and void, and constitutes a cloud upon the plaintiff's title.

Wherefore plaintiff prays the court to cancel, set aside, and for naught hold said purported warranty deed, and for such other and further relief as to the court may seem proper in the premises.

The answer of defendant Scanlan was as follows:

"Comes now Mary A. Davis Scanlan, the above-named defendant, and for her answer to

the plaintiff's petition admits that plaintiff and defendants are residents of Phelps county, and that the defendant is the mother of the defendant Jessie Davis; defendant Scanlan further admits that there was an error in the description of the deed mentioned in the first count of plaintiff's petition, and denies generally each and every other allegation in plaintiff's petition contained.

"Further answering, the defendant says that at one time she agreed with the plaintiff for the sale of the lands described in plaintiff's petition, it being agreed that he was to pay her the sum of \$600, but being wholly without means to pay anything on said contract of purchase, and, the parties not wishing to give or take a mortgage to secure the purchase price, it was agreed that a deed should be made out and properly acknowledged by the defendant, deeding said premises to plaintiff, but that the same should not be delivered, but held by the defendant until the full and final payment of said sum of \$600, with interest thereon, should be fully paid to defendant; whereupon said deed was to be then delivered to plaintiff, and that until such payment was fully made and the deed delivered the ownership of the land was to be in defendant, but plaintiff was to cultivate said lands and to enjoy the use and benefit thereof.

"Defendant further says that the plaintiff wholly failed, neglected, and refused to pay said sum of \$600, or any part thereof, but that on or about the 12th day of December, 1914, the plaintiff stated to the defendant that he was unable to carry out his contract of purchase of said lands or to pay the purchase price thereof, and entered into a writing whereby he agreed to release all claim to said land or any right to pay for the same and receive a deed therefor, and consented and agreed that the contract of sale aforesaid should be then and there afterwards nullified and for naught held, and further agreed orally to there afterwards become a tenant of the defendant and to pay her rent on such premises.

"Defendant, further answering, specially denies that the plaintiff is the owner of said premises or that she delivered a deed to him therefor; but she says that while the deed was in her possession in accordance with the agreement above set forth it was taken out of her possession without her knowledge or consent, and acquired by plaintiff unlawfully and wrongfully, and in a manner unknown to her, and that he is not, and never was, the legal and rightful holder of said deed, but fraudulently acquired possession thereof and wrongfully recorded it.

"Defendant further states that the deed is wholly without consideration, and never legally delivered, and is fraudulent and void.

"Further answering, the defendant says that by her good and sufficient deed she deeded said lands to her daughter, Jessie Davis, who is now the legal holder thereof."

Plaintiff's reply to the answer of Jessie Davis was a general denial, and his reply to the answer of defendant Scanlan reads:

"Comes now the plaintiff in the above-entitled cause, and for his replication to the separate answer of the defendant Mary A. Davis Scanlan denies all allegations and new matter there-



in contained, and especially denies that he or the 12th day of December, 1914, in writing entered into an agreement in writing with the defendant whereby he released any or all claims he had in and to the real estate described in his petition; and for further reply says that, if said defendant has any such writing, that the same is false, and was feloniously forged by her, with the purpose and design of cheating and defrauding this plaintiff out of the real estate described in his petition."

The plaintiff's testimony was substantially as follows:

James Huskey, being duly sworn, testified in his own behalf as follows:

"Have lived in Phelps county all my life. Was born and raised in this county. I am acquainted with the defendant Mary Davis Scanlan, and her daughter Jessie Davis, and have known them about fifteen years. I know what piece of land I live on. I have tended it for about six years.

"[Then follows a description of the land, and, as there is no dispute as to the error in the deed, this part of the evidence will be omitted.]

"Q. Who did you buy it from? A. Mary Scanlan, Davis then, the defendant.

"Q. Now, you may tell the court how you bought it, and what was said and done between you and her when you did buy it, and what your contract was? A. I bought the land from her, and I was to give her five hundred dollars for it, and I paid her three hundred dollars down, and she give me a bond for a deed, and I had two years to pay her the other two hundred in, and I paid the other two hundred afterwards, and she made me a deed to it then.

"Q. How did you pay the first three hundred, Jim? A. Well, I had a span of mules and a mare, and I sold them to her for three hundred dollars before we come in town, and she gave me a bond for the deed; that is how I paid her the first three hundred dollars.

"Q. Can you tell the court how you paid the remaining two hundred dollars? A. Yes, sir. I sold a span of mules. One of them was hers, but she stood by when I sold them, and one was hers and one was mine, and I sold them to Mr. Henson; and Mr. Henson gave her a dollar on her mule to hold the trade until the next day, and he didn't give me anything, and the next day he paid her the hundred dollars for me on this land. And I went on to Illinois; I wasn't out there when he come to town and got the money. I give her a check for the other hundred dollars.

"Q. After that was all done did she make a deed to you? A. Yes, sir; she made me a deed to the land. I have the deed; here it is. This is the deed that she made to me. Harry Perry wrote the deed.

"Q. That is 'Barker' Perry, the deputy county clerk now? A. Yes, sir.

"Q. Who was present when he wrote this deed? A. I and Mary Davis Scanlan, and she give me the deed. That was in July, 1911, and I took the deed home.

"Q. When, after that, was it that you discovered that there was a mistake in the range of this land? A. I never discovered it until they sued me, Mary Davis and Jessie sued me, for possession up in town, and that is the first time I knew anything about it. That was about

two months ago. When I was sued I brought the deed to you. That was when I first discovered the mistake in the deed.

"Q. Now, from the time that she first made this deed, Jim, and delivered it to you, in July, 1911, up until two or three months ago, when she brought an unlawful detainer suit against you, did she at any time make any claim to this land from you? A. No, sir; she never made no claim, but she tried to buy it.

"Q. Where was her daughter, Jessie Davis, living at that time? A. She was living out in the country, where she lived most of the time.

"Q. Did Jessie ever make any claim to you that she owned this land at all, or knew anything about it? A. No, sir.

"Q. Have you put any improvements on it since you got it? A. I put the house and the barn there since I bought it. There was no house or barn on it when I bought it.

"Q. Was any of it in cultivation when you bought it? A. Just the same as there is now; I never cleared out any. I built a frame box house. The house cost me about one hundred dollars besides my own work; I had the lumber sawed.

"By Mr. Watson: Q. Now, I will ask you if, sometime during the month of last September, the defendant Mary A. Davis Scanlan tried to trade you a piece of property which she owns near Vida, and known as the Nix property, for your farm? A. Yes, sir; I know where this Vida property is. I think something about fifteen acres. There is a house on it. She talked to me about swopping places with me. She offered me the Nix property for my place even up, and I said I wouldn't trade. This was about the time she was in the lawsuit here last court.

"Q. Now, if you have had any talk with Jessie Davis since this suit was filed, about her interest in this piece of land that you claim you own out there? A. Yes, sir; I talked to her some. She told me that she didn't buy that property and she wasn't going to appear against me. She said she never had this deed, and she never bought it, and she never put it on record, and if it was put on there her mother did. She said she never paid anything for the deed. And Jessie knew that I was in possession of this property, and had built a house on it.

"Mr. Watson: I believe that is all.

"Cross-examined: Q. Now, Mr. Huskey, you have known Mrs. Scanlan for about how many years? A. About fourteen or fifteen years, and I am thirty-four years old. I am not married. I have lived around Mrs. Scanlan's place for a great many years—about fourteen or fifteen years. I moved on Piney in 1901, and have worked for her all this time, off and on. I farmed her land and transacted a great deal of business for her.

"Q. Now, you say you built a house on this farm? A. Yes, sir. The lumber was gotten off of the place. Bill Swarts sawed the lumber and I paid for it—fifty cents a hundred. I guess I had two or three thousand feet sawed up. I furnished the nails, etc. I guess I bought them from Baker, or at Rolla. Mrs. Davis did not buy those nails, nor did she pay for the cutting of the lumber, or for the building of this building. I boarded at home when I was building that building. I mean at my father's.

She had a hand there who helped with building and we changed work a day.

"Q. Now, when did she build the store building on this place? A. She never built nary one.

"Q. Is there a store building there on that place? A. Yes, sir; there's a house there. Me and my brother built the house; bought the lumber from Vanderpool and built it. I built it about a year ago. She occupied the store a part of that time. I sold her some goods there, and she wouldn't move them; she wouldn't pay for them and wouldn't move them. She is in possession of that building now, but has not been in possession of it all the time. I made the contract of purchase at home.

"Q. Was the bargain in writing? A. She give me a bond for a deed. Harry Bonebrake drew the bond, and she delivered it to me, but now she has it, I guess. I give it to her when she give me the deed. I did not give it to her at the time she give me the deed. I give it to her along last winter; it was laying around on the floor.

"Q. Who signed that bond? A. Mary Davis.

"Q. And the provision of the bond was that she should give you the deed when you made the other payments? A. When I made the payment of two hundred dollars. It was not recorded. I had it about five years, I guess, in my possession.

"Q. Now let me ask you, you say you paid her three hundred dollars; gave her a span of mules and a mare? A. Yes, sir.

"Q. Did the bond have a consideration of five hundred dollars or two hundred dollars? A. Five hundred dollars, and I paid three hundred dollars down and had two years to pay the other two hundred dollars. The bond recited that I had paid her three hundred dollars. I sold one of my own mules and one of hers too; I sold a span of mules, and she stood right by, and the purchaser came around and paid the hundred dollars he owed her, and paid her the hundred dollars that he owed me for my mule, and she said it would go on this land.

"Q. And the other hundred dollars you gave her by check? Yes, sir; on the Rolla State Bank. I have not got that check. It was some time in 1911. I couldn't tell you exactly. I was to pay interest on this deferred \$200—eight per cent. I did not pay it in that check; I was working there and worked it out. It amounted to thirty-two dollars for two years.

"Q. Did you have a settlement in which she allowed you for work thirty-two dollars as interest on the note? A. She counted it up that way.

"Q. Now she give you the deed, did she, Jim? A. Yes, sir.

"Q. When did she give you the deed? A. When she made it.

"Q. Who drew the deed? A. Harry Perry.

"Q. Did she give you the deed in Harry Perry's presence? A. I guess he could have seen it. She handed it to me at that time.

"Q. Do you know when she made a deed to her daughter? A. No, sir; I don't remember exactly. She told me she deeded all of her land to her daughter; that was all I know about it.

"Q. Weren't you present when she deeded this land that you claim to her daughter? A. No, sir; I don't think I was; I was there when she was making a will of some kind.

"Q. Now, Mr. Huskey, is not it a fact that

you took this deed that she had made from her possession without her knowledge or consent?

A. No, sir.

"Q. You did take it out of the trunk that was in her house? A. No, sir.

"Q. And put your deed on record? A. No, sir.

"Q. You owe her three notes, don't you, Jim? A. No, sir.

"Q. You don't owe her two notes for two hundred and fifty dollars? A. No, sir.

"Q. And a note for a hundred dollars? A. No, sir.

"Q. For this farm? A. No, sir.

"Q. And you had a contract and an agreement with her that you was to execute these notes and when you paid them she was to deliver this deed to you? A. No, sir; there was no such contract at all.

"Q. Now, you say she give you that deed in the circuit clerk's office, in Mr. Perry's presence? A. He was in there; he wrote the deed out, and she turned around to me and handed me the deed, and that is all that I can say.

"Q. You say that on July 22, 1911, you didn't execute a note for six hundred dollars to Mrs. Davis to pay for this land? A. No, sir.

"Q. You wasn't to give her six hundred dollars for it? A. No, I wasn't.

"Q. Now, Mr. Huskey, I will ask you if on the 12th day of December, 1914, you executed an agreement whereby you released this land to her by reason of not being able to pay those notes? A. No, sir; I didn't do it.

"Q. Did you ever see that agreement? A. No, sir.

"Q. Have you ever seen the record of it? A. No, sir; I never went to look up the record.

"Q. You have never seen it? A. No, sir.

"Q. Do you know Hugh Wilson? A. Yes, sir.

"Q. You talked to him about the deed that you had for this land, didn't you? A. I never talked to Hugh Wilson a thing about it.

"Q. Do you remember of talking to Hugh Wilson when he was up about your place last March, and explaining to him how you got this deed from Mrs. Davis? A. No, sir; I didn't.

"Q. Didn't you go down to his house? A. I was there yesterday morning.

"Q. What did you go down there for? A. I just went down there monkeying around, but I never saw him.

"Q. Who did you see—his wife? A. Yes, sir.

"Q. How much did you offer her not to swear in this case? A. I never offered her a cent.

"Q. Did you try to get her to go to Illinois? A. No, sir. I know her well; I know Hugh also.

"Q. I will ask you if you stated to Hugh Wilson or his wife that you took this deed from Mrs. Davis' trunk or Mrs. Scanlan's trunk? A. No, sir; I never did tell no such stuff to nobody.

"Q. Do you know a little boy by the name of Irvin Fore? A. Yes, sir; I never stated, in his presence, that I had taken this deed from Mrs. Scanlan. I haven't got the check; I gave it to Mrs. Davis.

"Q. You don't know the date? No, sir; I can't tell you about the date. It was a long time before the deed was made.

"Q. Before the deed was dated? A. Yes, sir; I received the deed in 1911.

"Q. Now, explain to the court why it was that you didn't record it until May, 1915? A. I thought when a fellow had a warranty deed to a piece of land, I thought that was all a fellow needed.

"Q. You didn't think anything about recording it? A. I thought when you had a warranty deed to a piece of land you had a warranty deed. I did not know there was a deed on record to Mrs. Davis' daughter when I recorded the deed.

"Q. Nobody told you that? A. No, sir.

"Q. Didn't you say a while ago that you had ascertained that there was a deed on record and that was why you recorded your deed? A. No, sir; I didn't say that.

"Q. You didn't say that? A. No, sir.

"Q. That is all."

The plaintiff then offered in evidence the deed which he asks to have reformed. It was an ordinary warranty deed, and executed by the defendant Scanlan to plaintiff, conveying the land in question, but locating it in range 8 instead of 9, the correct range.

"By Mr. Watson: Q. I understood you to say that you never executed a paper writing purporting to release to the defendant Mary A. Davis any right or interest you had in the lands sued for, to her, did you at any time? A. No, sir; I never did.

"Q. If there is any such writing, is it your writing or not? A. No, sir; it is not. I never did it.

"Q. Did you ever have any such writing in your possession or know anything about it? A. No, sir; I never."

James Henson, being duly sworn on the part of the plaintiff, testified substantially as follows:

That he lived near the defendants and knew them, and also the plaintiff, and had done so for six or seven years; that he was familiar with the land in question; that the plaintiff has lived on the land five or six years; that during that time Jessie Davis lived at home with her mother, near this land, but she was in St. Louis part of the time; that Jessie knew plaintiff was in the possession of this land.

"Q. Now, I will ask you if you ever paid the defendant, Mary Davis Scanlan, any money for Jim Huskey on this land, and, if so, tell the court what it was and how you come to pay it? A. Well, Jim Huskey owned a mule and Mary Ann owned a mule, and I went there and bought them, and I contracted for Jim's mule first, and then me and Jim went on up to Mary Ann's, and we made a contract for her mule, and I paid her one dollar on her mule, so I would get the mules you know, and the next day I paid, and Jim told me to give her his hundred dollars on this land, and the next day--

"Cross-examination by Mr. Watson: Q. What did you do in pursuance to your conversation with plaintiff? A. I went and paid the hundred dollars on the land; give her his hundred dollars, and give her ninety-nine dollars for her.

"Q. What did she say about that? A. She took the money, that is all I know about it.

"Q. About how many years ago was that? A. I don't remember, but I think it was in 1911; I believe it was '10 or '11. I never thought

about anything of this kind occurring because it didn't come in my mind.

"Q. That is all.

"Cross-examined by Mr. Crites: Plaintiff lived at home sometimes, and sometimes he was at Mary Ann's at work. He was around there most of the time. I have heard that he has been around there for twelve or fifteen years; that is, around Mary Ann's. He is a single man. I had known them mules ever since they were colts. They were raised right there on the farm.

"Q. All you know is that you paid two hundred dollars there? A. That is all I know.

"Q. And Mrs. Davis got the money? A. Yes, sir.

"Q. And you don't know who those mules belonged to, do you? A. Only just what they said. They both claimed that the little one was Jim's and the biggest one was Mary Ann's.

"Q. Did she make that statement there? A. Sure. I bought them separate, you know; one from one, and one from the other. And he told me to pay the one hundred dollars to her, and I did so. That was in '10 or '11; it was one or the other though.

"That is all.

"By the Court: Q. What did she say? A. She didn't say anything; she took the money that is all, and that's all I know about it.

"Q. That is all."

The plaintiff then offered in evidence the warranty deed of defendant Scanlan to her daughter, dated August 14, 1913, conveying this same land to her in consideration of one dollar, which was duly acknowledged, and the deed was recorded.

John Grayson, being duly sworn on behalf of plaintiff, testified as follows:

"I am familiar with the piece of land out near Vida known as the Nix property. Mrs. Scanlan owns it.

"Q. I will ask you if you had a conversation with her two or three months ago with reference to trading this property to Jim Huskey for this property he lives on? A. She asked me to get Jim Huskey; she wanted to make a trade with him; she wanted to trade the Nix property for his land.

"Q. Who asked you that? I wouldn't be sure whether it was Mrs. Scanlan or Harry Perry.

"Q. Well did you see Jim about it or not? A. Well, I went to get him and take down there.

"Q. Where did you take him to? A. Down in the county clerk's office.

"Q. Did you hear any conversation between them there about it? A. No, sir; I never heard any conversation between them at all; I went on out.

"Q. That is all.

"Cross-examined: Q. That was after this suit was brought, wasn't it, Johnnie? A. It was last September; I don't know whether it was after the suit was brought or not.

"Q. You just got them together and left? A. Yes, sir; that is all I know about it.

"Q. That is all."

Harry B. Perry, being duly sworn on the part of the plaintiff, testified as follows:

"I live in Rolla, Mo. Have lived here a little over thirty years. I am deputy county clerk.

"Q. I will ask you to look at that deed and state whether or not you wrote it, and, if so, under what circumstances you wrote it? A. Yes, sir; I wrote that deed.

"Q. At whose request did you write it? A. Why, Mary Ann Davis and James Huskey were both present.

"Q. They were both present when you wrote it? A. Yes, sir; I think Mrs. Davis paid me for it.

"Q. Well, you were representing them both when you wrote this deed, were you? A. Well, I suppose so; both were present. It was all understood that I was to write the deed. After I wrote the deed I gave it back to Mrs. Davis. The plaintiff was present at that time. This deed was made out in the circuit clerk's office.

"Q. Do you remember anything about when you wrote this deed, whether or not you had another paper lying there in front of you, from which you took those numbers? A. No, sir; I don't remember whether I did or not.

"Q. Don't you remember now—let me refresh your memory—don't you remember there was a bond for a deed there, or something said about it? A. I know we were talking about a bond for a deed, but I never saw it.

"Q. It wasn't there? A. No, sir; I don't think so.

"Q. Where did you obtain these numbers from. A. I think I got them from the record and made a mistake in writing it.

"Q. You made a mistake in the range? A. Yes, sir.

"Q. It should have been '9' and you put it '8'? A. Yes, sir.

"Q. What did Mary Ann say there, if anything, about a bond for a deed? A. Well, that day, they claimed there at the time, she said something about there being some writing, or instrument of writing, and Mr. Huskey objected to the way the instrument of writing was, I think, and there was some notes of six hundred dollars out that he hadn't never paid her; that is what she said about it, and he said he didn't like to let it go the way the bond was now, and for her to make a deed.

"Q. To make a deed to the farm? A. Yes, sir; to make a deed in the place of the bond.

"Q. But as a matter of fact the bond for the deed wasn't there before you at that time was it? A. If it was, I don't remember it; I don't remember seeing it.

"Q. That is all.

"Cross-examined: Q. Mr. Perry, you say at the time you prepared this deed it was stated there, in the presence of both of them, that Mr. Huskey owed her six hundred dollars in notes? A. That is what Mrs. Davis stated there. And they wanted this deed; they didn't want it to stand in this shape, but they wanted this deed executed. And when I prepared it I gave it to Mrs. Davis.

"Q. Now you, on the 14th day of August, 1918, prepared another deed from Mary A. Davis, single, to Jessie Davis? A. Yes, sir; I don't know what date it was.

"Q. Well, I'll hand you this record here, Mr. Perry, and see if you can tell by this record whether or not you prepared that deed, recorded in Book '77', at page '345'? A. Yes, sir.

"Q. You took the acknowledgment of that

deed as a justice of the peace at Rolla township? A. Yes, sir; Mary Ann Davis and Mr. Huskey both were present.

"Q. The deed from Mary Ann Davis to Jessie Davis? A. Yes, sir.

"Q. Was that deed read over in the presence of Mr. Huskey? I don't know about that, but they was talking about it.

"Q. They were there in the office together? A. Yes, sir; in the clerk's office.

"Q. That is all.

"By Mr. Watson: Q. Was there anything said about the land that was conveyed in that deed? A. They was having some trouble between them and he said he couldn't pay for it.

"By the Court: Q. Who said that? A. Mr. Huskey.

"By Mr. Watson: Q. Well, it includes the other land too, doesn't it? A. No, sir; it was another deed I made four or six days, I think, for Mary Ann Davis, to other lands.

"Q. For Mary Ann? A. Yes, sir; I made three, I think, one day.

"By the Court: Q. Was there anything said between them, that is between Mr. Huskey and Mrs. Davis, about the deed she had made to him before; was there any discussion about that deed there? A. No, sir; I don't know that they discussed it, only what Mrs. Davis told me herself.

"By Mr. Orites: Q. In his presence? A. No, sir; I don't think it was in his presence.

"Q. Do you know it was intended to be the same land that was put in the other deed? A. Yes, sir.

"Q. I knew that, because I knew about the land before.

"Q. Now, what did he say about paying for it, Huskey? A. He said he couldn't pay for it.

"By Mr. Watson: Q. Well, you know as a matter of fact, don't you, Mr. Perry, that he had paid for it? A. No, sir.

"Q. Now, there wasn't anything said about the fact that he hadn't paid for this seventy-five acres of land? A. He said he couldn't pay for it.

"Q. Long after this Mrs. Davis come to you and tried to get you to swop the Nix property for this land, didn't she? A. Yes, sir.

"Q. That is all.

"By the Court: Q. What did she say? A. She said she wanted to swop it; she had rather let him have that than have a lawsuit."

Charley Huffman, being duly sworn on the part of the plaintiff, testified as follows:

"I know Mary Davis Scanlan and James Huskey. I have known them about all my life. I know the farm also.

"Q. Did you ever have any talk with her about the ownership of that farm? A. Well, no, sir; all I know about it she wanted me to swop Nix property to Jim Huskey for this place over there.

"Q. When did this occur? A. That must have been some time in August or September of this year."

This was all of the plaintiff's evidence.

"The plaintiff: We rest our case."

The defendants then, to sustain the issues on their part, introduced the following testimony:

Mrs. Hugh Wilson, being duly sworn on the part of the defendants, testified as follows:

"I live in Rolla, Missouri. I am Hugh Wilson's wife. I know Mrs. Mary Ann Scanlan, and have known her quite a while. I know Mr. Jim Huskey; he has been working on her farm and around there for her. I have had quite a good deal of conversation with Mr. Huskey about this farm, at different places.

"Q. Well, tell what conversation he has had with you and when and where, if you can. A. Well, he told me that Mrs. Scanlan made him a deed, and he gave her three notes; two notes was two hundred and fifty dollars, and one note was one hundred dollars; and she was to hold this until the last note was paid, and then when the last note was paid he was to get the deed, so he told me before that that he had the deed; and I was at Mrs. Scanlan's last spring, somewhere in March or along there, and he said he had something to tell me; and I said, 'If you have something to tell me, why not tell it here;' and he said he didn't want everybody to hear it, and he called me outside, and he told me that he would give me five dollars if I would get those notes that his name was signed to—his name was signed to them, and he wanted those notes—and I said I wasn't in the habit of doing anything like that.

"Q. Did he say where they were? A. He said he thought they were in the trunk where he got the deed.

"By the Court: Q. What? A. He said he thought the notes would be in the trunk where the deed was; that he got the deed out of the trunk, and thought if I would go there I would find the notes.

"By Mr. Crites: Q. Was that about all the conversation you had with him? A. Well, not exactly.

"Q. Well, go ahead and tell anything else you know? A. He said all he was sorry of he had signed his name to all those papers; that he didn't have any title to this property at all.

"Q. Is he related to your husband in any way? A. I think that they are own cousins, if I am not mistaken.

"Q. Has he been to your home since this case commenced? A. He was down there yesterday morning.

"Q. What was the object of his visit to your home? A. He was trying to get me to go away until after court. He said he would pay my way. He said to St. Louis or Illinois, where I wanted to go.

"Q. That is all.

"Cross-examined: My husband's name is Hugh Wilson.

"Q. When was it you first met Jim and talked to him about these notes? A. I met him at different times. I have no interest in these notes at all. I never talked to Mrs. Davis about these notes. I have seen her since she has been here in court.

"Q. What did she say to you about it? A. Nothing at all.

"Q. Where is Hugh? A. He is here in the courtroom, I suppose.

"Q. Was he present when Jim Huskey was down to your house yesterday? A. No, sir.

"Q. What time in the day was he down there? A. He was there close to 11 o'clock.

"Q. What was the notes he said she had of his? A. He said there was two \$250 notes and one \$100 note. I don't know if I ever saw them.

"Q. Did you go and try to steal them, as he asked you to? A. No, sir; I didn't.

"Q. What did you tell him you would do about it? A. I said I didn't do that kind of business—around stealing.

"By the Court: I first heard about this land transaction between Mr. Huskey and Mrs. Davis last year. The plaintiff told me of it. I was at Mrs. Scanlan's at the time. I was down there on a visit—a couple of visits. A. He didn't say when he got the deed.

"Q. Had you ever heard before that that he had bought that piece of land? A. I never heard a word about it; the daughter always told me that it was her place, and I always thought it was her place, which I think yet is her place.

"Q. What did he tell you about the notes? A. He told me that he would give me five dollars if I would get the notes that his name was signed on them, and he knew that I was there, and he thought I could get hold of them. I had never seen the notes.

"That is all.

"By Mr. Crites: I told my husband after I come home about the matter."

Hugh Wilson, being duly sworn on the part of the defendants, testified as follows:

"Q. What relation are you to the lady that was just on the stand? A. Her husband. The plaintiff is a cousin of mine.

"Q. Now, Hugh, have you been out and about the land that is in question? A. I was on the land once. Plaintiff told me he had a deed to the land. He said he got it out of her trunk.

"Q. Did you inform Mrs. Davis that Huskey had a deed for this farm? A. Yes, sir; I did.

"Q. That is all.

"Cross-examined: Q. Where was this conversation between you and Jim? A. Between Piney and her house.

"Q. You know John Henson, do you, Hugh? A. Yes, sir; I know him when I see him. I saw him here last night.

"Q. I will ask you if you didn't tell him, in the city of Rolla yesterday evening, that you was willing to swear anything in this case for money, and you ought to have, at least, two dollars and a half for what you was going to swear? A. No, sir.

"Q. You didn't tell John Henson that? A. No, sir.

"Q. I will ask you if you didn't tell John Henson and Jim Huskey, the plaintiff in this case, that you was a witness, and you was willing to swear anything in it for money? A. No, sir.

"Q. And it would take about two dollars and a half to fix up your testimony? A. No, sir.

"Q. And I will ask you if you didn't further say, in that conversation, that you was hard up, and you didn't have money to feed your team, and you was going to have it out of this lawsuit? A. No, sir.

"Q. You didn't say that? A. No, sir.

"By Mr. Crites: You say you was talking to Jim Huskey? A. Yes, sir.

"Q. What was you talking about? A. Jim Huskey wanted me and my wife to get out of town, and I said, 'No, I won't leave town; I

make my living here, and I didn't have money to get away.'

"By the Court: Q. Did he offer you anything to leave? A. He said, 'I ain't got a thing against you, and you ought not to have anything against me.'

"By Mr. Watson: Q. John Henson was there, too? A. No, sir; not at that time."

Mary A. Davis Scanlan, being duly sworn, testified in her own behalf as follows:

"Q.- Your first husband was Mr. Davis and your present husband is Mr. Scanlan? A. Yes, sir. I don't remember just how long I have owned this land. It come from my father's estate. I think it was in 1907 that I acquired it. I have known plaintiff thirteen or fourteen years—ever since he was a young fellow. He worked most of the time for me, and rented land from me. I heard his testimony a while ago. At one time I contracted to sell him this land.

"Q. Tell the court the conditions on which you sold it. A. He was to pay me six hundred dollars for the land, and I was to keep the deed, and we had contracted that I was to hold the deed and notes until the land was paid for, and when the land was paid for I was to deliver the deed over when he paid the last note.

"Q. Did he ever pay those notes? A. He never did.

"Q. Now where did you keep this deed? A. Well, as well as I can remember, it was among my old papers in an old trunk that I kept my old papers in; as well as I can remember, I think that is where it was.

"Q. When did you first discover that it was gone? A. Since last fall I began to look for it, and I taken a look for it, and so this spring I was talking to Hugh Wilson about the place down there, and he says, 'Jim Huskey owns it,' and I says, 'No, he doesn't;' and he says, 'I'll bet you anything he has got a deed for it.'

"Q. Well, after this conversation with him what did you do? A. Well, then I come to the conclusion that he had the deed, and I took my daughter's deed and put it on record. I brought the deed to town, and I come in, and Harry Perry was in the office, and I asked him if it wouldn't be a good idea—

"Q. When you came to town who came with you? When you came to make your daughter's deed who came with you? A. James Huskey.

"Q. Was he present in Mr. Perry's office? A. Yes, sir; and he told him that he couldn't pay for the land, this land that I deeded my daughter he couldn't pay for it, and that he wouldn't keep the taxes and the fences up on it for it.

"By the Court: Q. Was that after Wilson told you about the deed? A. No, sir; it was just lately that I found out he got the deed. I didn't think the old deed was any good, and I throwed it among the papers.

"By Mr. Crites: Q. Was this time that you and Mr. Huskey came to Harry Perry's office, in 1913, was that after or before Wilson told you about him having the deed? A. No, sir; it was lately I found out he had the deed. I found out he had put his deed on record last summer. When I made this deed to my daughter his deed wasn't on record.

"Q. You had the deed with you—the Huskey deed? A. Yes, sir; I had the deed. We took the deed, and, thinking we might need the numbers, didn't know but what we might have the

deed made by some justice of the peace, and I had the deed along with me. Jim Huskey was present when I made the deed to my daughter, and he knew that fact. No one was present but Mr. Huskey and my daughter and Mr. Perry.

"Q. You heard the testimony of James Huskey about him selling two mules? A. Yes, sir.

"Q. Who did the mules belong to? A. They belonged to me; they never was off of the place.

"Q. How did Jim Huskey come to have any claim to one of them? A. He contracted to buy this mule, but he never paid me a cent on the mule.

"Q. He called it his mule? A. If he had paid for it it would have been his mule.

"Q. When it was sold to Henson the two hundred dollars was paid to you? A. Yes, sir. It was my money, and I kept it.

"Q. Did you, at any time, deliver this deed to Mr. Huskey? A. I never did in my life.

"Q. Has he ever paid anything on that? A. No, sir.

"Q. This Jessie Davis is your daughter? A. Yes, sir. She is nineteen years old.

"Q. Now, have you given any other part of your land to any other of your children? A. Yes, sir; I give the boy some land the same as I did her. I only have the two children. And I give each some land.

"Q. Now then this house that was built on this land, do you know where the lumber came from? A. Yes, sir; it was sawed around there. Some of it came off of the land that we are speaking about.

"Q. Who paid for the sawing of it? A. I paid Jim Huskey for the expense of building this house, and paid him for the work, and he and the hands boarded at my house, that built the house.

"Q. That is all.

"Cross-examined: Q. Now, you did contract to sell Jim Huskey this piece of land in question, didn't you? A. Yes, sir; he was to pay me six hundred dollars for it.

"Q. Well, then, you give him a bond for a deed, didn't you? Didn't you execute that down before Harry Bonebrake, who was then circuit clerk? A. I think it was a bond, and then he got dissatisfied about the bond and had to have the deed, and he said I could hold the deed, and turned the deed over to him when he paid for it.

"Q. You did make a bond to him for a deed? A. I think I did, or a contract. I was in possession of the land when I sold it. When he said he couldn't pay for it he rented it of me. I have collected some rent off of Jim for this land, but I can't remember just when. I got a third of the rent. This was after he give up the deed, but he has paid no rent this year.

"Q. You claim he paid you after you made the deed to your daughter? A. Sure; I hold possession of the land just the same, and I have possession of it now.

"Q. Did he pay you any in 1914, and, if so, how much rent? A. Well, I tell you I don't just remember; after he said he couldn't pay for this place he rented this place.

"Q. Did he pay you any wheat in 1914? A. 1914 is when there was a dry year, and there wasn't hardly a ear of corn raised on there, and the third of it wasn't hardly anything. After he had rented it he turned around and sub-rented it to Taylor Huskey, and I think he give me ten dollars for the little old fodder

that stood there. That is all I got that year. I ordered Jim off of the place last fall, and you know it. I brought a suit against him. My daughter did not pay me anything for this property. I remember Mr. Hanson brought some money up there, but I don't remember of him saying anything about giving it to me for that, but I remember I got the money for the mules.

"Q. Didn't he tell you that Jim said for him to pay the hundred dollars to you and you to credit it on what he owed you for the farm? A. I don't remember it that way.

"Q. Did you take the money? A. Yes, sir; I took the money that came from the two mules.

"Q. There were no notes executed in consideration of this purchase price was there? A. Sure, I couldn't give it to him for nothing; he would have to give me notes or something.

"Q. Did he? A. Yes, he did; when I made him the deed he gave me the notes.

"Q. Well, where are they?

"By the Court: Q. Have you the notes? A. Yes, sir.

"By Mr. Watson: Q. Then you made the deed at that time? A. Not just at that time; after he had made me this bond I held this bond and wouldn't give—I wouldn't give him the place until he made me notes; and he made the notes and he wanted deeds, then, and afterwards we came to town and Harry Perry made the deed and I held them all. I have never been paid for the land. I don't remember when I discovered there was a mistake in the deed that Perry wrote up. I didn't know that there was a mistake in the deed at the time it was made.

"Q. Now you did know that you had made him a deed, didn't you? A. Sure.

"Q. And in the face of that, you came up and made a deed to your daughter to the same property? A. Sure; he couldn't pay for it.

"Q. Did you ask him for the deed back? A. He didn't have the deed to give it back; he never did have it.

"Q. Did you know where it was—did you try to ascertain where it was? A. Yes, sir; I knew at that time where the deed was.

"Q. Where was it? A. I had it in my hands that day; I took it to town.

"Q. That was the day you came in and made a deed to your daughter, wasn't it? A. Yes, sir.

"By Mr. Crites: Q. I will ask you if you heard the testimony of Mr. Huskey? A. Yes, sir.

"Q. Where he said that he had paid you three hundred dollars on this land, by a span of mules and a mare, the first payment, did he ever make you any payment of that kind? A. No, sir.

"Q. Now, this talk you had with Charley Huffman, or with John Grayson, about the exchanging of the Nix property, tell the court what the Nix property is? A. The Nix property is just fourteen acres of ground, I believe is what it is.

"Q. Where does it lay? A. It lays out here on the Edgar Springs road, I believe, about six miles from Rolla. When I come to town Mr. Perry says, 'I'll tell you, you had better compromise rather than have a lawsuit;' and I says, 'If he will do that way;' and John Grayson was in the courthouse, and he says, 'You go and call John Grayson, and he has some influence over him, and he may compromise bet-

ter than have a lawsuit;' and that is the reason we offered this trading business.

"Q. In order to avoid a lawsuit? A. Yes, sir.

"By Mr. Watson: Q. Now, do you remember of sending for me to come over to the county clerk's office here? A. Yes, sir; you thought it was a good idea for me to compromise, too. I said that people told me I could get eight hundred dollars for the Nix property.

"Q. And if Jim wasn't a fool he would take that for his property down there? A. I told you I was merely giving Jim Huskey that, is what I told you, and I was in your office when I told you that.

"Q. Did you, at any time in your conversation with Perry and I, ever make any claim to Jim Huskey's farm? A. You was compromising between yourselves.

"Q. Have you got an instrument of writing from him canceling this trade? A. Yes, sir; I believe I have.

"Q. Where is it? A. He signed me up an affidavit last winter; when I went on to him last winter he says, 'I'll sign my right to you and show that I haven't got the deed.'

"Q. Where is the paper? A. It is misplaced some way.

"Q. Who saw him sign it? A. I saw him sign it.

"Q. Who else? A. There wasn't anybody else.

"Q. Who did you show it to? A. I brought it to town and showed it to Mr. Perry; I asked him what would be a good idea to do about this.

"Q. Did you show it to Mr. Perry? A. Yes, sir.

"Q. Does he know his handwriting? A. Well, he wrote the paper and Mr. Huskey signed it.

"Q. Does Perry know his signature? A. I think he does.

"Q. Did he look at it? A. Yes, sir.

"Q. You showed it to Perry? A. Yes, sir."

H. B. Perry, being recalled, testified as follows:

"By Mr. Crites: Q. While you were on the stand a while ago I omitted to ask you whether or not you had seen what purported to be a release canceling the transaction between Mrs. Davis and Mr. Huskey? A. Yes, sir; I looked it over.

"Q. Did you look at the signature? A. No, sir; I couldn't say that I did.

"Q. Do you know whose signature was attached to that? A. It was purported to be Huskey's, but I don't know his handwriting. I do not know whether it was Huskey's signature or not. I told her to put it on record and she did so. It wasn't acknowledged before anybody. I saw the original; she had it there. I didn't draw it."

James Huskey, being recalled, testified as follows:

"Q. Did you give Mrs. Davis any notes? A. No, sir.

"Q. You know your signature when you see it? A. Yes, sir."

The defendants here rested the case. The plaintiff then, in rebuttal, offered the following testimony:

John Howard, being duly sworn, testified in rebuttal as follows:

"Q. Where do you live, John? A. I live in Phelps county.

"Q. How long have you lived here, John? A. All my life.

"Q. Do you know the plaintiff, Jim Huskey? A. Yes, sir.

"Q. Do you know the defendants, Mary Ann Davis and Jessie Davis? A. Yes, sir.

"Q. Do you know the farm down there that Jim Huskey claimed he bought from Mary Davis? A. Yes, sir.

"Q. Now, I will ask you if in the last two or three years you had a conversation with her in which you tried to rent her property down there? A. Yes, sir; I rented her farm.

"Q. Did you have any talk with her about this particular property that Jim Huskey had got from her? A. Yes, sir; I did.

"Q. What did she say to you? A. I asked her to rent that down there. I says, 'That don't belong to Jim; I rented your entire farm; that down at Huskey's belongs to you;' and she says, 'I haven't got no rent off of it for six years; I guess it belongs to Mr. Huskey.'

"Q. As I understand from you, your original contract was to rent her entire possession there? A. Yes, sir.

"Q. And you had a conversation about what Huskey had possession of? A. Yes, sir.

"Q. And she said she hadn't got no rent for six years? A. Yes, sir. She did not claim that Jim had ever paid her any rent on it, or money; she said he hadn't never paid her no rent on it.

"Q. That is all."

Frank Henson, being duly sworn, testified in rebuttal, as follows:

"Q. State your name? A. Frank Henson.

"Q. Where do you live? A. I live in Newburg.

"Q. Do you know Jim Huskey? A. Yes, sir.

"Q. You know where he lives, do you, Frank? A. Yes, sir.

"Q. You know Mary Ann Davis here, do you, Frank? A. Yes, sir.

"Q. Do you know anything about a deed between them to a piece of property down in that country down there? A. Why, Jim showed me a deed one day that he said was a deed to that land that he bought.

"Q. What I want you to do is to state when that was? A. That has been some two or three years ago.

"Q. Two or three years ago that he showed you the deed? A. Yes, sir.

"Q. He had it in his possession then, did he? A. Yes, sir.

"Q. That is all.

"Cross-examined: I have never seen that deed since. I looked at it. I looked over it. I don't know as I read all of it. It was a warranty deed, the best I remember.

"Q. That is all."

Mrs. Mary A. Davis Scanlan, being recalled, testified as follows:

"Q. Mrs. Scanlan, I hand you the papers marked Exhibits 'B' and 'C', and ask you what they are? A. Why, they are notes that Jim Huskey give me on this land that he bought.

"Q. Whose handwriting are in the body of those notes? A. Which? This part of it [indicating]?"

"Q. Yes? A. I drew them up and he signed them the morning before we came to town to make the deed.

"Q. I thought you said there was three this morning? A. There was three this morning.

"Q. Now, Mrs. Davis, these notes, where were they given to you? A. Well, I held the notes with the deed until he paid them off—until the deed was paid for.

"Q. When were the notes given to you? A. The day the deed was made.

"Q. When were they signed? A. The morning we contracted to come to town and make the deed we drew up the notes and came to town, and that evening Harry Perry drew up the deed.

"Q. Was it the same day the deed was drawn? A. Yes, sir.

"Q. And these notes, you say, were at your home? A. Yes, sir."

The defendants then offered in evidence the notes marked Exhibits 'B' and 'C':

#### "Exhibit A.

"Rolla, Mo., July 27th, 1911.

"One year after date, for value received, I promise to pay to the order of Mary A. Davis \$250.00, two hundred and fifty dollars, at the Rolla State Bank, Rolla, Missouri, with interest from maturity at the rate of eight per cent. per annum.

James Huskey."

#### "Exhibit B.

"Rolla, Mo., July 27th, 1911.

"One year and six months after date, for value received, I promise to pay to the order of Mary A. Davis \$250.00, two hundred and fifty dollars, at the Rolla State Bank, Rolla, Missouri, with interest from maturity at the rate of eight per cent. per annum.

"James Huskey."

"Q. I will ask you, was the hundred dollar note that you had, and that you delivered to us this morning at the table here, was it the same, and dated the same, as these are, and for a hundred dollars? A. Yes, sir; they all made the same date.

"By the Court: Q. What became of the hundred dollar note? A. It was there on the table this morning.

"By Mr. Crites: That is all.

"Cross-examined: Q. You say he executed you six hundred dollars worth of notes at the time you made this deed? A. Yes, sir.

"Q. Now this was July the 27th, 1911, wasn't it? A. It was when we made the deed; we came to town and made the deed and we made the notes.

"Q. Where did you make the notes? A. At home,

"Q. You wrote those notes yourself? A. Yes, sir.

"Q. And you signed them, too, didn't you? A. No, sir, I didn't; he signed them.

"Q. Can you explain to the court how that erasure happens there on that note—on that signature there? A. I don't know how it happened."



Some of the expert witnesses testified that in their opinion plaintiff signed the notes mentioned, and others were of the contrary opinion.

Lorts & Breuer and J. J. Crites, all of Rolla, for appellants.

J. A. Watson and J. O. Holmes, both of Rolla, for respondent.

WOODSON, J. (after stating the facts as above). The defendant Scanlan admits that she signed, sealed, and acknowledged the deed purporting to convey this 75 acres of land to plaintiff, and that it erroneously recited that the land was situated in range 8, when in fact it was in range 9.

With these admitted facts out of the way, the only disputed facts are, did the plaintiff pay for the land, and did Mrs. Scanlan deliver the deed to him. If so, then the decree of the circuit court is correct; but if not, then the judgment is erroneous.

With great care and much pains I have stated the substance of all the evidence introduced by both the plaintiff and defendants, and during all of my experience on the bench and at the bar I have never seen such sharp and diametrical conflict between all the evidence introduced by the plaintiff and that by the defendants, both as to substance and details; even the smallest corroborating facts and circumstances on each side were squarely contradicted by the evidence of the other.

And there is another noticeable feature about this evidence, and that is it sounds reasonable and is destitute of inherent weakness, bearing no special earmarks of perjury or concealment of the truth; but there is this to be said of the corroborating and impeaching testimony introduced by each party, and that is it falls far short of carrying conviction with it.

This status of the evidence renders the case a typical one for this court to defer to the finding of the trial court for the reason that it had the witnesses before it, and was able to observe their appearance and demeanor upon the witness stand, and the manner of giving testimony—facts which contribute so much to the assistance of the court in passing upon the credibility of the witnesses and the weight to be given to their testimony.

This court is denied that valuable aid; all we see is in a transcript of their testimony, printed in black and white, all of which looks alike, and in the absence of some inherent weakness in their story or convincing facts or circumstances, or some impeaching testimony which carries conviction to the mind, it becomes most difficult, if not impossible, for us to separate the wheat from the chaff, the truth from the lie.

There is no question but that the evidence for the plaintiff and the admissions of defendant made out a case for the plaintiff; it then devolved upon the defendants to disprove his case, and, while their evidence tended to so do, yet it was of such a character as to fail to carry conviction of its truthfulness to the mind of the chancellor.

Under the rule of evidence previously stated, we are constrained to affirm the judgment.

All concur.

(277 Mo. 392)

JOHNSON v. BREWN et al. (No. 19514.)

(Supreme Court of Missouri, Division No. 2  
March 4, 1919. Rehearing Denied  
March 17, 1919.)

**1. WILLS §222—CONTEST—REVOCATION OF PROBATE AND GRANT OF LETTERS—STATUTES.**

Under Rev. St. 1909, §§ 21, 555, jurisdiction which circuit court acquires in will contest is derivative, and mere filing of suit to contest will operates in nature of appeal from order of probate court probating it, revoking order admitting will to probate and granting letters testamentary.

**2. WILLS §207—SUIT TO CONTEST—DISMISSAL—STATUTES.**

Under Rev. St. 1909, §§ 21, 555, party who files in circuit court suit contesting a will cannot dismiss it; will must still be proved or rejected in circuit court, as filing of contest suit automatically revokes probate.

**3. EXECUTORS AND ADMINISTRATORS §22(2)—CONTEST OF WILL—TEMPORARY ADMINISTRATOR—APPOINTMENT.**

Where contest of probate of will is brought in the circuit court, under Rev. St. 1909, § 555, which action revokes the will and letters testamentary, it is the duty of the probate court under section 21 to appoint a temporary administrator.

**4. EXECUTORS AND ADMINISTRATORS §388(5)—PURCHASER FROM EXECUTOR—NOTICE OF LIABILITY TO OR FACT OF WILL CONTEST.**

In view of Rev. St. 1909, §§ 555, 557, purchaser of realty from executor, like purchaser from devisee, is bound to take notice will does not become finally binding and operate until expiration of time of filing suit to contest, and is bound to take notice of action filed in circuit court within that time, revoking the probate and the letters of the executor.

**5. EXECUTORS AND ADMINISTRATORS §349(2)—ORDER OF SALE—COLLATERAL ATTACK.**

In action to determine title to realty, circuit court could question jurisdiction of probate court, in ordering sale of realty to plaintiff by decedent's executor, by inquiring further than record made in probate court as to fact of suit to contest will in circuit court.

**6. EXECUTORS AND ADMINISTRATORS §—388(5)  
—PURCHASER FROM EXECUTOR—CONSTRUCTIVE NOTICE OF CONTEST.**

Purchaser of decedent's land from executor, who took with constructive notice of contest of decedent's will pending in circuit court and of want of jurisdiction in probate court to order sale on account of the filing of contest, that fact having been ascertainable by examination of records of circuit court, acquired no title.

Appeal from Circuit Court, Jackson County; Kimbrough Stone, Judge.

Action by George R. Johnson against Martha Ann Brawn and others. From judgment for plaintiff, defendants appeal. Reversed and remanded.

John H. Gatley, William S. Bray, and H. J. Emerson, all of Kansas City, for appellants.

WHITE, C. This is an action to determine title to certain real estate in Jackson county. The plaintiff claims title under an executor's deed made by the executor of the will of Sarah Talley, deceased. The appellants here are heirs of Sarah Talley. Other heirs of Sarah Talley were made defendants but did not appear at the trial and have not appealed.

Sarah Talley died in March, 1895.

On March 24, 1895, her will was presented for probate and duly probated by the probate court of Jackson county. The will named N. J. Sechrest as executor. On March 29, 1895, Sechrest duly qualified and by order of probate court took charge of the estate and entered upon his duties as executor.

On May 20, 1895, an action was begun in the circuit court of Jackson county by certain heirs of Sarah Talley, to contest her will.

On May 25, 1897, the executor, Sechrest, made application to the probate court to sell the real estate in controversy here for the purpose of paying the debts of the deceased. August 9, 1897, the probate court ordered the sale of said real estate. On February 14, 1898, the executor made a deed purporting to convey the land in controversy in pursuance of the said order of probate court.

In the meantime Sechrest, who was made a party to the suit to contest the will, filed his answer to said suit September 20, 1897. On September 21, 1898, the circuit court in which said suit was pending rendered judgment declaring the instrument which was admitted to probate in the probate court was not the will of Sarah Talley.

It will be seen from this brief statement of the principal facts that, at the time the executor filed application in the probate court to sell the real estate in controversy, the will contest was pending, and he was made a party to it. It was pending and undisposed

of when he made the sale and executed the deed under which the plaintiff claims.

The circuit court rendered judgment in favor of the plaintiff determining that the plaintiff, George R. Johnson, was the owner in fee simple of the real estate in controversy, having acquired the same through the said deed. The defendants appealed.

I. The trial court gave a declaration of law to the effect that if the executor under the will before the institution of the contest, was duly qualified and acting as such under the orders of the probate court, he remained such with full power to act under orders of said court until the said probate court, by appropriate order, made upon its own motion or upon application of some interested party, should appoint an administrator to act during the contest proceeding.

The appellants challenge that statement of the law.

[1-3] The principal question for determination, then, is whether the filing in the circuit court of a suit to contest a will, which has been probated in the probate court, ipso facto vacates an order probating the will without any formal order of the probate court.

It has always been held, in the early and late cases, that when a suit to contest a will is filed in the circuit court under section 555, R. S. 1909, the suit operates in the nature of an appeal from the order of the probate court probating the will.

"The Legislature may undoubtedly provide other modes besides the ordinary form of appeal, by which the controlling power of the circuit court may be exercised." *Dickey v. Malech*, 6 Mo. loc. cit. 182, 34 Am. Dec. 130.

"There was no appeal in form, but the result of the process was the transference of the contest from an inferior to a superior court." *Bennoist v. Murrin*, 48 Mo. loc. cit. 52.

"Such contest destroys the present efficacy of the mere formal probate in the probate court." *State ex rel. v. Imel*, 243 Mo. loc. cit. 186, 147 S. W. 991.

Since the statute, section 4056, R. S. 1909, gives probate courts original jurisdiction "over all matters pertaining to probate business, to granting letters testamentary and of administration," the jurisdiction which the circuit court acquires in a contest case is derivative and not original. *State ex rel. v. Guinotte*, 156 Mo. loc. cit. 519, 57 S. W. 281, 50 L. R. A. 787.

The logical conclusion from these interpretations of the statute would furnish an affirmative answer to the question propounded, the filing of a contest operates ipso facto, to vacate an order of the probate court admitting a will to probate.

The section of the statute which the circuit court doubtless had in mind as more particularly affecting the case is section 21, R. S. 1909, as follows:

"Sec. 21. *Administrators During Contest, minority or absence.*—If the validity of a will be contested, or the executor be a minor, or absent from the state, letters of administration shall be granted during the time of such contest, minority or absence to some other person, who shall take charge of the property and administer the same according to law, under the direction of the court, and account for and pay and deliver all the money and property of the estate to the executor or regular administrator when qualified to act."

Section 21 does not provide that when a contest is filed the probate court shall revoke the order admitting the will to probate and granting letters testamentary; it only provides that the court shall appoint a temporary administrator. The obvious inference is that the probate court is powerless to revoke the order because the order is already vacated by the filing of the suit to contest. The probate court retains jurisdiction of the estate and should appoint a temporary administrator to administer it. But the jurisdiction of all questions pertaining to the probate of the will are transferred by the contest to the circuit court. This construction of that section is the only one consistent with the interpretation of section 555, as explained above, and the two sections must be construed in *pari materia*. Hence it follows that a party who files such a contest suit in the circuit court cannot dismiss it; the will must still be proved or rejected in the circuit court. *Hogan v. Hinchey*, 195 Mo. 527, 94 S. W. 522.

Section 47, R. S. 1909, is in effect the converse of section 21. It provides that, if letters of administration are granted and the will of deceased is found and admitted to probate, the letters of administration shall be revoked and letters testamentary granted. This court in *Re Estate of Brinckwirth*, 266 Mo. 473, 181 S. W. 403, Ann. Cas. 1918B, 1056, construed that section and held that no formal order was necessary to vacate the order granting letters to the administrator. The court says, (266 Mo. loc. cit. 480, 181 S. W. 404, Ann. Cas. 1918B, 1056):

"Yet it is perfectly clear that no such order of revocation was necessary, for the reason before stated that, when the will was probated, then, by operation of said section 47, his authority to further act ceased *ipso facto*."

The executor in this case had no authority to present an application for the sale, the probate court of Jackson county had no jurisdiction to make the order of sale, the sale and deed made in pursuance of such invalid order were void and passed no title.

[4, 5] II. One other question remains to be

answered. In this collateral proceeding could the circuit court question the jurisdiction of the probate court in ordering the sale, by inquiring further than the record made in that court? It has been held that a person to whom land was devised by a will duly probated cannot make a valid conveyance of the land pending the time the will may be contested. *Hughes v. Burris*, 85 Mo. 680; *McIlwrath v. Hollander*, 73 Mo. 105, 39 Am. Rep. 484. The reason for that holding in these cases is stated in the *Hollander Case*, 73 Mo. loc. cit. 113, in this language:

"When the suit was instituted in the circuit court to contest the validity of said will, the action of the probate court [in probating the will] was in effect annulled, and they [the devisees] had no more authority to convey as devisees, than if the will had never been presented to the probate court."

The will ceased to be operative, although that did not appear from the record in probate court. The purchaser from the devisee was bound by the result of the suit to contest the will filed in the circuit court. It is held in the *McIlwrath Case* that the pendency of a suit to contest the will did not require the filing of a statutory lis pendens; that the common-law doctrine of lis pendens applied.

Section 555, R. S. 1909, provides that any one "interested in the probate of a will" may appear within two years (now one year, Acts 1917, p. 106) and contest the validity of the will or pray to have it proved; and section 557 provides that if no person shall appear within that time the probate or rejection of the will shall be binding. A purchaser, therefore, from the executor, like a purchaser from the devisee, is bound to take notice that the will does not become finally binding and operative until the expiration of the time for filing a suit to contest it, and he is bound to take notice of an action filed in the circuit court within that time.

[6] The want of jurisdiction in probate court to order the sale could be ascertained by examination of the record of the circuit court. The purchaser took with constructive notice of the pending contest and therefore acquired no title.

The judgment is reversed, and the cause remanded so that the trial court may determine the title of the parties in accordance with the views expressed in this opinion.

ROY, C., absent.

PER CURIAM. The foregoing opinion by WHITE, C., is adopted as the opinion of the court.

All the Judges concur.

**STATE v. PIERSOL (No. 21070.)**

(Supreme Court of Missouri, Division No. 2.  
March 4, 1918.)

**1. CRIMINAL LAW §1106(3)—PERFECTION OF  
APPEAL — FILING OF TRANSCRIPT — TIME  
LIMIT—DISMISSAL.**

An appeal on conviction for felony wherein the defendant was not sentenced to suffer death falls within the provisions of Rev. St. 1909, § 5313, requiring defendant to perfect the appeal within 12 months, and the appellant could not shift the duty of filing a duly certified transcript to the circuit court clerk under section 5308, to prevent dismissal of appeal.

**2. CRIMINAL LAW §1084—APPEAL—STAY OF  
PROCEEDINGS.**

An appeal on conviction for felony wherein defendant was not sentenced to death falls within the provisions of Rev. St. 1909, §§ 5308, 5309, and does not operate as a stay of the proceedings in view of section 5294.

Appeal from Circuit Court, Webster County; C. H. Skinker, Judge.

Claude G. Piersol was convicted of kidnaping, and he appeals. Appeal dismissed.

Upon a trial in the circuit court of Webster county defendant was found guilty of the crime of kidnaping and was sentenced to imprisonment in the penitentiary for a term of 35 years. On November 5, 1917, defendant was granted an appeal to this court.

On December 30, 1918, the Attorney General, proceeding under and by virtue of section 5313, Rev. St. 1909, filed a motion to dismiss the appeal on the ground that appellant had failed "to perfect the appeal within 12 months from the time the appeal was granted," in that appellant had failed within said 12 months to file in this court a duly authenticated transcript of the record and proceedings of the trial court in said cause.

Even up to the present time a duly authenticated transcript of the record and proceedings of the trial court in this cause has not been filed in this court.

On September 6, 1918, four large volumes of typewritten evidence were filed with the clerk of this court, but none of these documents are certified to by the clerk of the trial court, and no attempt whatever has been made to file here a certified transcript of the record proper in said case.

After the motion to dismiss was filed, appellant filed what he terms an answer to the motion to dismiss, wherein he states in substance that, if a proper transcript of the record entries and proceedings in said cause is not on file in this court, it is the "omission of the said circuit clerk." No other facts are stated by appellant which would amount to a justifiable excuse for failing to perfect the appeal within the twelve months period.

Oliver J. Page, of Springfield, for appellant.

The Attorney General, for the State.

**WILLIAMS, P. J.** (after stating the facts as above). [1, 2] Upon an examination of the matter we have reached the conclusion that the motion to dismiss should be sustained.

Section 5313, Rev. St. 1909, provides:

"If any person taking an appeal to the Supreme Court, on a conviction for a felony, other than those wherein the defendant shall have been sentenced to suffer death, shall fail to perfect the appeal within twelve months from the time the appeal is granted, the Attorney General may file his motion before the Supreme Court asking that the appeal may be dismissed, whereupon the court shall make an order that the appeal be dismissed, unless the defendant shall show to the satisfaction of the court good cause for not perfecting his appeal."

The case at bar, being an appeal on a conviction for a felony wherein the defendant was not sentenced to suffer death, falls within the provisions of the foregoing statute.

Section 5309, Rev. St. 1909, provides:

"When the appeal or writ of error does not operate as a stay of proceedings, such transcript shall be made out, certified and returned, on the application of the appellant or plaintiff in error, as in civil cases, except that the costs of the transcript shall not be required in advance."

The case at bar falls also within the provisions of the foregoing statute, because the appeal in this case did not operate as a stay of the proceedings. See section 5294, Rev. St. 1909; *Ex parte Vickers*, 201 Mo. 643, 100 S. W. 585; *Ex parte Diple*, 233 Mo. 235, 135 S. W. 56.

In the case of *State v. Conners*, 258 Mo. 330, loc. cit. 333, 167 S. W. 429, the rule here applicable was stated as follows:

"In order to perfect an appeal in a criminal case as required by the statute in civil cases (section 2048, R. S. 1909), it is therefore necessary, within the one year above referred to, to file in the office of the clerk of this court a perfect transcript of the record and proceedings of trial court, under the certificate of the clerk of such court. Sections 5308 and 5309, R. S. 1909."

In the case at bar, the duty was upon the appellant to file in this court within the one-year period a duly certified transcript of the record and proceedings of the trial court. Appellant could not perform this duty by merely shifting it to the circuit clerk. *State v. Pleski*, 248 Mo. 715, loc. cit. 718, 154 S. W. 747. See, also, *State ex rel. v. Robertson*, 264 Mo. 661, loc. cit. 671, 175 S. W. 610.

The appeal is dismissed.

All concur.

**OLDAKER v. SPIKING et al. (No. 19089.)**

(Supreme Court of Missouri, Division No. 1.  
Dec. 30, 1918. Rehearing Denied  
March 1, 1919.)

**1. JUDGMENT  $\Leftrightarrow$ 475 — PROBATE COURTS—PRESUMPTIONS—COLLATERAL ATTACK.**

Orders and judgments of probate courts, made in exercise of their statutory powers over subjects conferred upon them by law, are entitled to same favorable presumptions, arising from either affirmative statements or silence of their records, as are accorded in similar cases to circuit courts.

**2. GUARDIAN AND WARD  $\Leftrightarrow$ 17—APPOINTMENT—CONCLUSIVENESS.**

An order of probate court appointing a guardian cannot be overturned in action by ward to set aside a sale of land made by guardian by testimony of ward that he was of age when guardian was appointed.

**3. GUARDIAN AND WARD  $\Leftrightarrow$ 79 — SALES OF LAND—JURISDICTION OF PROBATE COURT.**

Under Const. 1865, art. 6, § 23, and Laws 1865-66, pp. 85, 86, §§ 6-10, 14, probate court had power to order sale of interest of a minor as a remainderman in land.

**4. REMAINDERS  $\Leftrightarrow$ 14—TRANSFER OF RIGHTS.**

One having a remainder in land may sell and convey his interest.

**5. GUARDIAN AND WARD  $\Leftrightarrow$ 111—SALES UNDER ORDER OF COURT—GUARDIAN'S DEED.**

A sale of land, made by a guardian of a minor under and pursuant to order of probate court, vested in purchaser equitable title to ward's interest, although no proper guardian's deed was made or delivered.

Appeal from Circuit Court, De Kalb County; Alonzo D. Burnes, Judge.

Action by John D. Oldaker against John H. Spiking. Judgment for defendant, and plaintiff appealed. Defendant having died, the action was revived in the names of the defendants Sarah A. Spiking and others. Affirmed.

This action was commenced by plaintiff against John H. Spiking, in the circuit court of De Kalb county, Mo., on April 2, 1914. The first count is ejectment to recover possession of an undivided one-half of the west half of the 103 acres of land in said county, described in petition. The date of ouster is stated as April 15, 1909. The second count seeks to partition the west half of said 103 acres, on the theory that plaintiff and said John H. Spiking were tenants in common as to same.

The suit was originally brought against John H. Spiking, in which he was alleged to be the owner of an undivided half interest in the west half of said 103 acres, as a tenant in common with plaintiff. John H. Spiking died, after the cause was appealed

to this court, and the action was revived in the names of the present defendants, as his heirs.

The answer filed by John H. Spiking contains a general denial as to first count, and alleges that he was the owner of the real estate in controversy. It is further averred in said answer that in December, 1866, one Nathaniel Crank was appointed by the probate court of De Kalb county, Mo., guardian and curator of plaintiff's estate in said county, said plaintiff being a minor at the time; that he duly qualified as such guardian and curator; that as such he was legally ordered by said probate court to sell plaintiff's interest in the real estate in controversy; that on or about the 10th day of February, 1868, under and pursuant to said order, the guardian and curator aforesaid sold plaintiff's interest in above land to one David McAllister for \$200 in cash, the same being a fair valuation for said interest; that he made a report of said sale, as such guardian and curator, to the probate court aforesaid, on or about the ——— day of February, 1868; that on or about the ——— day of May, 1868, said sale was confirmed and approved by said court; that the latter ordered said guardian and curator to execute and deliver to said purchaser a deed for plaintiff's interest in said land; that said purchaser complied with the terms and conditions of said sale; that defendant, through mesne conveyances from said David McAllister and others, became the owner of the land aforesaid, formerly owned by plaintiff. Defendant alleges that he held the equitable title to all the lands described in first count of petition, and in equity should be decreed the legal owner thereof, etc. Said answer further avers that said McAllister purchased of said Crank, as curator, in 1868, the real estate described in petition, which at that time belonged equally to plaintiff and his brother, James Darby, and paid for said land \$200 in cash; that said purchase was made in good faith, and without any knowledge of lack of authority to sell and convey, if any; that plaintiff and his brother became the beneficiaries of said sale; that said purchase money was received and used for their benefit; that defendant by mesne conveyances from said McAllister and others became the owner of said land; that in equity and good conscience plaintiff should not be permitted to recover any part of said land described in the first count of petition, until he has repaid the sum of \$100, with 6 per cent. interest from the date of payment of the purchase price by said McAllister. Said answer, as to second count, denied that plaintiff had any interest in the lands described therein. It alleges that said defendant holds the fee-simple title to said lands and is the owner thereof.

### Plaintiff's Evidence.

It is conceded that Sylvester Crank was the common source of title. On September 4, 1866, said Sylvester Crank and wife conveyed the west half of the 108 acres of land in controversy, for the expressed consideration of \$600 to "Mary A. McDaniel and to the heirs of her body after her death. \* \* \* To have and to hold the same together with all the rights, immunities, privileges and appurtenances to the same belonging unto the said party of the second part and to the heirs of her body after her death and assign forever."

On April 6, 1868, said Crank and wife again conveyed by warranty deed the land aforesaid, for the expressed consideration aforesaid, to Mary Ann McDaniel, and containing the following recital:

"The above-described land was intended to be conveyed by a previous deed."

The habendum of said last-mentioned deed reads as follows:

"To have and to hold the premises hereby conveyed with all rights, privileges and appurtenances in any wise belonging unto Mary Ann McDaniel, and to the heirs of her body, heirs and assigns forever."

The first deed from Crank and wife, supra, was filed for record October 1, 1866. The second deed, supra, was recorded April 6, 1869.

Plaintiff testified that he was born July 11, 1846; that he was never a resident of De Kalb county, but formerly lived in Gentry county, Mo.; that he never knew of Nathan Crank being his guardian; that he did not know, until a short time before the trial below, that a guardian's deed had been made to the land.

Counsel for plaintiff admitted at the trial that if plaintiff had any interest in the land in controversy, it was a half interest, and that it was sold under the guardian's deed.

### Respondents' Evidence.

Mary Ann McDaniel, the life tenant, died in 1909, and left as remainderman her two sons, James Darby and the plaintiff, John D. Oldaker. Her daughter, Florence, married Wm. J. Lingenfelter, but died before her mother, without issue.

The probate court of De Kalb county, Mo., was established in March, 1866, and the records of said court were destroyed by fire in 1878.

Nathaniel Crank, uncle of plaintiff, was appointed by the probate court of De Kalb county guardian and curator of plaintiff and his brother, James Darby, and duly qualified as such. He testified that they were then both minors and lived with their mother, Mary A. McDaniel, in De Kalb county; that the probate court ordered a

sale of the land in controversy, as the property of said plaintiff and Darby; that under said order of sale he sold the property in controversy, belonging to plaintiff and Darby, to David McAllister. He testified that plaintiff was about 18 and Darby between 12 and 14 years of age, when he was appointed their guardian and curator; that Meredith Marshall, Lewis Folkener, and Geo. R. Marshall, mentioned as appraisers in the guardian and curator's deed, were not related to plaintiff or Darby, nor were they interested in said real estate; that plaintiff and Darby were equal owners of said real estate; that he made a final settlement with the probate court of De Kalb county, Mo., as guardian and curator of plaintiff and Darby; that said settlement was approved, and he was discharged as such guardian and curator; that according to the best impression of witness, plaintiff got the benefit of the money coming to him, although it was paid under the direction of the probate court to his mother, for the support and maintenance of plaintiff; that John Stevens was the probate judge who ordered the sale of the land aforesaid. On cross-examination he testified that in his opinion the \$200 for which the land sold was paid to plaintiff's mother under the order of the court, and that it went in the direction of supporting plaintiff and Darby.

Over the objection of plaintiff, the guardian's deed heretofore mentioned was read in evidence by defendant. It is dated July 9, 1877. It recites on its face that the probate court aforesaid ordered said guardian and curator to sell said land as the property of plaintiff and Darby. It recites that such sale was made February 10, 1868, to David McAllister, for \$200 cash, said property having been appraised at \$250; that the guardian and curator at the February term, 1868, made return of his proceedings in respect to said sale; that said report was at the same term confirmed, and the sale made valid, as shown by the record. It recites the payment of the \$200 in accordance with the terms of said sale by McAllister. It conveyed to the latter the land in controversy. It was acknowledged before J. S. Stephens, judge of probate. It was filed for record July 9, 1877.

Defendant offered in evidence a warranty deed from David McAllister to Thos. D. Spiking, conveying the land in controversy, with the expressed consideration of \$500. Said deed was dated October 18, 1869. Also a warranty deed from Thos. D. Spiking and wife to John H. Spiking for same land, dated December 25, 1869, for the expressed consideration of \$600, recorded December 29, 1869. He also offered in evidence a quitclaim deed from James A. Darby, single, to John H. Spiking, conveying same lands, dated December 9, 1878, for the expressed consideration of \$10.

John H. Spiking testified that in 1875, he examined the records of the probate court of De Kalb county, Mo., in regard to this land, to ascertain why the guardian and curator's deed had not been made and put on the land records. He said the record showed Nathan Crank was appointed guardian in December, 1868, for John D. Oldaker and James Darby, minor heirs of Mary Ann McDaniel; that it gave the age of Oldaker at 15 and Darby as 9 years; that he saw the report of sale made by the guardian, which stated that the sale was made February 10, 1868. He said the record showed the land had been sold and appraised, and by whom; that the sale was received and report approved. He said the minor's interests sold for \$200; that he saw the report of the appraisers.

It appears from the record that Mary Ann McDaniel and husband and Florence Lingenfelter and husband conveyed their interest in said land to David McAllister on April 6, 1869.

There was some other oral testimony in regard to the age of plaintiff in 1868 and 1869.

Such other facts as may be considered necessary will be considered hereafter.

On April 20, 1915, the trial court found for defendants as to both counts of petition, and rendered its judgment accordingly.

Hewitt & Hewitt, of Maysville, for appellant.

Williams & Robison, of Maysville, for respondents.

RAILEY, C. (after stating the facts as above). I. While a number of law questions are presented for our consideration, the issues of fact are reduced to a narrow compass. It was conceded, at the trial below, by counsel for the respective parties herein that if plaintiff has any interest in the land in controversy, it is a half interest, and that it was sold under the proceedings in the probate court of De Kalb county, Mo. In other words, if the proceedings of the probate court of De Kalb county, Mo., in respect to the appointment of a guardian and curator for plaintiff, and in respect to the sale of his interest in said land, are coram non judge, then the plaintiff is still the owner of the undivided one-half interest in said land, and is entitled to maintain this action. If, on the other hand, the action of the probate court aforesaid, in regard to the appointment of a guardian and curator for plaintiff, and the sale of his interest in said land, cannot be overturned or called in question, in this collateral proceeding, then it follows that the judgment below for respondents should be affirmed.

II. It becomes necessary at the outset to ascertain and determine the jurisdiction of the probate court of De Kalb county, Mo., after its organization in March, 1868, and

during the proceedings relating to the sale of plaintiff's interest in said land. Section 28 of article 6 of the Missouri Constitution of 1865 provides that:

"Inferior tribunals, to be known as county courts, shall be established in each county, for the transaction of all county business. In such courts, or in such other tribunals, inferior to the circuit courts as the General Assembly may establish, shall be vested the jurisdiction of all matters appertaining to probate business, \* \* \* to settling the accounts of \* \* \* guardians, and to the appointment of guardians and such other jurisdiction as may be conferred by law." (Italics ours.)

The General Assembly of this state, pursuant to above provisions of the Constitution, on March 19, 1868, passed an act (Laws 1865-68, page 83 and following), establishing probate courts in 27 counties of this state, including De Kalb, in which certain powers, etc., were conferred upon said probate courts. Section 6 of above act provides that:

"The said probate court shall have exclusive original jurisdiction in all cases relative to the \* \* \* appointing or displacing guardians or curators of orphans and minors, and shall have authority to make reasonable allowance out of the estate of testators and intestates, for the care, maintenance, support and schooling of such minors, when proper provisions have not been made by will or otherwise sufficient and applicable for such purposes, and shall have original and exclusive jurisdiction in all cases relative to persons of unsound mind, and their estates and binding out apprentices; and in the settlement and allowance of accounts of executors and administrators, guardians and curators. \* \* \*"

Sections 7, 8, 9, and 10 of said act read as follows:

"7. The said probate courts shall have concurrent jurisdiction with the circuit court in the following cases: When the income of a ward shall be insufficient to maintain him or her and their families, or when it appears that it would be for the benefit of a ward that his or her real estate or any part thereof, be sold or leased, and the proceeds put on interest, or invested in some productive stock or real estate, his guardian or curator may sell or lease the same accordingly, upon obtaining an order for such sale or lease from said probate court, if any real estate owned by said ward in any county in this state; Provided, said probate court shall have the control of the estate of such ward; such guardian or curator shall proceed as hereinafter directed.

"8. To obtain such order the guardian or curator shall present to such probate court a petition setting forth the condition of the estate and the facts and circumstances on which the petition is founded. If after a full examination on the oath of creditable and disinterested witnesses, it appears either that it is necessary or that it would be for the advantage or benefit of the ward, that the real estate or any part thereof should be sold or leased, the court may make an order therefor, specifying therein whether the

sale or leasing is to be made for the maintenance or education of the ward and his or her family, or that the proceeds may be put out on interest, or invested on the circumstances which render such disposition beneficial.

"9. Such sales shall be made as sales of real estate by executors and administrators, and the court directing such sale shall require the guardian or curator to be bound in sufficient bond to insure his compliance with the orders of the court in all things relating to the selling, leasing and applying the proceeds of such sale, as ordered by the court.

"10. The probate courts hereby established are directed to be courts of record, and the judges thereof shall keep true and faithful records of the proceedings of said courts."

Section 14 of above act provides for the transfer of all matters over which the probate courts have jurisdiction, from the county courts to the probate courts, etc.

It appears from the testimony of Judge Thomas D. Williams, who was probate judge of De Kalb county for 12 years, that the probate records of said county were destroyed by fire on December 25, 1878, and that there are no records in the probate office of said county pertaining to any matters prior to December 25, 1878.

The main facts relied upon by the parties to this action are set out in the preceding statement. Aside from the oral testimony of plaintiff in respect to his age and lack of knowledge as to what was done concerning his estate in the probate court, there is no direct testimony tending to controvert that of respondents, as to what the probate records of De Kalb county recited in regard to plaintiff and the disposition of his interest in the land in controversy.

[1] It is now well-established law in this jurisdiction that the orders and judgments of our probate courts, made in the exercise of their statutory powers over subjects conferred upon them by law, are entitled to the same favorable presumptions arising from either the *affirmative* statements, or the *silence* of their records, as are accorded in similar cases to the circuit courts. *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *Henry v. McKerlie*, 78 Mo. 429; *Camden v. Plain*, 91 Mo. 117, 4 S. W. 86; *Rottmann v. Schmucker*, 94 Mo. 144, 7 S. W. 117; *Price v. Springfield Real-Estate Ass'n*, 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595; *Williams v. Mitchell*, 112 Mo. 308, 309, 20 S. W. 647; *Macey v. Stark*, 116 Mo. 494, 21 S. W. 1088; *McKenzie v. Donnell*, 151 Mo. 450, 52 S. W. 214; *Cox v. Boyce*, 152 Mo. 582, 54 S. W. 467, 75 Am. St. Rep. 483; *Covington v. Chamblin*, 156 Mo. 587, 57 S. W. 728; *Stark v. Kirchgraber*, 186 Mo. 646, 85 S. W. 868, 105 Am. St. Rep. 629; *Robbins v. Boulware*, 190 Mo. 51, 52, 88 S. W. 674, 109 Am. St. Rep. 746; *Desloge v. Tucker*, 196 Mo. 601, 94 S. W. 283; *Ancell v. Bridge Co.*, 223 Mo. 227, 122 S. W. 709; *Spicer v. Spicer*, 249 Mo. 598, 599, 155 S. W. 832, Ann. Cas. 1914D,

288; *Norton v. Reed*, 253 Mo. 251, 161 S. W. 842; *Wilson v. Wilson*, 255 Mo. 536, 537, 164 S. W. 561; *Bingham v. Kollman*, 256 Mo. 589, 165 S. W. 1097; *Harter v. Petty*, 266 Mo. 296, 181 S. W. 39; *Summers v. Cordell*, 187 S. W. loc. cit. 7, 8; *Fitzgerald v. De Soto Special Road District*, 195 S. W. 696, 697; *Thompson v. Pinnell*, 199 S. W. 1013; *Nodaway County v. Williams*, 199 S. W. 226.

[2] Although plaintiff was permitted, without objection, to testify that he was of age when Crank was appointed guardian and curator, yet it becomes our duty to pass upon the legal effect of this testimony.

In *Nodaway County v. Williams*, 199 S. W. loc. cit. 227, in disposing of a similar question, we said:

"We are not advised as to why counsel for respondent, in the light of foregoing authorities, failed to interpose an objection to the conversation between the judges and Talbott, when the order of the county court was made. The legal effect, however, of said conversation must be determined by the court, although introduced in evidence without objection. *McAlister v. St. Joseph Street Const. Co.*, 181 S. W. loc. cit. 59; *State v. Arcadia Timber Co.*, 178 S. W. loc. cit. 95; *Sanders v. Southern Electric Ry. Co.*, 147 Mo. loc. cit. 425, 48 S. W. 855; *Pettis County v. Gibson*, 78 Mo. 502; *Bartlett v. O'Donoghue*, 72 Mo. loc. cit. 564; *McMillan & Parker v. Ball & Gunning Milling Co.*, 190 Mo. App. loc. cit. 347, 177 S. W. loc. cit. 317; *Minter Bros. v. South Kansas Ry. Co.*, 56 Mo. App. 282; *State v. Kaufman*, 45 Mo. App. 656.

"Conceding that the conversations detailed by witness Talbott between himself and members of the county court actually occurred as stated, and that said conversations were given in evidence without objection in this cause, we are compelled to hold, under the array of authorities heretofore cited, that said conversations are insufficient to overturn or contradict the order and judgment of the county court, heretofore set out."

If, therefore, the plaintiff, as remainderman, had an interest in the real estate in controversy which could have been legally sold by the guardian and curator under the order of the probate court of De Kalb county, Mo., while the life tenant was still alive, then the proceedings of the probate court in selling plaintiff's interest in said land are conclusive against him in this collateral attack, and precludes a recovery in his behalf.

[3-5] III. Mary Ann McDaniel, the life tenant, died in April, 1909, and this action was commenced April 2, 1914. Plaintiff and James Darby were the only remaindermen living when the life tenant died. Did the probate court of De Kalb county, under the Constitution of 1865, and Act of 1865-66, p. 83, establishing said court and defining its jurisdiction, as heretofore set out, become vested with the power to sell and convey appellant's interest as remainderman in said land? Under the laws of this state, the plaintiff, after becoming of age, if there had been no proceedings in the probate court afore-



said, could have sold and conveyed his interest in the land in controversy as remainderman to David McAllister, although the life tenant was then living. Section 1, c. 109; General Statutes 1865, p. 444; White v. McPheeters, 75 Mo. 286; Godman v. Simmons, 113 Mo. loc. cit. 129 to 132, inclusive, 20 S. W. 972; Brown v. Fulkerson, 125 Mo. 400, 28 S. W. 632; Bradley v. Goff, 243 Mo. loc. cit. 102, 103, 147 S. W. 1012; Armor v. Lewis, 252 Mo. loc. cit. 589, 161 S. W. 251. The plaintiff, therefore, had an interest in the land in controversy, as remainderman, when the probate court appointed a guardian and curator to sell the same. We are of the opinion that the sale made under and pursuant to the order of the probate court vested in David McAllister, as purchaser, the equitable title to plaintiff's interest in said land, regardless of the guardian and curator's deed offered in evidence.

IV. John H. Spiking, in his answer, pleaded fully the facts relating to the sale of plaintiff's interest in said land, under the order and proceedings of the probate court. He averred that David McAllister bought plaintiff's interest in said land under said proceedings, and paid to the guardian and curator therefor the sum of \$200, which was the fair valuation of same; that said sale was approved by said court and a deed ordered to be made to said McAllister for plaintiff's interest in said land; that defendant, through meane conveyances became the equitable owner of plaintiff's interest in said land and in equity should be decreed the owner thereof. He concluded said answer, with a prayer for a decree vesting in him the title to plaintiff's interest in said land.

The guardian and curator's deed made in 1877 is assailed as being void, because the former guardian and curator, Nathaniel Crank, made his settlement with the probate court, had been discharged, and was no longer guardian and curator when said deed was made. Said instrument is also assailed upon the ground that plaintiff in 1877 was of age, and the former guardian and curator could not bind him by the execution of said deed, etc. We deem it unnecessary to consider or pass upon the validity of above deed, as the answer and facts disclosed by the record are amply sufficient to warrant the court in divesting plaintiff of any interest in said lands and vesting the same in respondents. Trigg v. Trigg, 192 S. W. 1015.

V. The judgment below was for the right party, and is accordingly affirmed.

BROWN, C., not sitting.

PER CURIAM. The foregoing opinion of RAILEY, C., is adopted as the opinion of the court.

All concur.

# HANCOCK et al. v. YORK. (No. 18898.)

(Supreme Court of Missouri, Division No. 1.  
March 1, 1919.)

## 1. QUIETING TITLE ¶27—ACTION TO TRY TITLE—CONVERSION OF PROCEEDING FOR PARTITION.

In statutory proceeding for partition of lands, defendant's answer, which, after general denial, asserted defendant was exclusive owner in fee of entire title, and asked for decree accordingly, and also pleaded defendant's adverse possession for a year, nonpayment of taxes, and other facts sufficient to bar action by plaintiff under Rev. St. 1909, § 1884, converted action for strict partition into one to try title, and it will be considered as such.

## 2. PARTITION ¶117—SALE—EFFECT.

If title to land passed by sheriff's deed, in partition among heirs, no title remained in them to be acquired by purchaser through any statute of limitation; all his acts of possession being referable only to status of ownership.

## 3. TENANCY IN COMMON ¶3—CREATION—PURCHASE FROM HEIRS.

If title to land did not pass by sheriff's deed, in partition among heirs of owner, all undivided interests acquired by purchaser through deeds from individual heirs were held by him as tenant in common with those heirs who did not convey.

## 4. TENANCY IN COMMON ¶13—POSSESSION BY ONE COTENANT.

Constructive possession of land by one cotenant for 30 years was equally the constructive possession of all.

## 5. TENANCY IN COMMON ¶30—PAYMENT OF TAXES—REPAYMENT.

Payment of taxes by one cotenant in possession of land created an obligation on each of the others to repay to the extent of his share.

## 6. TENANCY IN COMMON ¶32, 37—EXPENSE OF MAINTENANCE—ACCOUNTING FOR RECEIPTS.

A tenant in common in possession of land is entitled to compensation from other cotenants for money necessarily expended in care and preservation of property, and must account for anything received from its use.

## 7. TENANCY IN COMMON ¶15(2)—ADVERSE POSSESSION—REPUDIATION OF POSSESSION OF OTHERS.

One cotenant, in exclusive possession of land, to repudiate constructive possession of other cotenants through him to initiate in his favor adverse possession as required by Rev. St. 1909, § 1884, must use acts or words, open, unmistakable, and referable only to the purpose.

## 8. ADVERSE POSSESSION ¶112—HOLDING FOR YEAR—FAILURE OF ADVERSE CLAIMANTS TO PAY TAXES—BURDEN OF PROOF—STATUTE.

In proceeding for partition, defendant claiming under Rev. St. 1909, § 1884, burden was on him to prove adverse possession of land by him for a year before beginning of action, and plain-

tiffs' failure to pay taxes during the whole of the next preceding period of 30 years.

**2. ATTORNEY AND CLIENT — 68—CONFIDENTIAL RELATION—ATTORNEY FOR ADVERSE PARTIES TO SALE.**

Attorney for vendors of land to defendant, who, on objection to title by defendant's attorney, acted for the vendors in matters relating to the title, did not stand in the confidential and trust relation of attorney to defendant.

Appeal from Circuit Court, New Madrid County; Frank Kelly, Judge.

Statutory proceeding for partition and sale of land by Louisa Hancock and others against Preston York. From judgment for plaintiffs, defendant appeals. Reversed, and cause remanded for further proceedings.

This appeal was heard and submitted at the April term, 1918, on motion to dismiss the appeal.

The appeal was dismissed as per opinion filed on June 4, 1918, for insufficiency of the appellant's statement. A rehearing was granted on July 5, 1918, and the cause submitted at the following October term upon its merits.

This is a statutory proceeding for the partition and sale of 160 acres of land in New Madrid county described as the east half of the northwest quarter and the west half of the northeast quarter of section (8) of township 23 of range (15).

The answer denies the allegations of the petition, and pleads that the defendant is the sole and exclusive owner of the land. It also pleads affirmatively: (1) What is generally called the 31-year statute of limitation; and (2) such a professional relation between the plaintiff Brewer, who is also attorney for his complainants in this suit, as precludes him from asserting the interest in the land which he now claims in this suit. Both the plaintiffs and defendant claim title through one Olive Hunot, who, it is admitted, died intestate seized in fee of this and much other land in New Madrid county in 1861, leaving surviving him his wife, Josephine, and a number of children. In a partition proceeding between them, an attempt was made in 1865 to set off 200 acres of land in section 8, with other lands, to the widow as her dower; but the description was so carelessly written that we only notice it to show, as it does, why this land remained undivided and undisposed of until the widow's death in 1868, when a proceeding was instituted in the New Madrid circuit court to partition the lands which had been held by her as dower, among the heirs of Olive Hunot.

That suit resulted in a sheriff's sale in partition under a decree of the court entered at

the April term, 1868, which seems at that time to have been satisfactory to all parties, and one John T. Scott was the purchaser. The defendant, through Scott, by mesne conveyances, claims the entire title. It is not, as we understand the record, disputed that he has succeeded to everything Scott has obtained. What this may have been, if anything, is the principal question.

The sheriff's deed in partition is dated October 28, 1869, and was duly recorded the same day. No objection is made to its form, and we must therefore assume that it is valid upon its face. It purports to convey, among other land, in other sections, the following:

"The east half and the southwest quarter of the northwest quarter and the northwest quarter of the southeast quarter of the southwest quarter of section 8 in township 23 north, range 15 east, containing 200 acres."

It will be seen that this deed describes 80 acres of the 160 included in this suit, while it bears upon its face the evidence of a mistake in omitting to describe an entire 200 acres. This is explained in the acknowledgment, which fully describes the 200 acres in section 8 as in the following decree.

There was introduced in evidence (Abstract, p. 53), from Book F of the records of the New Madrid circuit court, a decree for partition and sale of the dower lands we have mentioned, entered at the April term, 1868, in which the lands ordered to be sold all lie in section 8, and are described as follows:

"The east half and southwest quarter of the northwest quarter and northwest quarter of northeast quarter and northeast quarter of southwest quarter of section 8, township 23, range 15, containing 200 acres."

This describes an entire 200 acres in section 8, including 120 acres of the land now in controversy.

On the same page of the same record, as shown on pages 50, 51, and 52 of this abstract, is another decree of partition and sale in the same case, entered at the same term, in which a sale of all the dower lands was ordered, and in which they are described as follows:

"The east half of the southeast quarter of section number one, in township number twenty-three north, of range number fourteen east, containing eighty acres. Also the east half and the southwest quarter and the northwest quarter of the northeast quarter, and the northeast quarter of the southwest quarter of section number eight in township number twenty-three north of range number fifteen east, containing two hundred acres."

This description contains 40 acres of the land involved in this suit but not included in the sheriff's deed except in the acknowledgment.

ment; that is to say, the northwest quarter of the northeast quarter of said section 8.

Scott afterwards acquired the interest of Lewis Hunot, one of the parties to this suit, and other heirs have attempted, by blundering descriptions, to convey to him.

The appellant assigns for error the following: (1) The court erred in not finding that all the respondents were barred by the 31-year statute of limitation. (2) In not finding that the appellant, and those through whom he claimed, derived the legal title to 80 acres of said land by the sheriff's deed to John T. Scott. (3) That the court erred in not finding that the interest of J. R. Brewer, if any, was held in trust for the defendant.

Matters appearing in the record will be more fully stated as necessary.

Gallivan & Finch, of New Madrid, for appellant.

J. R. Brewer, of New Madrid, for respondents.

BROWN, C. (after stating the facts as above). [1] I. This suit originated as a statutory proceeding for the partition of lands. The petition, as required by the statute, set out the several undivided interests of the plaintiffs and defendant, and asks, on the statutory ground, for sale.

The answer, after a general denial, asserts that the defendant is the exclusive owner in fee of the entire title, and asks for a decree accordingly. It also pleads the defendant's adverse possession for one year, the non-payment of taxes, and other facts sufficient to bar an action by plaintiff under section 1884 of the Revised Statutes of 1909. This converted the action for strict partition into one to try the title.

Although the propriety of such practice has been questioned, and, under the circumstances then in adjudication, denied by this court (*Chamberlain v. Waples*, 198 Mo. 96, and cases cited on page 110, 91 S. W. 934), the application of the principle has been much modified by us to suit the facts of particular cases (*Coberly v. Coberly*, 189 Mo. loc. cit. 16, 87 S. W. 957; *Waddle v. Frazier*, 245 Mo. loc. cit. 402, 403, 151 S. W. 87; *Armor v. Frey*, 253 Mo. 447, 161 S. W. 829). It is very doubtful if, under our practice, which includes the trial of title under the provisions of section 2535 of the revision of 1909, much of practical utility remains in the rule. In *Armor v. Frey*, supra, the issues were presented on a petition consisting of separate counts to try title under section 2535, and for partition and in ejectment. In *Waddle v. Frazier*, supra, the question of absolute title in the defendant in possession was presented and tried without objection in a proceeding for partition. The issues are presented to us here in the same manner, and properly call for consideration under the same rule.

210 S.W.—5

[2, 3] II. We must not confound the proceeding by which these parties have chosen to submit their various claims of title in this suit with the nature of those claims. So far as they are inconsistent in their nature, the inconsistency remains to be reckoned with. In the title to the land passed by the sheriff's deed in partition among the Hunot heirs in 1869, there was no title remaining in them to be acquired by the purchaser through any statute of limitations. All acts of possession would be referable only to the status of ownership. On the other hand, if the title did not so pass by the partition sale and deed, all the undivided interests admitted to have been thereafter acquired by the defendant through deeds from the individual heirs are held by him as tenant in common with those who did not convey, and his possession would be referred to his legal title as such, and be subject to all its incidents, including the presumption that he held for himself and his cotenants. That this relation existed as to 120 acres of the land is admitted in the petition and adjudicated in the decree, and is also shown by the evidence, through which we have waded without assistance from the parties. As to the remaining 40 (the southwest quarter of the northeast quarter of the section), the defendant was the owner of the life estate of one Mason, a former cotenant.

[4-6] The question arises whether, under these circumstances, the statute of limitations contained in section 1884 is available in favor of a cotenant against his fellow owners. The constructive possession of one during the 30 years is equally the constructive possession of all, and the payment of taxes by one created an obligation upon each of the others to repay to the extent of his share. He is also entitled to compensation for money necessarily expended in the care and preservation of the common property, and must account for anything received from its use. On this theory the petition asks an accounting for the proceeds of valuable timber charged to have been cut and sold by defendant.

[7] The statute appealed to requires, not only that the land must be in the lawful possession of the one asking its assistance, but that the claimant whom he fears should not have been in possession for 30 consecutive years, and should not have paid any taxes thereon during all that time. In this case, the consecutive possession of each has been continuous, and could have no greater effect to divest title than if the possession of appellant had been pedal instead of constructive. In such case, he must fix the time when he began to hold adversely to the true title, and then, and only then, would the general statute of limitations begin to run in his favor. *Hynds v. Hynds*, 202 S. W. 387; s. c., 253 Mo. 20, 161 S. W. 812; *Missouri Lumber Co. v. Jewell*, 200 Mo. 707, 718, 98 S. W.

578; *Hunnewell v. Adams*, 153 Mo. 440, 55 S. W. 95; *McCune v. Goodwillie*, 204 Mo. 306, 339, 102 S. W. 997, and cases cited. "The acts relied on, whether verbal or otherwise, must be so open, clear, and so unequivocal as to coerce belief." *Hynds v. Hynds*, supra. In these respects the relation of cotenant is one of trust and confidence, and the acts or words used to shake it off must be open and unmistakable, and referable only to that purpose. The purchase of the interest or claim of one of several cotenants refers itself primarily to the desire to create the relation rather than to destroy it.

The terms of section 1884 seem to us to be inconsistent with its application between cotenants in the circumstance of this case.

[8] III. There is another reason which forbids our interference with the judgment of the trial court against the defendant's claim of title under the provisions of section 1884. As against the cotenancy asserted in the partition proceeding, it is a purely legal defense. It consists in showing that by certain acts and omissions of the parties the title to the land had been transferred from the plaintiffs to the defendant. A necessary act to be shown for the accomplishment of that purpose was the adverse possession of the particular land by the defendant for one whole year before the beginning of the action. The omission necessarily involved was the failure of the plaintiffs to pay the taxes during the whole of the next preceding period of thirty years. The burden was upon the defendant to prove affirmatively both these things to the reasonable satisfaction of the court. *Lewis v. Barnes*, 272 Mo. 377, 405, 199 S. W. 212; *Land & Implement Co. v. Epright*, 265 Mo. loc. cit. 217, 177 S. W. 386; *Slicer v. Owens*, 241 Mo. 319, 323, 145 S. W. 428. It is not for us to weigh the evidence, and substitute our judgment for that of the trier of the fact as to its weight and sufficiency; but we have carefully considered it, and, while we think there is substantial evidence from which the court might well have found, had it been so impressed, that none of the plaintiffs had paid taxes during the period mentioned, the evidence of possession by the defendant during the required time was very weak. No declaration of law defining the issue was asked or given. We cannot disturb the judgment on that ground.

IV. While the question is not free from doubt, we have come to the conclusion that the sheriff's deed to Scott, in the proceeding to partition the "dower lands" among the heirs of Olive Hunot, conveyed to the grantee the entire title in fee to the east half of the northwest quarter of section 8 described in the petition. The record of that proceeding, as it appears in this abstract, is a curious combination of errors which these parties, in their statements, have not taken the

trouble to explain, and the petition in that case has been entirely omitted from this record.

It begins with a decree entered in the cause by the New Madrid circuit court at the April term, 1868, ordering the sale in partition of certain of the dower lands in section 1, together with other lands in section 8 purporting to be a part of the dower lands. These last were improperly described, and a similar decree for the sale of the 200 acres in section 8 only was entered on the same page of the same record. The 80 we have already referred to as having been conveyed by the sheriff's deed to Scott is included in this last description.

We think these two entries, while irregular, sufficiently appear on the face of the record to have embodied the order of sale actually pronounced by the court in the form of two judgments instead of one. The sheriff's deed, which purports to convey lands described in each entry, was evidently framed on the idea of their unity, and carries that explanation upon its face. So far as appears from the record, it is an error in the form of recording the action of the court and not in the substance of its order. While the clerk's error in description might have been more scientifically corrected, it is sufficient to sustain the deed.

[9] V. It is contended that the interest of the plaintiff Brewer is held by him subject to a trust in favor of the appellant. As a foundation for this, the answer alleges, in substance, that the Findlay Land Company, the defendant's grantor, "optioned" the land to one W. S. Edwards, who sold it to defendant; that, when the abstract of title was sent to defendant's attorney, "objections were made to said title; that the Findlay Land Company and W. S. Edwards took said abstract and said objections to James R. Brewer and informed him of the condition of said title; that the said James R. Brewer was the attorney of the said W. S. Edwards and was consulted on said occasion by the said W. S. Edwards as his attorney in matters relating to said title;" and that Brewer, taking advantage of said information, obtained from his coplaintiffs the deed under which he claims one-half of their interest in the land without any other consideration than his services in this suit.

It will be seen that the relation of attorney and client never existed between Brewer and the appellant. On the contrary, Brewer was employed by the other party to an adversary transaction. His duty was to advise and assist his client in procuring and furnishing to appellant's lawyer an abstract showing such title, whether good or bad, as the appellant, under the advice of his own lawyer, would be willing to purchase at the price his adversary would accept for it. It was an adversary transaction, pure and sim-

ple, between the Findlay Land Company, represented by Edwards, on one side, and the defendant on the other. Each side, according to the answer, had its own lawyer, Brewer representing the defendant's adversary.

While the relation of attorney and client is a fiduciary one of the most confidential character demanding the utmost good faith on the part of the lawyer in all matters pertaining to the employment, we have searched in vain through the many authorities by which this wholesome doctrine is buttressed, for even slight intimation that it extends the same watchful protection from the other man's lawyer.

The defendant cites us to *Guinan v. Donnell*, 201 Mo. loc. cit. 204, 98 S. W. 478, and *Davis v. Kline*, 96 Mo. 407, 9 S. W. 724, 2 L. R. A. 78. We have carefully examined these, and, like all we have been able to read on that subject, they are carefully confined to the relation of the attorney to his own client, and the trust and confidence which that relation requires and justifies.

For the error of the court in refusing to give effect to the sheriff's deed to Scott in accordance with the views we have expressed in paragraph 4, supra, the judgment of the New Madrid circuit court is reversed, and the cause remanded for further proceedings.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court.

All concur; BOND, J., in result.

(277 Mo. 239)

BREUNINGER et al. v. HILL et al., County Judges. (No. 21095.)

(Supreme Court of Missouri, in Banc. Feb. 15, 1919. Motion for Rehearing Denied March 15, 1919.)

# 1. COUNTIES ⇐178—ROAD BOND ELECTION—IRREGULARITY—INVALIDITY.

In determining whether election on issuance of road bonds by county was so irregular as to be invalid, it is essential to determine whether any mandatory provisions of Constitution or statutes have been violated, and, if so, the election should be declared void; otherwise if, despite irregularities, a free and fair opportunity was afforded voters to express their will.

# 2. COUNTIES ⇐178—ROAD BOND ELECTION—SECRECY.

Where failure to provide for absolutely secret ballot, as required by Rev. St. 1909, § 5897, at election pursuant to Laws 1917, p. 471, on question whether county should issue road bonds, could not reasonably have had any obstructive or unfair influence, since ballot was

short enough to hold in palm of hand while being marked, election was not void for lack of secrecy; requirement of statute not being mandatory in particular case.

# 3. COUNTIES ⇐178—ROAD BOND ELECTION—POLLING PLACES.

Requirement of Laws 1917, p. 471, § 84, that polling places at election on issuance of road bonds by county should be same as for general elections, did not prevent change from usual canvas polling places, on account of inclemency of weather, to other buildings elsewhere; such change not having rendered it difficult for any voter to locate his polling place, and requirement in particular case being directory only.

# 4. COUNTIES ⇐178—ROAD BOND ELECTION—NUMBER OF JUDGES AND CLERKS IN PRECINCT.

Appointment of two judges and two clerks for each election precinct on occasion of county road bond election was a compliance with the general election law, as amended by Laws 1913, p. 327, as required by Laws 1917, p. 471, providing that county road bond elections shall be held the same as general elections.

# 5. ELECTIONS ⇐51—APPOINTMENT OF JUDGES AND CLERKS—DIRECTORY CHARACTER OF STATUTE.

The general election law, as amended by Laws 1913, p. 327, in relation to appointment of judges and clerks of election in several election precincts, is clearly directory, and courts will not nullify result of votes honestly cast and counted, though statute has not been directly complied with.

# 6. COUNTIES ⇐178—ROAD BOND ELECTION—SUPPLEMENTAL REGISTRATION—FAILURE TO ENTER ORDER OF RECORD.

Failure of county court to cause to be entered of record order directing clerk to give notice of supplemental registration of voters, did not invalidate election on issuance of road bonds by county, pursuant to Laws 1917, p. 471; clerk having published notice in conformity with law, so that no voter could have been deprived of opportunity to register.

# 7. COUNTIES ⇐178—ROAD BOND ELECTION—EVIDENT WILL OF MAJORITY.

Fact that more than four to one of votes on proposition of issuance of road bonds by a county in precincts free from irregularities were in favor of issuance has cogency in justifying the court in upholding the validity of the election, which is supported by the adjudications.

Woodson and Faris, JJ., dissenting in part.

Appeal from Circuit Court, Buchanan County; Alonzo D. Burnes, Judge.

Suit by Maggie Breuninger and others against Thomas J. Hill and others, County Judges of Buchanan County. From judgment for defendants, plaintiffs appeal. Affirmed.

B. J. Woodson, of St. Joseph, for appellant Breuninger.

W. B. Norris and Vinton Pike, both of St. Joseph, for other appellants.

Strop & Mayer, of St. Joseph, for respondents.

**WALKER, J.** In January, 1918, an election was held in Buchanan county to determine if a bonded indebtedness of \$2,000,000 would be incurred, to provide funds for the building of roads in said county. At this election there were 7,784 votes cast. Of this number, 6,342 were in favor and 1,442 against the incurring of the indebtedness. Before the bonds authorized by the election were issued by the county court, in April, 1918, Maggie Breuninger, one of the plaintiffs, for herself and others similarly situated, brought this suit in the circuit court of Buchanan county against the county judges to enjoin them from issuing said bonds. Others appeared, and on their application were made parties plaintiff. Defendants entered their appearance.

*The Pleadings.*—The petition of the plaintiff Breuninger, as well as those of the others, alleged that the county judges were threatening to issue bonds in the sum of \$2,000,000 payable in 20 years, under the authority of the election held in January, 1918; that their proposed action was unauthorized, because of the invalidity of the said election, in that it was held (1) at other than the usual polling places; (2) that only two judges and clerks were appointed and acted at each voting precinct; (3) that no order was made and entered of record by the county court calling said election; (4) that no order was made and entered of record authorizing the pretended supplemental registration in said county; (5) that the pretended supplemental registration was illegal, because not held at the regular polling places in the city of St. Joseph; and (6) that the election was held in total disregard of the Australian ballot law.

Defendants' answer admitted their official character; that, unless restrained, they would issue the bonds referred to; that said bonds, if issued, would constitute a county indebtedness; that the plaintiff Breuninger was a resident assessed taxpayer of said county; that St. Joseph was a city of the first class and contained more than 25,000 and less than 100,000 inhabitants; and that only two judges and two clerks for each voting precinct were appointed by the county court and served at each voting precinct during said election.

For further answer, defendants alleged the presentation to the county court of the petition for the calling of the election for the submission to the voters of a proposition to issue bonds in the sum of \$2,000,000 for road purposes; that, pursuant to said petition, an order calling an election for January 24, 1918, was made and entered of rec-

ord December 28, 1917; that an order was made by the county court for a special registration for June 12, 1918, and was entered of record on December 31, 1917; that the required notice of said registration was given; that the places used for registration were the same places used as polling places at said election; that in some precincts the places used as polling places were not the same places as the usual polling places, and that, where the same places were not used, the places used were described, and the reason for their use stated; that notice of the location of all of the polling places was given to the voters by publication in the daily newspapers published in the city of St. Joseph, and by mailing a printed notice of any changes to every voter in the city of St. Joseph, designating the location of the polling places for the purpose of this election; that it was the custom of the county to use canvas booths as polling places in the city of St. Joseph; that because of the inclement weather it was not possible to find persons who would serve as election officials, if such booths were used; that, because of this fact, the defendants secured such places as could be obtained as polling places in each precinct; that the utmost effort was made to find and secure such places as would be suitable for an orderly and peaceable election, and as would afford voters of each precinct a fair opportunity to vote secretly and free from duress or interference; that there were 30 precincts in Buchanan county outside of the city of St. Joseph; that in all of said precincts the county had permanent buildings, which were used as polling places, and that said buildings were so arranged as to comply in the minutest detail with the requirements of the Australian ballot law, and were used at such places at said bond election; that none of said defendants have any personal interest in said election, or the result thereof; and that the acts performed by them were in good faith and in an honest endeavor to have a fair election in accordance with the provisions of law.

The reply was a general denial to the new matter contained in the answer.

*The Facts.*—On the 28th day of December, 1917, during the regular November term of the county court of Buchanan county, a petition was presented to said court requesting it to call a special election for the submission to the qualified voters of said county of a proposition to issue bonds in the sum of \$2,000,000 for grading, constructing, and paving the roads. On said 28th day of December, the court entered of record an order calling said election for January 24, 1918, and on the 31st day of December, 1917, the court made an order for a supplemental registration, to wit:

"Now, on this day it is hereby ordered by the court that a supplemental registration be held

in the city of St. Joseph, Mo., one day, Saturday, June 12, 1918, from 8 o'clock a. m. to 9 o'clock p. m., in each of the voting precincts of the city."

No other order was made fixing places for the supplemental registration, nor was an order made directing the clerk of said court to give notice of such registration. However, the clerk did publish in the daily newspapers in the city of St. Joseph, for the requisite number of days, a notice of said supplemental registration. This notice fixed the places for holding the registration in each precinct, and in a number of the precincts the place thus fixed was other than the place designated by ordinance. The election was held, however, and the polling places used were the same as those where the supplemental registration had been held.

For many years it had been the custom in the city of St. Joseph to erect canvas tents for polling places, and these tents contained conveniences for the conducting of elections in compliance with the Australian ballot law. At this election none of these tents were erected or used, but the election was held at such polling places as had been selected by the county court, of which the voters had notice.

There were 87 voting precincts in Buchanan county; 57 of these are within the corporate limits of the city of St. Joseph, and 30 in the county of Buchanan, outside of the city. Within the city, there were 4,077 votes cast for the bonds, and 1,026 cast against them. Outside of the city there were 2,265 votes cast for the bonds, and 416 against them. The foregoing constitutes the material portions of the evidence adduced by plaintiffs.

The evidence on the part of the defendants shows that the petition presented to the county court requesting the calling of the election was signed by more than 3,000 residents of the county; that the order made by the court for said election was published as a notice of same by the county clerk; that the notice of special registration with the proof of its publication showed that it was published the requisite number of days; and that it had been regularly filed with the clerk of the county court. In 34 of the precincts in the city of St. Joseph, the county court did not provide booths within which the voter could retire to prepare his ballot. This failure was due to the inclemency of the weather. In furtherance of the attempt of the court to afford voters an opportunity to cast their ballots, the county judges selected other polling places than the canvas booths, and the places thus selected were as near the regular voting places as it was possible to have them; that the conditions surrounding the places selected were such as to enable the voter to readily find the polling place and to cast his ballot free from

duress or other influence calculated to interfere with the free exercise of this right, and that voters had notice of all changes made; that at each precinct the election was conducted in a quiet and peaceable manner, and no voter was denied an opportunity to freely and fairly cast his ballot.

[1] I. *The Issue*.—It appears that it is not fraud, duress, or any interference with the rights of voters of which complaint is made. Nor is the correctness of the result questioned; but the burden of the plaintiff's contention is that the calling of the election and the conduct of the same were characterized by such irregularities as to render it invalid. Recognized by the Constitution (article 8), the regulation of the right of suffrage, whether it be as to the form of the ballot, the manner in which it is required to be cast, or the character of the polling places and conduct generally of the election, has two well-defined objects: One, to afford the voter the free and untrammelled right to vote; and the other, that a correct record of the return of the votes may be made. A first essential, therefore, in the determination of the matter at issue, is whether any of the mandatory provisions of the Constitution or statutes regulating the rights of voters and the calling and conduct of the election, have been violated. If so, then the contention of the plaintiffs should be sustained. Otherwise, however, if it has been shown, despite irregularities, that a free and fair opportunity was afforded the voters to express their will, and no question has arisen as to the correctness of the return of the votes and the result of the election. While it may be admitted that irregularities invite and afford opportunities for the concealment of fraud, and that a conformity with regulatory statutes is necessary in many instances to procure exactness of results, the end for which all rules are made, and regulations prescribed, is a free ballot and a fair count. This conclusion is not intended in disregard of any legislative provision which has clearly been defined to be necessary to the validity of an election; but to provisions which have not been so defined, the violation of which is not shown in any manner to have influenced the conduct of an election, or rendered the result doubtful. A contrary ruling would not be in harmony with the purpose of regulatory statutes—would subordinate substance to form, the end to the means, and thus defeat the vital purpose for which elections are authorized. *Nance v. Kearbey*, 251 Mo. 374, 158 S. W. 629.

[2] II. *The Secrecy of the Ballot*.—Complaint is made that voters were not afforded an opportunity at certain precincts to cast a secret ballot. This contention is based on the assumption that the absence of booths at certain precincts rendered a secret ballot impossible. Notwithstanding the

absence, in the city of St. Joseph, of booths in the conduct of this election, there is no instance in evidence where a single voter could not, if he so desired, have prepared and cast his ballot in the utmost secrecy as to the nature or result of his vote. The ballots were exceedingly brief, could be read at a glance, and were couched in the following words:

"For incurring of county indebtedness for road and bridge purposes. Against incurring of county indebtedness for road and bridge purposes. (Erase the clause you do not favor.)"

Embracing but the one subject, the ballots were not difficult to understand, and the voter was enabled to express his will with two strokes of a pen. Such a ballot, encompassed, as it might have been, within the palm of the voter's hand while preparing it to be cast, did not require that paraphernalia as an auxiliary of secrecy which a reasonable construction of the statute might require in the preparation of a blanket ballot at a general election, which might involve the selection of presidential electors, state and local officers, and the approval or rejection of constitutional amendments.

Admitting, therefore, that the Constitution, in providing for elections by ballot, means a secret ballot, and the fact that the law provides means to encourage and facilitate the preparation of such a ballot, it does not follow, in the utter absence of any fraud, unfairness, or other effort made to influence the voter, that a ballot not prepared and cast in secret is invalid. On the contrary, although the facilities for secrecy are thus afforded, it could not in reason be held that, if a voter tendered a ballot prepared and furnished to him under the requirements of the law, his disregard of the law in regard to its secret preparation, or even his announcement as to the manner in which he had voted, would invalidate his vote.

Regulations, therefore, as to the right of the voter to a secret ballot, are sustained on the ground that it secures him freedom in the exercise of his franchise and reduces to a minimum the incentive to fraud. Such is the trend of the ruling in *Ex parte Arnold*, 128 Mo. loc. cit. 261, 30 S. W. 768, 1036, 33 L. R. A. 386, 49 Am. St. Rep. 557, in harmony with other cases on the same subject. Where, however, as here, there is evidence that the voter was afforded every opportunity to freely cast his ballot without disclosing the nature of same, and there was an utter absence of any attempt to influence him in so doing, a statute requiring the erection of booths should not be held mandatory, because not a necessary condition precedent to the secrecy of the ballot.

It may be admitted as a general proposition, as was held in *Hall v. Schoenecke*, 128 Mo. loc. cit. 669, 31 S. W. 97, that where it is necessary to secure an absolutely secret bal-

lot and thus protect the right of the latter in the free expression of his choice of candidates to be voted for, uninfluenced by fear or intimidation, that not only the requirement as to booths, but others which, if disobeyed, would necessarily defeat a fair election, should be held to be mandatory. In the case at bar a failure to comply with the requirement complained of not only did not have, but could not reasonably have had, any obstructive or unfair influence. The requirement under such circumstances should be held to be directory. Such a construction does not violate the spirit of the law, is consonant with justice, and is affirmative of the free expression of the will of the people.

We said no more than this in *State ex rel. Miles v. Ellison*, 269 Mo. 157, 190 S. W. 274, where it appeared that not only were no booths provided, but that no facilities were furnished the voter to enable him to prepare his ballot free from observation and coercion. This, as we have shown, was not the case at bar; but there was, as stated in the *Ellison Case*, as an exception to the ruling that the statute be construed as mandatory, but a deviation from the method marked for the holding of an election not sufficient to violate the spirit and general purpose of the law (section 5897, R. S. 1909), and thus render the result invalid (*Skelton v. Ulen*, 217 Mo. 383, 117 S. W. 32).

[3] III. *Polling Places*.—It is urged that in certain precincts the election was held at unauthorized places; that is, it was not held at the same polling places where general elections were required to be held as prescribed by the statute (Laws 1917, p. 471, § 84); the specific ground of error being that the physical character of the places to which the polls were changed were of such a nature that the requirements of the law could not be carried out. There is no evidence to sustain the reason thus urged in support of the contention.

The facts disclose that, where changes were made, the same were rendered necessary on account of the inclemency of the weather; that all voters were notified of the same; and no contention is made that any voter encountered any difficulty in locating his polling place, or that he was, by reason of such change, hindered or obstructed in the right of suffrage. The contention, therefore, must resolve itself into a question as to the construction of the statute. If it means that no exigency will authorize a change, although it be shown that no obstacle was thereby interposed to the holding of a fair, free, and full election, then the plaintiffs' contention must be upheld.

There is no general statute prescribing the manner in which polling places shall be fixed by the county courts of the several counties. The nearest approach thereto is found in the authority conferred upon such courts to establish election precincts. Sections 5801,



5802, R. S. 1909. The succeeding section (5803) impliedly confers upon them the power of fixing the polling places in providing that, upon their failure so to do, the same may be designated by the sheriff. The election here under review, having been held throughout Buchanan county, was not to be regulated by the statute regarding elections in cities of the first class. This question, however, is foreclosed for another reason: That all elections in cities of the first class, of which St. Joseph is one, are required to be held under the general laws of the state. Section 5564, R. S. 1909. Consequently, in construing the statute (Laws 1917, *supra*) authorizing a county court to submit a proposition to voters for the creation of an indebtedness for the building of roads, we are not confronted with a mandatory statute in regard to the fixing of the polling places, a violation of which would render the election invalid. The effect, therefore, upon the election, by whatever changes were made, must be determined by the facts applicable to this particular case. There is no evidence of any obstruction or hindrance caused by the county judges in making the changes which in any wise interfered with the expression of the true sentiment of the voters. Under this state of facts, it does no violence to the law, but is promotive of the public will, that the statute be held to be directory. In thus holding, we are not unmindful of the importance which attaches to a specific designation of the polling places, because this notifies the voters where their votes can be cast. But that reason for the requirement, however, loses its force in the present case, in the face of the facts that the voters were not only apprised of the changes, but encountered no difficulty in casting their votes notwithstanding the same. Many cases from other jurisdictions are cited by plaintiffs in support of this contention, but an analysis of them, if carefully made, will show that in each instance there was either present a mandatory statute, or that the changes made interfered with the freedom of action of the voter, and, as a consequence, prevented a fair election.

We have given express judicial approval to the conclusion we have here reached, first, in *State ex rel. Canton v. Allen*, 178 Mo. loc. cit. 576, 77 S. W. 308, in which we held that where there was no pretense that the election was fraudulent, or that it was not the expression of the will of the people, a change in the polling places was nothing more than an irregularity, and should not be held to invalidate the election (citing cases). This ruling has been subsequently affirmed in the recent case of *State ex rel. Memphis v. Hackman*, 273 Mo. loc. cit. 695, 202 S. W. 7.

The Courts of Appeals, for like reasons, hold the contention here made, under facts parallel with those in the instant case, to be without merit. *Bauch v. Cabool*, 165

Mo. App. 494, 148 S. W. 1003; *State ex rel. Fahrman v. Ross*, 160 Mo. App. loc. cit. 693, 143 S. W. 502; *O'Laughlin v. Kirkwood*, 107 Mo. App. 302, 81 S. W. 512.

[4, 5] IV. *Judges and Clerks*.—There is no merit in the contention that the election was invalid because the county court appointed but two judges and two clerks for each election precinct. The general law, which required the appointment of six judges and six clerks, was amended in 1913 (Laws 1913, p. 327), so far as regards the manner of holding special elections for the purpose of voting bonds for road purposes; it being expressly provided by the amendment that only two judges and two clerks for each voting precinct were necessary. The act approved April 9, 1917 (Laws 1917, p. 471), which provides that bond elections shall be held in the same manner, etc., as general elections, has reference to the general law as it then existed, which includes the amendment of 1913, *supra*, with which the action of the county court was in accord. Aside from this, the law governing the appointment of judges and clerks is clearly directory, and courts will not nullify the result of votes honestly cast and counted, although the statute has not been strictly complied with. *Sanders v. Lacks*, 142 Mo. 255, 43 S. W. 653.

[6] V. *Notice of Registration*.—It is urged that the failure of the county court to cause to be entered of record an order directing its clerk to give notice of the supplemental registration invalidated the proceeding; this, notwithstanding the fact that the clerk in his official capacity published the notice in conformity with the requirements of the law. The notice having been published, no voter could have been deprived of an opportunity to register, and the basis of the contention must rest wholly upon the technicality of the absence of the record entry. This, in the presence of affirmative proof that no injury arose from the omission, affords little reason for the sustaining of this contention. The will of the people, fairly expressed at the polls, ought not be rendered ineffectual by the interposition of objections which go merely to the oversight or unintentional omissions of officers charged with purely administrative duties. There is nothing in section 6070, R. S. 1909, concerning days of registration and notice of same, which militates against the conclusion that the action of the county court in regard thereto was not in substantial compliance with the law. While this section requires that registrations shall be held at the places of voting, established by the county court, we have shown that this requirement is directory in discussing the location of polling places, and ample notice having been given and no ground of complaint coming from the voters, there remains nothing in this regard upon which to base a ground of complaint meriting a reversal of the judgment.

**VI. Other Errors Assigned.**—The record discloses that the required petition for the special election was filed with the county court; that a formal order therefor was made and entered of record; that notice of same was published as required by law. These grounds of complaint, although presented by the petition, are not pressed upon our consideration, and, if so, would be held without merit in the face of the facts. Hence they need not be discussed.

[7] **VII. Conclusiveness of Result.**—In addition to the lack of substantial error in any of the assignments made by plaintiffs, we are confronted by this fact: That in 30 precincts outside of the city of St. Joseph, and in 23 therein, in which there was no issue of irregularity other than in the number of judges and clerks, which we have shown to be without foundation, there were 3,559 votes cast for the bonds, and 849 against them. The statute provides that if it appears that two-thirds of the qualified voters voting at the election favor the issuance of the bonds, the court shall order same. Laws 1917, p. 471, § 85. The affirmative result in the instant case shows that more than four to one of the votes cast in precincts free from irregularities were in favor of the issuance of the bonds. Under this state of facts, the holding as to the lack of substantial error, in addition to being supported by precedents, is in accord with the express will of the people, and constitutes such an interpretation of the election laws as comports with the administration of justice.

In view of all of which the judgment of the trial court is affirmed; and it is so ordered.

BOND, C. J., and WILLIAMS, GRAVES, and BLAIR, JJ., concur.

WOODSON, J., dissents, in separate opinion, in which FARIS, J., concurs.

WOODSON, J. (dissenting). While I fully concur in the views expressed in the majority opinion to the effect that mere irregularities should not nullify an election fairly and honestly held, yet I do most earnestly dissent from the proposition that, where an election is held which the law requires to be held under the Australian ballot law, in total disregard of that law, it is a valid election. That the Australian ballot law applies in this case is not denied, and that it was totally ignored is conceded, yet it is held that such an election is valid. This is strange doctrine to me, since there is no other law in existence in this state governing elections of any kind, except school and perhaps some other minor elections; therefore the conclusion is irresistible that this election was held under no law whatever—only a voluntary election held by common consent of those who participated therein. I say this because, prior

to the enactment of the Australian ballot law, we had an elaborate system of laws governing all kinds of elections, but upon its enactment it superseded all of those laws, except as previously stated.

Moreover, if this election is valid, then the general elections for the election of state, federal, and county officers may be held in total disregard of the Australian ballot law, and yet be valid, if no fraud is shown, which all know would be an almost impossible thing to do.

For the reasons stated, I dissent from the majority opinion.

FARIS, J., concurs herein.

(277 Mo. 264)

LUSK et al. v. PUBLIC SERVICE COMMISSION. (No. 18819.)

(Supreme Court of Missouri, In Banc. March 15, 1919.)

1. APPEAL AND ERROR  $\S$  877(2)—RIGHT TO RAISE POINT AFFECTING OTHER PARTY—STATUTE.

In view of Rev. St. 1909, § 2082, providing that error, to be reversible, must be against appellant or plaintiff in error, a point concerning a party who does not appeal cannot be raised and relied upon by another who does appeal.

2. PUBLIC SERVICE COMMISSIONS  $\S$  35—CERTIORARI—SPECIFICATION OF POINT ON REHEARING—NECESSITY.

Under Laws 1913, pp. 640, 641, § 110, making it necessary for parties complaining of order of Public Service Commission to apply for rehearing before seeking certiorari in the circuit court, a point not set forth in the application for rehearing before the commission cannot be ruled on its merits on appeal in the certiorari proceeding.

3. APPEAL AND ERROR  $\S$  238(3), 301—RESERVATION OF GROUNDS OF REVIEW — MOTION FOR NEW TRIAL OR IN ARREST.

An appellate court cannot consider errors not drawn to the attention of the court nisi either in appellants' motion for new trial or their motion in arrest of judgment.

4. PUBLIC SERVICE COMMISSIONS  $\S$  35—REVIEW OF ORDER ON CERTIORARI—APPELLATE JURISDICTION.

Under the Public Service Act, the circuit court, on certiorari to review an order of the Public Service Commission, exercises a jurisdiction in its nature derivative or appellate, and, if the commission had no power to make its order, the circuit court has none to adjudge an affirmance.

5. RAILROADS  $\S$  227—TRAIN SERVICE—CONSTRUCTION OF PUBLIC SERVICE ACT.

Question as to power of the Public Service Commission to require stoppage of trains by railroad at a city, and, as an incident, to

require them to run there as they formerly had done, must be liberally determined on the true spirit and intentment of the Public Service Act, as read in light of underlying reasons, keeping in mind furtherance of benefits sought and retarding of mischiefs struck at, particularly in view of provision of the act itself (Laws 1913, p. 648, § 127).

6. STATUTES §184 — CONSTRUCTION — PURPOSES.

A statute must be liberally construed in the light of its underlying reasons, keeping in mind the furtherance of the purposes sought thereby.

7. RAILROADS §227—PUBLIC SERVICE COMMISSION—POWER TO REROUTE TRAINS—STATUTE.

Under Public Service Act, § 47, subd. 2, and sections 49 and 51, Public Service Commission has power and jurisdiction to require rerouting of trains by a railroad as a mere incident to their stoppage in order to render reasonably adequate service to a city or town, particularly where rerouting merely re-establishes former service.

8. EVIDENCE §20(2) — JUDICIAL NOTICE—BRANCH LINE RAILROAD SERVICE.

Supreme Court may take judicial notice that, in Northeastern Missouri, a "branch line service" is an indifferent service by a railroad put up with by the public because nothing better is offered.

9. RAILROADS §227 — STOPPAGE AND ROUTING OF TRAINS—REASONABLE CHARACTER OF ORDER.

Order of Public Service Commission requiring railroad to reroute trains away from a cut-off as an incident to the stoppage of such trains at a city formerly served by them, before the cut-off was opened, and subsequently, *held* not arbitrary, oppressive, unjust, or unreasonable.

10. RAILROADS §227—ADEQUACY AND REASONABLENESS OF SERVICE — NUMBER OF TRAINS.

On question of reasonableness and adequacy of a railroad's service to a city, the mere number of trains is not of so much importance as the direction, destination, and facilities of the trains listed.

11. CONSTITUTIONAL LAW §241—RAILROADS §227—EQUAL PROTECTION—STOPPAGE OF TRAINS—ORDER OF COMMISSION.

Order of Public Service Commission requiring railroad to reroute passenger trains, away from cut-off as incident to stoppage at city where they had stopped before cut-off was opened and even afterwards, *held* not unconstitutional as denying railroad company the equal protection of the laws.

12. CONSTITUTIONAL LAW §297—DUE PROCESS—STOPPAGE OF TRAINS—ORDER OF COMMISSION.

Order of Public Service Commission requiring railroad to reroute passenger trains away from cut-off as incident to stoppage at city where they had stopped before cut-off was opened, and even afterwards, *held* a denial of due process of law.

13. COMMERCE §58—INTERSTATE COMMERCE —ORDER OF PUBLIC SERVICE COMMISSION—OPERATION OF TRAINS.

Order of Public Service Commission requiring railroad to reroute two local passenger trains daily away from a cut-off as an incident to requiring their stoppage at a city, as before the cut-off was opened, and subsequently, *held* not void as burdening interstate commerce.

Bond, O. J., and Woodson, J., dissenting.

Appeal from Circuit Court, Cole County; J. G. Slate, Judge.

Certiorari by James W. Lusk, Nixon, and Biddle, receivers of the railroad and properties of the St. Louis & San Francisco Railroad Company, against the Public Service Commission of the State of Missouri. From judgment affirming an order of the commission, the receivers appeal. Affirmed.

W. F. Evans, E. T. Miller, and A. E. Haid, all of St. Louis, for appellants.

Alex Z. Patterson, Gen. Counsel, and James D. Lindsay, Asst. Gen. Counsel, both of Jefferson City (R. L. Ward, of Caruthersville, of counsel), for respondent.

LAMM, Special Judge. A statement of the facts pertinent to the decision of questions raised on this appeal will appear in connection with rulings on those questions. However, it has seemed sensible to fetch a small compass by way of an outline of the case in limine, to the end that it may have an understandable setting for discussion, thus:

The mayor and aldermen of Caruthersville, on behalf of that city and its people (and *virtute officii*), filed a complaint with respondent commission of three specifications, in substance, to wit:

First. It was charged that appellants, unmindful of the safety of the people, operate certain passenger trains into and out of Caruthersville by backing them. (After complaint filed, this method of train operation was discontinued, as we gather; hence the foregoing was abandoned at the hearing and will not be further noticed.)

Second. It was charged that a certain local passenger train, operating from Kennett, Mo., to Memphis, Tenn., via Caruthersville, was run on a schedule creating unnecessary lay-overs, inconveniences, and reductions of traffic. (The grievances complained of in this specification seem to relate to conditions in Arkansas; hence the finding of respondent commission was against complainants thereon, and, as no appeal was taken by the mayor and board of aldermen, it drops out of the case and will not be further noticed.)

Third. It was charged (and on this charge the live issues seem to hang) that certain day trains between St. Louis and Memphis, known as 801 and 802, no longer stopped at

Caruthersville, but were diverted through a cut-off, to the inconvenience, loss, and injury of the business and inhabitants of said city; that said failure to stop there was without meritorious cause, etc. Complainants prayed an order requiring said trains to run into and stop at Caruthersville as they had formerly done, thereby correcting the alleged wrongs.

It seems the railroad company itself was made a party defendant, together with said receivers, in the original proceeding before the commission. Accordingly, on the coming in of said complaint, the railroad company filed its separate answer setting up the fact that its codefendants were acting as receivers under the appointment of the United States District Court for the Eastern Division of the Eastern District of Missouri; and that since their appointment said receivers have had full possession and operative control of its railroad and properties.

By their answer, the receivers denied the charges made in the complaint; admitted they had charge of and were operating the road and its properties and that they had in August, 1913, discontinued the operation of trains 801 and 802 by the way of Caruthersville for the purpose, they allege, of reducing expenses and making connections at St. Louis and Memphis; and they further averred that they are furnishing reasonable passenger facilities to Caruthersville.

On issues thus joined, a hearing was had before respondent commission, on testimony taken and duly preserved, with the result that the commission found in favor of the complainants as to said trains 801 and 802, that the passenger service at Caruthersville was insufficient and inadequate, and an order was passed and served on appellants in effect to run said two passenger trains through Caruthersville and stop them at the depot there to receive and discharge passengers and their baggage, and appellants were given until August 2, 1915 (about six months), to comply with such order. Vide *Byrd et al. v. St. Louis & San Francisco Railroad Company*, J. W. Lusk, W. C. Nixon, and W. B. Biddle, Receivers, 2 P. S. C. R. 430.

Denied a rehearing, appellants in statutory form sued out a writ of certiorari, in the Cole circuit court. On a new hearing in that court, on the same record before the commission, it was adjudged that the order of respondent commission be affirmed. From that judgment, on due intermediate steps taken, the cause came up on appeal to this court, was heard first in division and then in banc with a special judge on the bench in place of Judge Faris, who declined to sit.

The case was submitted in banc on the admission that in due time appellants complied with the order and are now running, and ever since the time limited in the order have run, said trains in compliance therewith.

Recognizing that refusing to stop day trains 801 and 802 at Caruthersville and that by rerouting them through the cut-off aforesaid, and leaving that city to one side, would seriously affect the convenience of its inhabitants and of the passengers destined to or from that point and the business of the city, appellants attempted to remedy the inconvenience and loss of facilities in ways that will appear later or when a statement of the facts is made and when the reasonableness of the order is up for judgment. So the facts relating to the inconvenience and loss to Caruthersville and its people and the traveling public by the substituted scheme of appellants, abrogated by the order of the commission under review, will be sufficiently set forth.

On a record thus briefly outlined, learned counsel for appellants argue the judgment of the circuit court, affirming the order of the commission, should be reversed, because, they say:

First. As to the railway company itself the order was error for that the receivers, not the company, operated the railroad when the complaint was filed.

Second. The court exceeded its power in affirming an order rerouting trains 801 and 802.

Third. The order of the commission, affirmed by the court, was arbitrary, unjust, and unreasonable (and herein of the reasonableness and adequacy of the passenger train service existing at the time and of certain constitutional questions sprung).

Fourth. Such order was void for that it interfered with interstate commerce by impinging on named constitutional guaranties in that behalf.

Of these in their order.

[1-3] I. *Of the alleged error in the inclusion of the St. Louis & San Francisco Railroad Company in the order of the commission and the judgment affirming the same:*

Appellants assign error for that the railroad company was included in the order when, as here, the road and its properties were in the hands of receivers. The assignment justifies the following observations:

(a) While it is clear from the abstract that the railroad company was a party below and was affected by the order and judgment, yet it is far from clear whether the company did or did not appeal jointly with the receivers. There are indicia in the record (as well as in briefs) pointing both ways. Now, if it be true that the company did not appeal, then it is also true that the receivers cannot be allowed to stand in its shoes in so far forth as to make such point in the company's behalf; for in an appellate court the fetching and stirring motto of Dumas' Three Guardsmen, "One for all and all for one," is not practically applied in settling the right of one appellant to make a point that concerns

another party, who was a codefendant and did not appeal but abided the judgment. The statutes of the state ordain that error to be reversible must be "error \* \* \* against the appellant or plaintiff in error." R. S. 1909, § 2082.

(b) But if the assumption be indulged that the company actually appealed from the judgment affirming the order of the commission, then there are several reasons why the assignment of error is not well laid.

In the first place, before the cause could get into the circuit court for review, it was necessary for parties complaining of the order of the commission to apply for a rehearing. Laws 1913, § 110, p. 640. Such application or motion for rehearing, by express statutory command, must specifically set forth the ground or grounds on which the applicant "considers said order to be unlawful, unjust, or unreasonable," and prescribes (page 641) that "no corporation or person or public utility shall in any court urge or rely on any ground not so set forth in said application."

Now, in appellants' application for a rehearing before the commission, no such ground as that under discussion was set forth. Hence the point cannot be ruled on its merits, but must be disallowed to appellants by virtue of said statutory command.

In the next place, no such ground of error was laid in appellants' motion for a new trial or their motion in arrest. In that condition of things, an unbending rule of appellate procedure precludes the consideration of any errors not drawn to the attention of the court, nisi, in one or the other of those motions. *Maplegreen Co. v. Trust Co.*, 237 Mo. loc. cit. 362, 363, 141 S. W. 621.

The premises all in mind, the point is disallowed to appellants.

[4-7] II. *Of appellants' point that the court had no power or jurisdiction to affirm an order requiring the rerouting of trains 801 and 802:*

It will be observed that the word "court" is employed in the point, and not the word "commission." However, in disposing of the contention, we shall assume that appellants' point is tantamount to a total denial of power in the commission to make the order it did; and since, under the Public Service Act, the circuit court exercises a jurisdiction in its nature derivative or appellate, rather than original, it follows that, if the commission had no power to make the order originally, then the circuit court had none to adjudge an affirmance of the order—this agreeable to the maxim, "Cessante primitive, cessat derivativus"—and so appellants' learned counsel treat the contention in their formidable printed argument which runs on the theory that the Public Service Act donated to the commission no power to make trains "deviate from the route dictated by a prac-

tical operating policy." In other words, counsel say that this is essentially a case of rerouting, and that the commission had not a whit of power to reroute passenger trains in any case that can be put. Now, if the real question here was the naked and bald one of rerouting trains, no more and no less, then, under the challenge made, we would have call to see whether the finger could be put on such general power to be exercised generally. But in the judicial exposition of a statute so remedial, comprehensive, far-reaching, and novel as the Missouri Public Service Act, it is wise to allow such exposition to proceed in its evolution step by step as each concrete case in hand calls; and therefore, under the facts of this record, we are of the opinion that the case ought not to break on the thin edge of so narrow and academic a question as that of merely rerouting two passenger trains operated by the receivers, and this, because:

In the instant case, the order of the commission was responsive to the complaint, and the gist of the complaint was that it was necessary to have trains 801 and 802 stop at Caruthersville, as they had formerly done, so that said town would have adequate and convenient railroad facilities and service. In our opinion, such rerouting of the two trains as required them to run over the original line around the curve via Caruthersville, instead of running them through the cut-off, was a mere incident or condition relating to the stoppage of said trains at Caruthersville station, which latter, to wit, the stoppage of trains, was the very heart and soul of the matter. It results from these views that to search through the Public Service Act with microscopic eyes, as we are invited to do, to discover whether or not the phrase "reroute trains" appears written there, ipssimis verbis, is not only sticking in the bark, but is a vain and futile task. It may be conceded, for the purposes of this case, that the very word "reroute," or the very phrase "reroute trains," is not written in the statute; but it also must be conceded that the naked question, whether the abstract general power (disconnected from the concept of the stoppage of trains) is given to the commission to reroute railroad trains generally, is not in this case either. On the other hand, the concrete question whether, under the facts of such a record as this, and for the purpose of giving to Caruthersville reasonable railroad service and facilities, the commission had the power to order trains 801 and 802 stopped at that city and, as an incident or condition precedent to that stop, had the power to require them to run there as they formerly had done on the original railroad line, so that they could stop, is in this case; and that proposition must be liberally ruled on the true spirit and intentment of the statute as read in the light of, and interpreted

by, the reasons underlying it, keeping always steadily in mind that the furtherance of the benefits sought by the legislation and the retarding of the mischiefs struck at thereby is the golden rule of statutory construction.

The general canon of construction just announced is, in effect, the very rule prescribed by the lawmaking power for the construction of the Public Service Act (Laws of 1913, § 127, p. 648), to wit:

"The provisions of this act shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."

The act defines many of its own terms, and these definitions illuminate and fix its operative scope and intent, for instance:

Subdivision 24 of section 2 reads:

"The term 'transportation of persons,' when used in this act, includes every service in connection with or incidental to the safety, comfort or convenience of the person transported, and the receipt, carriage and delivery of such person and his baggage."

Subdivision 26 of section 2 reads:

"The term 'service' when used in this act, is used in its broadest and most inclusive sense and includes not only the use and accommodation afforded consumers or patrons, but also, \* \* \* the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service. \* \* \*"

Subdivision 2 of section 47 of the act reads, in part:

"Whenever the commission shall be of the opinion, after a hearing had \* \* \* upon complaint, that the \* \* \* service of any \* \* \* common carrier, railroad corporation or, \* \* \* in respect to transportation of persons or property within this state are \* \* \* unreasonable, \* \* \* or inadequate, the commission shall determine the \* \* \* reasonable, \* \* \* adequate and proper \* \* \* service thereafter to be enforced, \* \* \* and so fix and prescribe the same by order," etc.

Section 49 of the act prescribes, *inter alia*, as follows:

"If, in the judgment of the commission, additional \* \* \* facilities \* \* \* for use by any common carrier, railroad corporation \* \* \* in or in connection with the transportation of passengers \* \* \* ought reasonably to be provided, \* \* \* or changes in any thereof in use ought reasonably to be made, \* \* \* in order to promote the security or convenience of the public, \* \* \* or in order to secure adequate service or facilities for the transportation of passengers, \* \* \* the commission shall \* \* \* make and serve an order directing such repairs, improvements, changes or additions to be made. \* \* \*"

What is the meaning of the word "facilities," as used in the foregoing section and elsewhere in the act? It is pointed out by

counsel that it is thus defined by an accredited treatise (19 Cyc. pp. 106, 107):

"Applied to railroads, it means everything necessary for the convenience of passengers and the safety and prompt transportation of freight. As applied to a ferry franchise, everything incident to the general, prompt and safe carriage of passengers, boats in good repair, appliances answering the purpose, and readiness and willingness to perform the service incident to the grant."

Section 51 of the act reads, in part, as follows:

"\* \* \* The commission shall, after a hearing, either on its own motion or after a complaint, have power to make an order directing any such railroad corporation or street railroad corporation to increase the number of its trains or its cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car or make any other suitable order that the commission may determine reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation."

Other sections of the act might be profitably invoked to show that the rerouting of a train for the purpose of stopping it, thus affording adequate facilities and service to a county seat on the line, is within its purview; but the foregoing is enough for our purposes. It would be narrow construction of the comprehensive act in question to rule that a public utility could, without adequate cause, take from an important community the reasonable service and facilities it had theretofore received at the hands of such public utility, and, as it were by a mere twist of the wrist, to wit, the administrative detail or expedient of rerouting a train through a cut-off, thereby disarm the Public Service Commission of all power to correct any resulting inadequate new service by re-establishing the old. Such construction would open an inviting door to drive a coach and six through the statute, and we are clearly of the opinion that it would not be within the intentment of the act. It is on such premises we shall rule the point against appellants; and in doing so we shall limit our holding to the precise case in hand, namely:

We hold that the Public Service Commission of Missouri has power and jurisdiction to require the rerouting of trains where (as here) the rerouting is a mere incident to the main thing, to wit, the stoppage of such trains in order to render reasonably adequate service to a town, especially where such rerouting is but re-establishing the service formerly rendered by the public utility to such town.

This brings us to the main question in the case and calls for the record facts.

[8-12] III. *Of the contention that the order of the commission was arbitrary, unjust, and*

*unreasonable (and herein of the reasonableness and adequacy of the train services existing at Caruthersville at the time the order was made, and of certain constitutional questions sprung):*

St. Louis is 305 miles from Memphis. As we understand the record, the St. Louis & San Francisco Railroad purchased from other roads certain lines of track running in the region of and via Caruthersville, and presently connected these tracks with the terminal cities of St. Louis and Memphis. When completed, the original line of the St. Louis & San Francisco Railroad ran through Caruthersville, in Pemiscot county, en route from St. Louis to Memphis. Northwest of Caruthersville is the station of Hayti. Southwest of Caruthersville is the station of Grassy Bayou, and trains on the original line, running south from St. Louis, first reached Hayti, next Caruthersville, and next Grassy Bayou.

Now, as the bee flies, the distance from Hayti to Grassy Bayou is about 6 miles, while the distance between the same points by way of Caruthersville on the line of the original railroad is about 10 miles (to be exact, 9.9) farther. In other words, the original line curved to the east and made a detour to pass through Caruthersville. In 1904, after the original line was built and in operation, the railroad company built a "cut-off" track on said direct line from Hayti to Grassy Bayou and at once began to run its through heavy freight trains between St. Louis and Memphis by way of this cut-off. At the same time, it also put on two through passenger night trains (one each way) of best modern equipment and service, which said trains were scheduled at 35 miles an hour; and, as we gather, these night trains never ran via Caruthersville, but used said cut-off, but, to accommodate mails and people of Caruthersville and those passengers to and from Caruthersville who desired to use these night trains, a sleeper, to connect with each, ran back and forth from Caruthersville to Hayti on the old original line. No complaint is made of this arrangement, nor was any change sought therein by the complaint. The record also shows that what is known as "through travel" between Memphis and St. Louis used these night trains to such an extent that on the day trains, presently to be mentioned, the through travel was negligible.

At the same time this cut-off was built, and continuously thereafter for nine years, until August, 1913, the railroad company also operated two daily passenger trains (one each way) between St. Louis and Memphis via Caruthersville. These trains were known as Nos. 801 and 802; the one south-bound to Memphis being No. 801, and the one north-bound to St. Louis being No. 802. These day trains were called "through trains," but they

were in fact accommodation trains doing a local (intrastate) business and stopping at over 60 stations, flag stations, and cross-roads, between said terminal cities. They also did an interstate business. They ran at a slow schedule rate of 23 miles an hour; the one running north from Memphis at a bit faster schedule than the one running south from St. Louis of, say, 40 or 50 minutes.

Caruthersville, the county seat of Pemiscot county, is on the Mississippi river, and while it has such negligible river shipping and passenger service as was in vogue on that river at that point at the times in hand, yet it quite depended for its mail and passenger service on said railroad company, which, as we gather, has an unbroken monopoly of the railroad business of that region.

Caruthersville is a flourishing, ambitious city of 5,000 people, keenly engaged in business in a rich and rapidly developing country. The railroad company has a \$12,000 passenger station there, and, at the times in hand, 7,000 tickets were sold to passengers traveling out of Caruthersville each month, at an average monthly cash receipt therefrom of \$4,000 (\$48,000 per year). So railroad receipts from freight business amounted to \$18,000 per month, or \$216,000 per year. In fact, barring Cape Girardeau, the record shows it is the largest and briskest city and the most remunerative shipping point for passengers and freight anywhere on appellants' railroad between Memphis and St. Louis.

It further appears that under the spur and lure of a promise that it was not to lose, or have interfered with, its said through day train service then existing, Caruthersville caused to be procured the right of way for the cut-off mentioned, and its citizens donated most of the right of way to the railroad company.

The record shows the following additional facts:

Train 802 was the only day train run by appellants north-bound from Memphis by which passengers from Caruthersville could leave that city in the daytime, and, without change of cars, reach St. Louis; and train 801 was the only day train south-bound from St. Louis by which passengers from that city (and intermediate points as far south as Cape Girardeau) could reach Caruthersville in the daytime without change of cars. So, said two trains were the only day trains by which passengers could reach or leave Caruthersville from the south in the daytime at reasonable hours without change of cars. It appears that much of the business of Caruthersville, at the times in hand, came from territory south of the city, and the accommodation of the people in that region is a material and live matter to the prosperity of the city. Said two trains were much used during all the years they ran via Ca-

ruthersville and supplied it with necessary facilities and service. It seems to be abundantly shown that they were a great convenience and benefit to the city as originally run, and there is substantial evidence tending to show an appreciable business loss to the city by the substituted service and substantial inconvenience in delays incident to the change of cars in making connections and in the quality of the service rendered and the facilities afforded by the substituted service. The commission found (2 P. S. C. R. p. 440) that "the train service as now offered the public at Caruthersville is branch line service both as to equipment \* \* \* and manner of operating trains," and that finding is sustained by the substantial weight of the evidence. There are a dozen or 14 passenger trains operated to or through Caruthersville in one day. Some of these were in existence when trains Nos. 801 and 802 ran via Caruthersville. Some of them were put on after said trains 801, 802, no longer ran via Caruthersville, and some of them met trains 801 and 802 at Hayti, so that passengers to and from Caruthersville might take them. The paper showing made in regard to the number of passenger trains in and out of Caruthersville at the time of the hearing before the commission loses some of its significance by the fact that some of them are shuttle trains and the same train carries a different number each way. The passenger traffic accommodated by most of these trains, is not, in its entirety, the passenger traffic accommodated by trains, 801 and 802, but extended to the west and southwest. The commission, as pointed out, spoke of the service and facilities at Caruthersville as "branch line." Now, a "branch line service" in Southeast Missouri, as shown by this record (and of which the court may, without serious impropriety, take notice), is an indifferent service put up with because nothing better is offered. It is not the kind of service and facilities to give satisfaction, business health, and vigor to an ambitious and growing city like Caruthersville. We give an extract from the finding of the commission, which is sustained by the record, which sufficiently gives the data of the service and facilities afforded to the public at Caruthersville:

"Defendants operate a passenger train (No. 821) daily from Hayti, via Caruthersville, to Memphis, leaving Caruthersville at 10 minutes after 5 o'clock a. m., thence to Turrell, Ark., where the cars are placed in another train and carried to Memphis, and cars are carried from Memphis to Turrell, Ark., and from that point as No. 822, are carried to Caruthersville, arriving there at 11 o'clock p. m. When trains Nos. 801 and 802 were diverted from Caruthersville, defendants put into service passenger trains Nos. 825 and 826, which are operated daily from Blytheville, Ark., via Caruthersville, Hayti and Kennett, to Cape Girardeau and return, arriving

at Caruthersville, going north each day at 7:25 a. m. and returning via Caruthersville at 7 o'clock p. m. Defendants operate passenger trains Nos. 881 and 882, leaving Caruthersville as No. 882 at 50 minutes after 5 o'clock, thence to Hayti, Kennett and Cape Girardeau by way of the Leachville branch, and returning to Caruthersville as No. 881 at 5 minutes after 9 o'clock p. m. A passenger train is operated as trains Nos. 893, 894, 895, 896, 897, 898, 891, 892 between Campbell, Kennett and other points to Hayti and Caruthersville. That train carries all passengers to and from trains Nos. 801 and 802 and between Caruthersville and Hayti. Train No. 802 as now scheduled arrives at Hayti at 45 minutes after 11 o'clock a. m. Passengers coming from Caruthersville to take that train leave Caruthersville at 15 minutes after 11 o'clock a. m., and that train is due at Hayti at 40 minutes after 11 o'clock and is due to arrive at Caruthersville from Hayti at 20 minutes after 12 o'clock. Train No. 801 is due to arrive at Hayti at 5 minutes after 4 o'clock p. m. The train to meet this train at Hayti leaves Caruthersville at 30 minutes after 3 p. m. and arrives at Hayti at 55 minutes after 3 o'clock p. m., and returns to Caruthersville at 40 minutes after 4 o'clock p. m. As trains Nos. 801 and 802 are now operated, all passengers going to and from Caruthersville are required to change to or from the said main line at Hayti."

It will be observed that appellants' answer undertook to justify running trains 801 and 802 through the cut-off, rather than via Caruthersville, in order to reduce expenses and make connections at St. Louis and Memphis. Without cumbering the opinion with further details, we state that we do not find these averments of the answer satisfactorily supported by the evidence. To the contrary, at the hearing, other reasons were given for the rerouting of trains; for instance, some relating to track conditions. But we do not find that improper track conditions may not, and should not, with business propriety and reasonable outlay, be overcome; and throughout the whole case the pregnant fact runs like a marking thread that, for nine years after the cut-off was built and in use, the railroad company itself acted on the theory that the routing of these trains via Caruthersville was a practical railroad proposition, all of which must be held to evidence the fact that the railroad company on its then settled judgment deemed such running of said trains a necessary convenience of service and facility to that city and to local traffic wants.

It appears that the greater percentage of the income of the passenger traffic on these trains, in and out of Caruthersville, was from an intrastate, rather than an interstate, service, was largely a local as contradistinguished from a through business.

Charges are made on one side that the routing of trains 801 and 802 through the cut-off originated in hostility to the growth and development of Caruthersville and in a



corporate disposition to build up a rival city in Hayti. But we do not find the record sustains that contention, nor do we find anything in the record to sustain the contention, made on the other side, as we gather, that the re-establishment of the former routing of trains 801 and 802 originated with complainants as a plan to injure Hayti.

On such record, on the assignment of error now under consideration, we announce the following conclusions:

(a) That the order of the commission, affirmed by the circuit court and appealed from, was neither arbitrary, oppressive, unjust, or unreasonable on the record we are dealing with.

(b) That at the time the order was made, the north and south passenger train service at Caruthersville was, in fact, inadequate and unreasonable.

(c) In reaching the above conclusion, we have held in review (among other things) the condition of the track in the detour, the expense incident to its reasonable repair, the fact that the railroad is under a federal receivership, the number of passenger trains in and out of Caruthersville daily, and the alleged interference with connections at terminals, which, we think, encompass the main contentions of appellants under this head; and, in this connection, we make the following observations on two phases of the case:

(1) It must, in reason, be allowed that the mere number of trains is not of so much importance, on the question of reasonableness and adequacy of service, as are the direction, destination, and facilities of the trains listed. The fact that some of these trains are "shuttle trains," and that many of the others bear away southwest from the main line and across the Little River drainage territory, must not be overlooked; for the inadequacy complained of is in the north and south service.

(2) There was testimony tending to show that to make the old track around the detour as good as the main line track would cost, it was estimated, \$6,000 per mile; but it does not appear that for these slow moving day passenger trains, 801 and 802, a track was required as good as the main line, nor does it appear that the condition of track, ties, and roadbed around the detour was not, at least to some extent, due to neglect which ought to cease. We are of the opinion the track outlay, if any be necessary, would not be unreasonable, nor are terminal connections unreasonably interfered with—a subject referred to again later.

(d) In this connection, it is argued by learned counsel for appellants that the order of the commission, in question, was unconstitutional and void for that it denied the railroad company the equal protection of the

law and did not constitute due process of law. As to that, we say:

The contentions take not only color out hinge on the related question of fact, namely, whether the order is reasonable or unreasonable, arbitrary or not, just or unjust, oppressive or not. We have been cited to no soundly reasoned and controlling case, holding that the reasonable and just order of a Public Service Commission, requiring adequate and reasonable train service and transportation facilities, at a given town on its line, impinged upon the constitutional guaranties of due process and equal protection of the law, where, as here, the orders of such commission are made subject to judicial review by the act creating it and donating regulation power to it. In this view of it, since the fact of the justness and reasonableness of the order in question has already been determined in this opinion, and since appellants are now having their day in court and a judicial hearing, we disallow the constitutional points under discussion and hold them without controlling vitality on this record.

This brings us to the only remaining material contention of appellants, namely:

[13] IV. *Of the contention, that the order was void for that it interfered with interstate commerce by impinging upon named constitutional guaranties in that behalf:*

In ruling the contention, the following propositions must be taken as true, to wit:

First. There are no federal regulations shown by this record covering the subject-matter of the concrete case. Hence it cannot be held that the authorities of this state, in making the order in question, have intruded upon territory already occupied and covered by federal regulations in point.

Second. It must be considered that the order in question, on its face, does not relate to or cover interstate commerce, but, on the other hand, solely on its face relates to and is leveled at local and interstate transportation service and facilities at Caruthersville for passengers. Hence it cannot be ruled that the order on its face is void as an interference with interstate commerce.

Third. It is self-evident that, if the order complained of affects interstate commerce at all, it does not do so directly, or as the gist of the matter, but only indirectly and incidentally.

Fourth. Present the three propositions, just ruled, above, it results that the remaining and decisive inquiry is this:

Does the order, under the cover and guise of a regulation of an intrastate matter, nevertheless lay an unreasonable burden upon, and is it unduly restrictive of interstate commerce? For it may be conceded that the right doctrine is that a state regulation surcharged with vice of that character, may

be drawn within the intentment of the commerce clause of the federal Constitution and may become void under such circumstances.

Now, we search in vain in this record for any unreasonable burden or for any undue restriction upon interstate commerce hid away in the bowels of the order. The through passenger travel on the railroad between its terminals, St. Louis and Memphis (except to a negligible extent), is taken care of on its two heavy and modern night trains, which latter run, and always have run, through the "cut-off." The only two through passenger day trains, to wit, 801 and 802, which are affected by the order, carry few or no through passengers from St. Louis to Memphis, or vice versa. The connections at St. Louis and Memphis for those who do use these day trains are not seriously hurt by the order. So, too, these day trains in question, though well equipped, run on an exceedingly slow schedule, calling for 60 stops at this or that crossroad, way station, and little town, in running about 300 miles. Now, keeping in mind that Caruthersville is a fine, growing, and populous city (as cities run in Missouri), is a county seat, and originates more passenger business and travel, in and out, than any other city on the entire line, outside of St. Louis and Memphis, and excepting only Cape Girardeau—we say, keeping in mind these facts, and the further fact that Caruthersville, by the use of the "cut-off" by these two day trains, was to all intents and purposes relegated to "a branch line service" with all its incident disadvantages and impediments to travel, he would be an over-bold man who would not conclude that interstate commerce would be benefited, rather than burdened or restricted, by the order appealed from.

We are of the opinion, then, that interstate commerce will be benefited by the order and will not be unduly restricted or burdened by it. We therefore conclude that the order is not subject to be attacked from the angle that it unduly restricts or burdens interstate commerce.

The conclusions reached under this head, are well within the doctrines announced in a line of cases. We cite only a few: *Gulf, Colorado & Santa Fé Railway Co. v. State of Texas* (decided by the Supreme Court of the United States March 4, 1918) 246 U. S. 58, 38 Sup. Ct. 236, 62 L. Ed. 574; *Chicago, B. & Q. Ry. Co. v. R. R. Commission*, 237 U. S. 220, 35 Sup. Ct. 560, 59 L. Ed. 928; *Lake Shore & M. S. R. R. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 48 L. Ed. 702; *Mo. Pac. R. R. v. Atkinson et al.*, 269 Mo. 634, 192 S. W. 86, L. R. A. 1918A, 46, Ann. Cas. 1917E, 987; *State ex rel. Mo. Pac. R. R. and Bush, Receiver, v. Public Service Commission of Mo.*, 278 Mo. 632, 201 S. W. 1143, handed down at January call, 1918.

The premises all considered, the order of

the commission, appealed from, should be affirmed. It is so ordered.

All concur, except WOODSON, J., who dissents in separate opinion in which BOND, C. J., concurs.

FARIS, J., not sitting.

WOODSON, J. (dissenting). I dissent from the opinion written in this case by our learned special judge who was called in to sit with us in the case, because of an equally divided court; one of our number not sitting.

For the reasons stated in the opinion I wrote when this case was in division, which I refiled here as a dissent, I dissent from the majority opinion herein.

I also dissent for the further reason that the majority does not state the facts as I understand the record discloses them. The facts stated by me in the divisional opinion, which is refiled here, were taken almost literally from the statement of the case made by counsel for the respondent, and in my opinion the record sustains that statement.

The divisional opinion was as follows:

"This action originated before the Public Service Commission, by the mayor and board of aldermen of the city of Caruthersville filing a petition requesting an order requiring the appellants to reroute their trains, Nos. 801 and 802, through said city.

"After hearing the evidence, the respondent ordered the appellants to route said trains through Caruthersville as prayed. From that order the appellants moved the case to the circuit court of Cole county by writ of certiorari. After hearing the case, the circuit court affirmed the order of the Public Service Commission, and in due time appellants appealed the cause to this court.

"The principal facts of the case are stated by counsel for respondent in substantially the following language:

"That Caruthersville is the county seat of Pemiscot county and has about 5,000 inhabitants. The appellants, at the time of the filing of the original complaint herein, were erecting a new passenger depot at Caruthersville at a cost of \$12,000. The railroad facilities furnished at that place before the construction of the line from St. Louis to Memphis by the St. Louis & San Francisco Railroad Company were afforded by a line of railroad extending through Caruthersville to a point in Arkansas. This line was extended north to St. Louis and south to Memphis, Tenn., and was acquired by the St. Louis & San Francisco Railroad Company. About the year 1904, the entire railroad from St. Louis to Memphis was completed and opened for use. The line of appellants' railroad extending through Caruthersville makes a large curve toward the east. The distance in a direct line between Grassy Bayou, which is on the railroad south of Caruthersville, is six miles, while the distance along the railroad from Grassy Bayou, to Caruthersville, is nine miles, and from there to Hayti is seven miles. In 1904 the appellant railroad company constructed a railroad track from Grassy Bayou to Hayti,

almost due north and south, a distance of six miles, connecting the north and south line of appellants' road instead of detouring to the east nine miles from Hayti to Caruthersville, and then back seven miles to Grassy Bayou, thus saving a run of about eleven miles in distance and from thirty-five to forty minutes in time.

"The purpose of constructing the road between the points last named was, as the respondent's evidence tended to show, for the use of the freight trains, and upon this assurance the citizens of Caruthersville assisted in procuring the right of way for the railroad between Grassy Bayou and Hayti, and donated a large part of it to the railroad company.

"Trains Nos. 801 and 802 were, until August, 1913, routed from St. Louis to Memphis and return through Caruthersville. At the time last named, said trains were routed over the short line from Grassy Bayou to Hayti and Caruthersville to carry passengers to and from said trains Nos. 801 and 802 at Hayti, and passenger trains Nos. 825 and 826 have been put into service between Blytheville, Ark., and Cape Girardeau, Mo., by way of Caruthersville, Hayti, and Kennett.

"Caruthersville is the second city in importance on appellant's line between St. Louis and Memphis, and the ticket sales at Caruthersville are only exceeded by the sales at Cape Girardeau. More than 7,000 tickets were sold to passengers traveling out of Caruthersville each month. The receipts from such sales averaged about \$4,000, and the receipts at said station from freight business amounted to \$18,000 per month. Caruthersville is situated on the line of railroad as originally located. Trains Nos. 801 and 802 were operated through Caruthersville for nine years.

"There are, independent of these trains, Nos. 801 and 802, seven trains running daily, each way, from Hayti to Grassy Bayou via Caruthersville, fourteen in all, connecting with the trains on the main line running from St. Louis, Mo., to Memphis, Tenn.

#### "Opinion.

"I. Counsel for respondent base their authority for making the order complained of by counsel for appellant, on sections 49 and 51 of the Act of 1913 (Laws 1913, pp. 588 and 589). They read as follows:

"Sec. 49. *Power of Commission to Order Repairs or Changes.*—If in the judgment of the commission, additional tracks, switches, terminals or terminal facilities, stations, motive power, or any other property, construction, apparatus, equipment, facilities or device for use by any common carrier, railroad corporation or street railroad corporation in or in connection with the transportation of passengers or property ought reasonably to be provided, or any repairs or improvements to or changes in any thereof in use ought reasonably to be made, or any additions or changes in construction should reasonably be made thereto in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for the transportation of passengers or property, the commission shall, after a hearing, either on its own motion or after complaint, make and serve an order directing such repairs, improvements, changes or additions to be made

within a reasonable time and in a manner to be specified therein, and every common carrier, railroad corporation and street railroad corporation is hereby required and directed to make all repairs, improvements, changes and additions required of it by any order of the commission served upon it. If any repairs, improvements, changes or additions which the commission has determined to order require joint action by two or more of said corporations, the commission shall, before entry and service of order, notify the said corporations that such repairs, improvements, changes or additions will be required and that the same shall be made at their joint cost, and thereupon the said corporations shall have thirty days or such longer time as the commission may grant within which to agree upon the part or division of cost of such repairs, improvements, changes or additions which each shall bear. If at the expiration of such time such corporations shall fail to file with the commission a statement that an agreement has been made for a division or apportionment of such repairs, improvements, changes or additions, the commission shall have authority, after further hearing, to fix in its order the portion of such cost or expense to be borne by each corporation and the manner in which the same shall be paid and secured."

"Sec. 51. *Power of Commission to Order Changes in Time Schedules, Running of Additional Cars and Trains.*—If, in the judgment of the commission, any railroad corporation or street railroad corporation does not run trains enough or cars enough or possess or operate motive power enough, reasonably to accommodate the traffic, passenger and freight, transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at reasonable or proper time, having regard to safety, or does not run any train or trains, car or cars, upon a reasonable time schedule for the run, the commission shall, after a hearing, either on its own motion or after complaint, have power to make an order directing any such railroad corporation or street railroad corporation to increase the number of its trains or of its cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car or make any other suitable order that the commission may determine reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation."

"Counsel for appellants deny that either of the sections quoted empower the commission to make the order complained of.

"In our opinion counsel for appellants is correct.

"By reading section 49, it will be seen that it relates only to repairs or changes in facilities, and empowers the commission to require additional tracks, motive power, etc., to be provided, repaired, or changed. And, as well said by counsel, 'it does not authorize the commission to direct where trains shall be run, but attempts to regulate only the facilities by which trains are run;' and especially may we add that neither of said sections empowers the commission to order what particular train or trains shall or shall not run to or from particular places. Such orders would be unjust, unreasonable, oppressive, and intolerable, and doubtless

that is why the Legislature withheld that power from the commission.

"All the Legislature had in mind was to empower the commission to require the railroads of this state to furnish ample and suitable trains to accommodate the public demand, where they were refusing or neglecting to do so. If the fourteen trains before mentioned are not sufficient and suitable for the transportation of freight and passengers to and from Caruthersville, at reasonable times, then clearly the commission has the authority, under said statutes, to require appellants to furnish them.

"Moreover, trains Nos. 801 and 802 are interstate trains, engaged in interstate commerce, and for that reason the state has no power or authority to impose unjust, unreasonable, or oppressive burdens upon them. The following cases so hold: *Illinois Central Ry. v. Illinois*, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. Ed. 107; *McNeill v. Southern Ry.*, 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142; *Atlantic Coast Line v. Wharton*, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. Ed. 230; *Herndon v. C. R. I. & P. Ry.*, 218 U. S. 135, 30 Sup. Ct. 633, 54 L. Ed. 970; *Kansas City Southern Ry. v. Kaw Valley District*, 233 U. S. 75, 34 Sup. Ct. 564, 58 L. Ed. 857; *C. B. & Q. Ry. v. Wisconsin*, 237 U. S. 220, 35 Sup. Ct. 560, 59 L. Ed. 926.

"There has been so much, and so well said, upon this subject, by the United States Supreme Court, that nothing of additional importance can be said by this court.

"The mere statement of the facts of this case conclusively show that the order in question requiring these interstate trains to detour 17 miles out of their due course, simply in order to furnish Caruthersville with two additional trains, when she already has 14, is unjust, unreasonable, and oppressive, within the meaning of the authorities cited.

"If the 14 trains mentioned are not ample or suitable for the purposes mentioned, then the commission has the authority, under the statutes mentioned, to remedy those deficiencies, but not to impose this unjust burden on those through trains.

"There are other points presented and discussed by counsel, but the view we have taken of the case renders it unnecessary for us to notice them.

"For the reasons stated, the judgment of the circuit court is reversed and the cause remanded, with directions to the circuit court to set aside the order, requiring the appellants to reroute trains Nos. 801 and 802, etc."

For the reasons stated, I dissent.

#### STATE v. ARNETT. (No. 20875.)

(Supreme Court of Missouri, Division No. 2  
March 4, 1919.)

#### 1. CRIMINAL LAW §1159(4) — REVIEW — PROVINCE OF JURY — CREDIBILITY OF WITNESS.

The credibility of state's principal witness, where it constituted substantial evidence of defendant's guilt, was for the jury, though it may

appear in the light of defendant's testimony to be against the weight of the evidence.

#### 2. CRIMINAL LAW §1037(1)—APPEAL—REMARKS OF COUNSEL—ADMONITION—WAIVER.

Where court, upon defendant's objection to prosecutor's remarks, admonished prosecutor not to go outside the evidence, and defendant appeared to be content with such admonition, he will not be heard to complain of such remarks upon appeal.

#### 3. CRIMINAL LAW §823(14)—INSTRUCTION—CIRCUMSTANTIAL EVIDENCE.

In prosecution for having stolen domestic fowls from the premises of another during the nighttime, in violation of Rev. St. 1909, § 4537, an instruction that defendant could be convicted, although evidence be not positive and direct, etc., held not objectionable in view of other instructions defining circumstantial evidence and stating the correct rule.

#### 4. CRIMINAL LAW §822(1) — INSTRUCTIONS. Instructions must be construed together.

#### 5. CRIMINAL LAW §789(4)—INSTRUCTIONS—REASONABLE DOUBT.

An instruction on the doctrine of reasonable doubt is sufficient, if it applies the doctrine to the whole case, it being unnecessary that it be applied in express terms to the matter at issue.

#### 6. CRIMINAL LAW §941(2)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

Where there was evidence, during the trial, as to the improbability of state's witness having seen defendant commit the crime, because of intervening objects, new trial on the ground of newly discovered evidence, as to the location of objects at the scene of the crime making it physically impossible for state's witness to have seen defendant commit crime, was properly denied; such evidence being cumulative.

#### 7. CRIMINAL LAW §939(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Defendant's motion for new trial, on the ground of newly discovered evidence, as to location of objects making it physically impossible for state's witness to have seen commission of crime, was properly denied, for lack of diligence; defendant having had opportunity to examine premises prior to trial, and a knowledge thereof having been necessary to the defense.

#### 8. CRIMINAL LAW §942(1) — NEW TRIAL — IMPEACHMENT OF WITNESS.

Motion for new trial, on the ground of newly discovered evidence, was properly denied, where effect of such evidence would have been simply to assail the credit and impeach the character of the state's witness.

Appeal from Criminal Court, Lafayette County; John A. Rich, Judge.

George Arnett was convicted of having in the nighttime stolen domestic fowls from the premises of another, and he appeals. Affirmed.

George V. Berry, of Odessa, and C. A. Keith, of Lexington, for appellant.

Frank W. McAllister, Atty. Gen., and S. P. Howell, Asst. Atty. Gen., for the State.

WALKER, J. Appellant was charged by indictment, under section 4537, R. S. 1909, with having in the nighttime stolen domestic fowls from the premises of another. Upon a trial, he was convicted and sentenced to two years' imprisonment in the penitentiary. From this judgment he appeals.

The material evidence of a direct character was that the appellant was seen to take chickens in the nighttime belonging to the owner of certain premises, and, with the assistance of another, tie them and take them away in his wagon. Other testimony of a circumstantial nature was adduced corroborative of the foregoing. Testimony was introduced on behalf of the appellant to show the unreasonableness of the state's direct testimony, due to the impossibility of the witness who testified thereto being able, on account of intervening objects, to see the chicken house from her residence, and to testify with truth as to the actions of the appellant. Appellant, in support of his motion for a new trial, filed an affidavit as to the location of the premises, and the impossibility of one being seen at the chicken house from the residence of the state's principal witness, and urged this fact as newly discovered evidence authorizing the granting of a new trial. This affidavit was supplemented by photographs of the premises.

The errors submitted for our consideration by the record are: The insufficiency of the evidence; the remarks of the prosecuting attorney; the giving of an improper instruction in regard to circumstantial evidence; the refusal of an instruction asked in regard to reasonable doubt; and the refusal of the trial court to grant a new trial, upon the ground of newly discovered evidence, as set up in appellant's affidavit, and the submission of photographs showing the location of the premises.

I. We have repeatedly, in ruling upon the sufficiency of the testimony necessary to sustain a conviction, held that we will not deal with this question, which is the peculiar province of the jury, if there is any substantial evidence upon which to base the judgment. *State v. Rowe*, 271 Mo. 88, 196 S. W. 7; *State v. Murray*, 193 S. W. 830; *State v. Jump* (App.) 198 S. W. 429; *State v. Evans* (App.) 198 S. W. 472; *State v. McKenzie*, 177 Mo. loc. cit. 717, 76 S. W. 1015.

[1] The credibility of the principal witness for the state is strenuously assailed. Under the rule above referred to, the truth of her testimony, which in itself constituted substantial evidence of appellant's guilt, was for the jury. This is true although, viewed in the light of appellant's testimony, it might

appear to be against the weight of the evidence. *State v. Long*, 257 Mo. 199, 185 S. W. 748; *State v. Nichols*, 262 Mo. 113, 170 S. W. 1110; *State v. Underwood*, 263 Mo. 677, 173 S. W. 1059.

[2] II. The remarks of the prosecuting attorney in his argument to the jury, in stating his theory for the severity of the punishment provided for the offense charged, is assigned as error. Upon objection being made to these remarks, the court admonished the prosecuting attorney that he must not go outside of the record. Counsel for appellant rested content, so far as the record discloses, with this ruling. He will not now be heard to further complain in this regard. *State v. Wana*, 245 Mo. loc. cit. 563, 150 S. W. 1065; *State v. Phillips*, 233 Mo. loc. cit. 307, 135 S. W. 4; *State v. McMullin*, 170 Mo. 632, 71 S. W. 221.

III. It is urged that the following instruction, given at the instance of the state, is error:

"And the court instructs you that the state is not required, in order to convict defendant, to prove him guilty by direct and positive evidence, but if under all the facts and circumstances in evidence the jury believe defendant guilty under the instructions of the court, then it is the duty of the jury to convict, even though the evidence be not positive and direct."

[3] This contention assumes that the instruction is incorrect as a statement of the law in regard to circumstantial evidence. The principal testimony was direct, and of such a nature as to sustain a conviction, but the state in addition introduced testimony of a circumstantial nature to show appellant's guilt. Standing alone, the instruction complained of may be subject to criticism, but it does not so stand. Other instructions, given at the request of the state, and not in conflict, but supplemental to, that complained of, define circumstantial evidence, and state the correct rule for the guidance of the jury in the presence of proof of this character. These instructions employ the substantial language of approved forms, and are not subject to objection. *State v. Tettaton*, 159 Mo. 369, 60 S. W. 743; *State v. Bauerle*, 145 Mo. 16, 46 S. W. 609; *State v. Gullette*, 121 Mo. 452, 26 S. W. 354; *State v. Woolard*, 111 Mo. 255, 20 S. W. 27; *State v. Hill*, 65 Mo. 87.

[4] One of the fundamental rules of interpretation, to which we have given approval, is that instructions must be construed together. *State v. Burgess*, 193 S. W. 821; *State v. Murray*, 193 S. W. 830; *State v. Montgomery*, 230 Mo. 671, 132 S. W. 232; *State v. McKenzie*, 177 Mo. loc. cit. 715, 76 S. W. 1015; *State v. Mathews*, 98 Mo. loc. cit. 130, 10 S. W. 144, 11 S. W. 1135.

The instruction complained of states the rule generally, defining the province of the jury in the absence of evidence not wholly direct and positive. Whatever it lacks in de-

fining circumstantial evidence is supplied by that portion of instruction numbered 1, given at the state's request, which is as follows:

"Circumstantial evidence is proof of certain facts and circumstances in a certain case from which the jury may infer other and connected facts which usually and reasonably follow, according to the common experience of mankind. Crime may be proven by circumstantial evidence, as well as by direct evidence of eyewitnesses, but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of defendant's innocence. Hence you are further instructed that even though no eyewitness had testified directly as to having seen the defendant steal, take, and carry away the domestic fowls as charged in the indictment, yet if you believe from all the facts and circumstances detailed in evidence that the defendant did steal, take, and carry away any of the domestic fowls, as charged in the indictment, then you should find the defendant guilty."

In this behalf, appellant has no ground of complaint.

[5] IV. It is urged that the instruction on reasonable doubt should have, in terms, been applied to the concrete facts in the case. This was not required. The instruction given was as follows:

"If upon the whole case the jury entertain a reasonable doubt of defendant's guilt, they will acquit the defendant, but to justify an acquittal upon the ground of doubt alone it must be a substantial doubt of defendant's guilt, based upon and arising out of all the facts and circumstances given in evidence, and not a mere possibility of his innocence."

Nothing more was required. An instruction is sufficient if it applies the doctrine of reasonable doubt to the whole case, and it is not necessary that it be applied in express terms to the matter at issue. *State v. Robinson*, 236 Mo. 722, 139 S. W. 140; *State v. Wertz*, 191 Mo. 569, 90 S. W. 838; *State v. Good*, 132 Mo. 114, 33 S. W. 790; *State v. Wells*, 111 Mo. 533, 20 S. W. 232; *State v. Crawford*, 84 Mo. 200; *State v. Schoenwald*, 31 Mo. 147; *State v. Dunn*, 18 Mo. 419.

The instruction given embodies the statement of the rule as to reasonable doubt approved by this court ever since the rendition of the opinion in *State v. Nueslein*, 25 Mo. 123. Appellant's contention in this regard is therefore without merit.

V. We have carefully examined the affidavit of appellant filed in support of the motion for a new trial, based on the ground of newly discovered evidence. It is to the effect that the location of objects at the scene of the crime was such as to have rendered the truth of the testimony of the principal witness for the state physically impossible. This affidavit was accompanied by photographs of the scene of the crime, and an affidavit of the photographer.

The record does not sustain this affidavit as to appellant's surprise at the testimony of the principal witness for the state and his consequent inability to produce testimony in rebuttal. However much surprised he may have been, he was enabled to introduce a witness in rebuttal, who testified explicitly as to the improbability of the testimony of the state's witness, in that the latter was not able, on account of intervening objects, to have seen the appellant commit the crime, as she stated. The jury, after hearing all of the testimony, gave credence to that adduced on behalf of the state.

[6, 7] In the face of this cogent fact, the action of the trial court in overruling the motion for a new trial was authorized on the ground that the alleged newly discovered evidence was but cumulative. Aside from this reason, the affidavit discloses a lack of diligence on the part of appellant in the preparation of his defense, which would have necessarily acquainted him with the facts he now claims to have discovered since the trial. Nothing is more easily ascertained than the location of such physical objects as would have rendered the truth of the testimony of the state's principal witness improbable, if not impossible, there being no controversy as to any change in their location either before or since the commission of the crime. One of the essentials necessary to the defense was a knowledge of the premises where the offense was charged to have been committed. Under the facts of this case, this was open to the appellant's examination from the time he received notice of the charge against him. His ignorance, therefore, in regard thereto, and his alleged surprise at the testimony of the principal witness for the state, constitutes no reason why the action of the trial court should be disturbed. It is too late for the appellant to be heard to complain, for the first time in his motion for a new trial, that he has suffered from the introduction of evidence on the part of the state, which, in the exercise of reason, he must have known would necessarily be introduced, and of the facts concerning which he could, with reasonable diligence, have had ample knowledge. We are authorized to review errors alleged to have been committed to the injury of the accused, but not to mend those of his own making, which would result in his going acquitted of punishment.

[8] Furthermore, the effect of this alleged newly discovered evidence would have been simply to assail the credit and impeach the character of the state's witness. It was properly denied on this ground. *Sang v. St. Louis*, 262 Mo. 464, 171 S. W. 347; *State v. McKenzie*, 177 Mo. 715, 76 S. W. 1015.

We find no error warranting a reversal.

The judgment of the trial court is therefore affirmed.

All concur.

REID v. SCHAFF. (No. 18976.)

(Kansas City Court of Appeals. Missouri. March 8, 1919.)

1. RAILROADS ¶328(4)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

Wagon driver, who stopped 30 or 40 feet from crossing and looked and listened, though view from such point was obstructed, and then drove on and crossed track without further effort to ascertain whether train was approaching, and without looking from point where view was unobstructed, was contributorily negligent.

2. RAILROADS ¶350(24) — CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Where defense was that driver failed to stop, look, and listen, after reaching a point where view of track was not obstructed, whether driver acted as a reasonably prudent man was for the jury.

3. RAILROADS ¶324(1)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE — ORDINARY CARE.

Wagon driver, who in approaching railroad crossing acted as an ordinarily prudent man would have done under the same circumstances, exercised ordinary care.

4. EVIDENCE ¶586(3, 4)—POSITIVE AND NEGATIVE TESTIMONY—WEIGHT.

Generally, where witnesses are of equal credit, positive evidence that a warning was given by train approaching crossing is entitled to more weight than that of witnesses who say they did not hear it.

5. RAILROADS ¶348(4)—CROSSING ACCIDENT—WARNING BY TRAIN—WEIGHT OF EVIDENCE.

In determining weight to be given witnesses testifying as to whether train approaching crossing gave the necessary warning of its approach, much depends upon the situation and position of witnesses and the attention they were giving at the time.

6. RAILROADS ¶350(7)—CROSSING ACCIDENT—SIGNALS—JURY QUESTION.

Whether train approaching crossing gave the statutory signals as a warning of its approach *held*, under the evidence, a question for the jury.

7. RAILROADS ¶312—DUTY OF ENGINEER—RINGING OF BELL—SOUNDING OF WHISTLE.

Engineer, who fails to ring bell or sound whistle 80 rods from crossing, and fails to continue ringing of bell or sounding of whistle until crossing is reached, is negligent.

8. RAILROADS ¶351(9)—ACTION FOR INJURY AT CROSSING—INSTRUCTION.

In action for injuries at crossing, instruction as to engineer's duty to ring bell or sound whistle *held* not to have led jury to think that ringing of bell and sounding of whistle were both necessary.

9. NEGLIGENCE ¶119(7) — PLEADING—VARIANCE.

Where petition charges specific negligence, plaintiff must stand or fall on the specific charge.

10. MASTER AND SERVANT ¶829 — NEGLIGENCE OF EMPLOYE — RECOVERY AGAINST EMPLOYER—PROOF.

In action against an employer, or employer jointly with employé, where gravamen of the charge is negligence of employé, there can be no recovery, in absence of proof of employé's negligence.

Appeal from Circuit Court, Boone County; D. H. Harris, Judge.

Action by William M. Reid against Charles E. Schaff, receiver of the Missouri, Kansas & Texas Railway Company, and another. Judgment for plaintiff, and defendant receiver appeals. Affirmed.

Harris & Price, of Columbia, and J. W. Jamison, of St. Louis, for appellant.

N. T. Gentry, of Columbia, for respondent.

TRIMBLE, J. Plaintiff, while driving a team of mules hitched to an empty farm wagon, in which he stood as he drove, was struck and injured at a public crossing by a swiftly moving passenger train. He brought suit for damages, alleging a failure to give the required statutory signals. A verdict and judgment for \$2,500 was obtained, and the defendant has appealed.

The suit was against the receiver of the Missouri, Kansas & Texas Railway Company and Mark Dewitt individually—the petition charging that the latter "was employed by the defendant receiver as locomotive engineer, and that as such employé the defendant receiver invested him with authority to run, control, operate, and manage trains and engines belonging to and being used by the defendant receiver over said line of railroad; that on the 26th day of December, 1917, the defendant Dewitt, as engineer, had charge of, ran, operated, and controlled the movements of a train and engine which struck and injured the plaintiff, as hereinafter stated and set forth, and was then and there in the employ of the defendant receiver, and acting within the line and scope of the power and authority conferred upon him by the defendant receiver." The receiver's answer was a general denial, coupled with a plea of contributory negligence. Dewitt's was a general denial.

At the close of plaintiff's case in chief, the defendant Dewitt demurred, and, there being no evidence that he was engineer of the train that struck plaintiff, his demurrer was sustained, whereupon plaintiff dismissed as to him. It was disclosed that one Williams, and not Dewitt, was the engineer in charge of the train that struck plaintiff. The de-

murrer of the receiver was overruled, and the case was sent to the jury. Plaintiff obtained a verdict and judgment for \$2,500, and the receiver has appealed.

In addition to alleging that Dewitt was the engineer in charge of the train as above stated, the petition charged that on the 26th day of December, 1917, the defendants, "while running certain cars and a locomotive, caused the same to pass over said public road crossing \* \* \* without ringing the bell of said locomotive, and without sounding the whistle thereon, at a point 80 rods before reaching said crossing, and without ringing said bell continuously until said crossing was passed by said locomotive, and without sounding said steam whistle at intervals until said crossing was passed; \* \* \* that while so driving on and over said railroad track at said public crossing, and without fault or negligence on his part, the plaintiff was struck by a locomotive engine and cars operated on said track by the defendants."

The injury occurred at what is known as the Gelsing crossing, on the Jefferson City public road, and it had been a public crossing for at least 25 years. The railroad runs east and west. A very short distance north of the railroad, the county road coming from the east meets another road coming from the west, and the two, merging into one, turn south and proceed to and across the railroad at right angles to it. The portion of the merged road between the meeting or turning point of the two roads and the crossing, or, in other words, that portion of the county road lying north of and next to the crossing, is practically level, and is on the same plane of altitude as the crossing itself; but immediately on the south side of the crossing the county road begins the descent of a sharp grade for some little distance south of the railroad.

Plaintiff lived on his farm northeast of the crossing, and on the morning of the day in question he was going in his wagon to a farm he had south of the railroad. He proceeded west along the road on the north side of the railroad till the merging point of the two roads was reached, and then turned south on his way to the crossing. Two grown sons were following a short distance behind the wagon, having chosen to walk in order to keep warm. At some point in the level portion of the road between the turn in the roads and the crossing, the plaintiff stopped his wagon and looked and listened for a train. On the north side of the track, and to the west of this level piece of road, the view is obstructed by a sharp curve in the track, by a bluff, and by some timber and bushes that extend down to the road and to the right of way of the railroad. Hearing no train, the plaintiff drove on toward and upon the crossing. When plaintiff got on the track, he suddenly saw the train bearing down upon him, and began slapping the mules with the

lines to get out of the way. The mules became frightened, however, and with characteristic maulishness "just squatted down" when the hind wheels of the wagon were still on the track. The engine struck the wagon, demolishing it, and hurling plaintiff some distance against a fence, with such violence as to break it down. Plaintiff's injuries do not seem to be in dispute.

[1] Defendant entertains the view that plaintiff's own evidence is such that we are justified in saying, as a matter of law, that his own negligence contributed to, or helped bring about, his injury. A careful study of the record convinces us that we are not warranted in so holding. The contention rests upon the assumption that certain distances were absolutely fixed and conclusively established, that only one conclusion can be drawn from plaintiff's evidence, and that only from certain statements contained therein. Defendant put in evidence tending to show that at 30 or 40 feet from the crossing the view of the track to the west was so obstructed that one could not see any distance at all; that at 25 feet from the crossing one could see 176 feet down the track, at 15 feet from the crossing one could see 196 feet down the railroad, and at 10 feet from the crossing one could see 210 feet down the track and observe an approaching train. On the assumption that this evidence is conclusively established and must be accepted, defendant rests the contention that plaintiff stopped his wagon and looked and listened for trains at a point 35 or 40 feet north of the crossing, where he could not see, and then drove onto the crossing without giving further heed, until he saw and heard the engine bearing down close upon him. Doubtless, if these matters were established beyond dispute, the plaintiff should be declared to be guilty of contributory negligence as a matter of law. *Shore v. Dunham*, 178 S. W. 900; *Owens v. St. Louis, etc., R. Co.*, 188 Mo. App. 450, 174 S. W. 116; *Landrum v. St. Louis, etc., R. Co.*, 178 S. W. 273; *Collett v. Kuhlman*, 243 Mo. 585, 591, 147 S. W. 965. But we cannot say they were established with such exact and conclusive precision as enables us to say that no other view can be taken of the evidence, except the one defendant takes.

In the first place, the evidence in plaintiff's favor was to the effect that, even at the distance of 15 or 20 feet from the track, there were things, such as shrubbery, trees, brush, and higher ground, to obstruct the view of an approaching engine. Defendant's surveyor admitted these things were there, but asserted that nevertheless a man could be seen down the track for the distances hereinabove stated. But, plaintiff testified that when "within a few feet of the track" one could get a pretty good view down the track—I. e., east of the crossing—but that up the track, or west of the crossing, "you can't see no distance much," and other testimony in



plaintiff's favor was that, if a traveler stopped his team anywhere in the clear north of the track, he could not see very far, and the photographs in evidence tend to bear out this trend of the testimony. There is also other evidence tending to show that, even when one is squarely on the track, the distance one can see down it is not so far as defendant's measurements make it. In the next place, although plaintiff, in estimating the distance from the crossing at which he stopped and looked and listened for a train, placed it at 35 or 40 feet, yet he showed throughout that he did not know how far it was. When first asked about it, he said he stopped on the level place "just beyond the railroad track." When asked how far, he said he did not know—"not very far, but far enough to be out of danger." He said he stopped to look for a train; that he looked, and that he listened; that he did not see any, and did not hear any coming. The evidence of his son, who was walking and following the wagon, in one part thereof, places the point where he stopped nearer to the crossing than the estimate given by the father, and in one other part thereof puts it much closer to the rails.

Now, it is true, in one place in his cross-examination, plaintiff's testimony does clearly convey the idea that, after having thus stopped and looked and listened, he then drove onto the crossing without further look-out for the train, at least without looking further in the direction from whence it came, until he himself was on the track, when he saw it bearing down upon him. But prior to this he was asked as to which of his boys was nearest to, and how far from, the wagon as he approached the crossing; and in explaining why he could not say how far behind he was, plaintiff said that he was looking for the train, and never looked back to see how far behind he was; and on re-direct examination, after stating that he did not see or hear any train where he stopped and looked and listened, he was asked whether or not he continued to look for the train, and he replied, "Yes, sir; I was looking and listening for the train, of course, before I drove on the track." He further said he could not tell exactly how far away it was when he first saw it, but he did not have time to do much. Defendant seems to think that there is a flat, absolute, irreconcilable, and unexplained contradiction between these portions of his testimony, and that we should accept the one and disregard the other. But we do not think they are so wholly opposed, irreconcilable, and inexplicable as to enable us to say that he was unquestionably telling the truth in one and lying in the other. At most, it was for the jury to say what was plaintiff's testimony on that feature of the case.

[2, 3] It is contended that the fact that he did not see the train till it was close upon

him showed that he was not looking as he drove toward the track from the point where he stopped, for if he had been looking he would have seen it before he got on the track. But this does not appear so conclusively as to justify us in saying so. As in the case of the matters just considered, it depends too much upon the niceties of a mathematical calculation, based upon assumed exactitude of distances and opportunities which are much too inexact, uncertain, and in dispute to permit us to say the finding of the jury was wrong. According to even the testimony of defendant's engineer, the train was going "all of 35 miles per hour." If it was going at this rate, it was traveling 61 and a fraction feet a second, and, if going 40 miles per hour, was moving at the rate of 58 and a fraction feet per second. Plaintiff could not tell how far the train was away when he first saw it, and manifestly any attempt to fix the distance was merely an estimate, and so, also, is it uncertain as to the exact place he was when he first saw the train. Under the excitement of the moment he had no time to accurately measure distances, or to judge the precise and particular spot his wagon and team occupied, save only that they were in the zone of danger, and he began wildly slapping his team with the lines to get out, but before the rear of his wagon cleared the rails the mules squatted, and in an instant the collision occurred. It is not affirmatively stated how fast the wagon was going, but there is enough to support an inference that it was not going much faster than a man would walk. If it was going 5 miles per hour, it was moving at the rate of 7 and a fraction feet per second. If plaintiff was looking to the west when he himself reached a point 20 feet from the track, the noses of his mules were within less than 7 feet of danger, and when he himself was 10 feet from the track, they had already passed into the danger zone. To travel this 20 or 15 feet, plus the distance he would have to get from one rail to the other, and then to get the rear of his wagon beyond the reach of the train, would require 4, or at best 3, seconds, to say nothing of the delay caused by the squatting of the frightened mules. In this short interval the train could travel from 153 to 204 feet at one speed, and from 204 to 232 feet at the other speed, and this, too, as stated, without making any allowance for the interval that elapsed between the squatting of the mules and the collision. Under such circumstances, it is not for us to say that the train was in sight when plaintiff got 15 feet from the track, and that therefore to look at that point was to see, and, since he did not see, it must be conclusively held that he did not look. Under all the evidence, the question of whether plaintiff acted as a reasonable man of ordinary prudence would do under the same circumstances was for the jury. If he did, he was in the exercise of ordinary

care. *Kenney v. Hannibal & St. Joseph R. Co.*, 105 Mo. 270, 286, 15 S. W. 983, 16 S. W. 887; *Russell v. Receivers, Atchison, etc., R. Co.*, 70 Mo. App. 88, 90. And that is all that is required of him.

[4-6] It cannot be said that plaintiff's evidence as to the failure to give the statutory signals is so purely negative in character as to raise no issue against the affirmative evidence of the engineer that he did give them. Plaintiff says that he was listening for them, and that they were not given. Two passengers, one in the chair car and the other in the smoker, say they did not hear any signals given. Two men sitting on a log, perhaps a quarter of a mile away testify that only the danger alarm of several quick, short blasts were given, and these were those made just before the collision, about which there was no controversy. A man shucking corn about 200 yards or less away, and plaintiff's two sons, walking along the road, say they did not hear any signals, but did hear the danger alarm. There was ample evidence to make an issue for the jury on this question. *Taylor v. St. Louis, etc., R. Co.*, 83 Mo. 386, 388. It is true that sometimes positive evidence of witnesses, who concededly are in a position to know, to the effect that warning signals were given, will prevail over evidence of witnesses concededly not so well situated, or of little or no opportunity to know, that they did not hear any warning. The general rule is that—

"Where the witnesses are of equal credit, the positive evidence that a warning was given is \* \* \* entitled to *more weight* than that of witnesses who say they did not hear it. Much depends upon the situation and position of the witnesses and the attention they were giving at the time." (Italics ours.) *Murray v. Missouri Pacific R. Co.*, 101 Mo. 238, 242, 13 S. W. 817, 819 (20 Am. St. Rep. 601).

In the case at bar, the circumstances were such as to make it a question for the jury. *Dutcher v. Wabash R. Co.*, 241 Mo. 137, 145 S. W. 63; *Hanlon v. Missouri Pacific R. Co.*, 104 Mo. 381, 388, 16 S. W. 233; *State ex rel. v. Kansas City, etc., R. Co.*, 70 Mo. App. 634, 642.

[7, 8] We are unable to agree with defendant in his criticism of plaintiff's instruction No. 1. It clearly and explicitly told the jury that the law required a bell to be rung at a distance of 80 rods from the crossing, and to be kept ringing till the engine shall have crossed the road, or a whistle to be sounded at least 80 rods from the crossing, and sounded at intervals until the engine shall have crossed such road. It then told the jury that, if they believed from the evidence that the engineer negligently failed to ring the bell at a distance of 80 rods from the crossing, and failed to keep same ringing until the crossing was reached, and that the

engineer negligently failed to sound the whistle 80 rods before reaching the crossing, and failed to sound the same at intervals until the locomotive crossed said crossing, and that by reason thereof the plaintiff, through no fault or negligence on his part, was struck and injured, the jury should find for plaintiff. In other words, the jury were told that the law required defendant to either ring the bell or blow the whistle but before recovery could be had the plaintiff must prove, and the jury must find, that the engineer negligently failed to do his duty in both of these respects. This was correct. *Van Note v. Hannibal, etc., R. Co.*, 70 Mo. 641; *Terry v. St. Louis, etc., R. Co.*, 89 Mo. 586, 1 S. W. 746. We are unable to see how the jury could possibly be led by the instruction to think that the law required both the bell to be rung and the whistle to be blown.

[9, 10] The fact that Williams, and not Dewitt, was the engineer in charge of the train, does not call for a reversal of the judgment. There is no doubt of the correctness of the rule that, where the petition charges specific negligence, plaintiff must stand or fall on the specific charge. *Northam v. United Railways (Sup.)* 176 S. W. 227. And it is no doubt true that in certain actions "whether brought against the employer severally, or jointly with the employé, the gravamen of the charge is, and must be, the negligence of the employé, and no recovery can be had unless it be proven, and found by the jury, that the employé was negligent." *McGinnis v. Chicago, etc., R. Co.*, 200 Mo. 847, 360, 98 S. W. 590, 593 (9 L. R. A. [N. S.] 880, 118 Am. St. Rep. 661, 9 Ann. Cas. 656). But the case we have here is wholly unlike the two cited. In the case at bar the specific negligence charged is the failure to give the statutory signals, and the evidence shows that the employé did fail to give them; the only difference being that the employé's name was Williams, instead of Dewitt. In the *Northam* Case the negligence charged consisted of one thing, and the proof showed it was an entirely different thing; and in the *McGinnis* Case the act of the employé was the sole basis of plaintiff's complaint, and, if there was no negligence on the part of the employé in doing that act, then there was nothing on which to predicate liability of his employer. Of course, if the erroneous naming of the engineer had tended in any way to mislead the defendant as to the particular train which struck plaintiff, or induced defendant to come prepared to defend against any other situation or state of facts on that account, then the error in giving the name of the engineer would be vital and important. But there is no pretense of anything of this kind, and it is manifest that defendant was not misled in any way.

The judgment is affirmed.

All concur.

**BOYCE v. HOWELL et al. (No. 18069.)**

(Kansas City Court of Appeals. Missouri.  
Feb. 17, 1919.)

**1. JURY ¶28(6)—WAIVER OF OBJECTIONS—JURY TRIAL.**

Where defendant's attorney upon statement by the court, at outset of case, that in his opinion it was an equity case, remarked: "We think it is a jury case. We have no objection to the court trying it, however"—and made no objection nor took exception to court's ruling that it was a case for the court and not triable by a jury, defendant waived a trial by the jury, notwithstanding exception taken to court's action in discharging the jury.

**2. APPEAL AND ERROR ¶1010(1)—REVIEW—FINDINGS—LAW ACTION.**

In law action where court's finding is sustained by abundant evidence, the Court of Appeals will not interfere.

**3. PARTNERSHIP ¶53—EXISTENCE—SUFFICIENCY OF EVIDENCE.**

Evidence held to show partnership in the purchase, shipment, and sale on the market of a lot of hogs.

**4. PARTNERSHIP ¶818—ACCOUNTING—FORM OF REMEDY.**

Where there has been an adjustment of partnership affairs between the members and a balance struck, an action at law will lie.

**5. PARTNERSHIP ¶107—ACTION BETWEEN—ABSENCE OF SETTLEMENT.**

An action at law will lie between partners where dispute is over a single item and does not involve an accounting, though there has been no settlement.

**6. ACTION ¶25(2)—LEGAL OR EQUITABLE—PARTNERSHIP TRANSACTIONS.**

An action on alleged partnership in the purchase, shipment, and sale on the market of a lot of hogs, where there were matters to adjust before the profits, the share of each partner, and the amount held by defendant partner could be ascertained, was an action in equity.

Appeal from Circuit Court, Boone County;  
D. H. Harris, Judge.

"Not to be officially published."

Action by W. M. Boyce against Murry Howell and another. Judgment for plaintiff, and defendant appeals. Affirmed.

H. D. Murry and E. C. Anderson, both of Columbia, for appellants.

N. T. Gentry and Russell E. Holloway, both of Columbia, for respondent.

**ELLISON, J.** Plaintiff's action is based on a petition alleging a partnership between him and defendant Murry Howell in the purchase, shipment, and sale on the market of a lot of hogs; that there was a profit made; and that defendant Murry Howell had taken the results of the sale to himself and refused

a division with plaintiff. Defendant Joseph Howell was made a party defendant on account of his alleged connection with the deal. The cause was tried by the court without the aid of a jury, and a judgment rendered for the plaintiff in the sum of \$146.03.

The first and one of the principal grounds of objection urged to the judgment rendered is that the case is one at law and that the trial court erred in trying it without a jury. Plaintiff takes the position that the action is in equity and that it was properly tried by the court. He also claims that, even though the action was at law, it was tried by the court by consent of defendants entered of record at the opening of the trial.

[1, 2] It seems that before the court had looked at the pleadings a jury had been called. After looking over the pleadings, the court expressed the opinion that it was an equity case, remarking, "I don't think it is a jury case." Counsel for defendants then spoke up and said: "We think it is a jury case. We have no objection to the court trying it however." The court then remarked that a particular fact could be submitted to a jury, but if it was not a jury case the court would not be bound by the finding. Then counsel for defendants stated that he "understood it to be in the discretion of the court as to whether he will take the opinion of the jury on any fact." The court then discharged the jury, to which action of the court, "in so discharging the jury," the defendants excepted. There was no objection or exception to the ruling that it was a case for the court and was not triable by a jury; on the contrary, the defendants stated that they had no objection to it being tried by the court. In this situation we are of the opinion that, if the case is one at law, a trial by jury was waived. We know of no other way to interpret the plain language used. Counsel showed that he differed from the court as to the kind of case it was, but added that nevertheless, or notwithstanding he thought it a law case, he had no objection to it being tried by the court. That is the meaning of the expression, "however." The subsequent objection to discharging the jury could not be made into an objection to the case being tried by the court. If an action at law, the evidence abundantly sustains the result reached by the trial court, and we cannot interfere.

[3] But in our opinion the case is in fact one in equity. The evidence conclusively shows a partnership. It is true that, taking the mere language used by defendant in testifying, he denied that there was a partnership. It is, however, evident that that was only a conclusion of his. Certain facts are either admitted or conclusively appear. By agreement between the parties, plaintiff bought 107 hogs of one Devers. Plaintiff was to take 20 head of those of lighter weight

for an individual purpose. But the 87 head were shipped to market in the name of Howell & Boyce, both parties participating in the shipment. The hogs were sold on the market as property of Howell & Boyce, and returns made in that name. Defendant got the proceeds. He gave to plaintiff a check for \$35, which was refused. At the trial he conceded the net profits were larger than double that sum and excused himself for only allowing that much to plaintiff on the ground that he had only promised to give him "a piece of money" if the deal turned out well.

[4-6] But defendant claims that, though there may have been a partnership, yet the action was at law for the reason that it involved but a single transaction. It is true that, where there has been an adjustment of partnership affairs between the members and a balance struck, and also, even where there has not been a settlement, in instances which do not involve an accounting, the dispute being over a single item, an action at law will lie. But here there were matters to adjust before it could be ascertained what the profits were and the share of each, and what defendant held in his hands. The purchase money, weights, freight, bedding in the car, feed, yardage, as well as commissions for sale on the market, and perhaps other expenses, and we have no doubt the relief was properly addressed to a court of equity. *Bambrick v. Simms*, 132 Mo. 48, 51, 33 S. W. 445; *Byrd v. Fox*, 8 Mo. 574; *Scott v. Caruth*, 50 Mo. 120.

We find no ground for interference, and hence affirm the judgment.

All concur.

(201 Mo. App. 162)

**FROLICHSTEIN v. CUPPLES STATION LIGHT, HEAT & POWER CO. et al.**  
(No. 16197.)

(St. Louis Court of Appeals. Missouri. Argued and Submitted January 22, 1919. Opinion Filed March 4, 1919. Rehearing Denied March 20, 1919.)

**1. ELECTRICITY §9(2)—WIRES—PERMITS UNDER CITY ORDINANCES.**

While Ordinance No. 18680 of city of St. Louis, the Keyes Ordinance, establishing district where electric wires are required to be laid in conduits, authorized and required parties to file application for permits under ordinance within 90 days, it also required them to file acceptances of provisions of Revised Code of Ordinances of 1895, c. 15, arts. 2, 9, granting privilege to place wires along streets and alleys and public places within time provided by the Keyes Ordinance, any time limit of articles 2 and 9, having been brought down to the date of the Keyes Ordinance by its section 604H.

**2. MUNICIPAL CORPORATIONS §112(3)—ORDINANCES—TITLE AND SUBJECT—ELECTRIC WIRES.**

Ordinance No. 18680 of city of St. Louis, establishing a district wherein electric wires are required to be placed in conduits, despite its title, has to do with permitting the stringing of overhead wires by persons or corporations accepting and complying with Revised Ordinances, c. 15, arts. 2, 9.

**3. ELECTRICITY §9(2)—OVERHEAD WIRES—RIGHT OF POWER COMPANY—MUNICIPAL ORDINANCES.**

Power company, by acceptance of terms prescribed by Ordinance No. 18680 of the city of St. Louis, within the time therein prescribed, and by acceptance of the terms and compliance with the provisions of Revised Code of Ordinances of 1895, c. 15, arts. 2, 9, within the time designated in the Keyes Ordinance, obtained authority to erect poles and string overhead electric wires in district proposed outside of the restricted underground district established by the ordinance.

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Suit for injunction by Simon H. Frolichstein against the Cupples Station Light, Heat & Power Company and the City of St. Louis. From judgment for defendants, plaintiff appeals. Affirmed.

See, also, 201 S. W. 897.

Schnurmacher & Rassieur and John M. Goodwin, all of St. Louis, for appellant.

Nathan Frank, Charles W. Bates, and I. R. Kelso, all of St. Louis, for respondent Cupples Station Light, Heat & Power Co.

Charles H. Daues and H. A. Hamilton, both of St. Louis, for respondent City of St. Louis.

REYNOLDS, P. J. On August 8th, 1914, plaintiff commenced this action against Cupples Station Light, Heat & Power Company (hereafter, for brevity, called Cupples Company), and the City of St. Louis, by filing a petition, in which, averring the incorporation of the Cupples Company under the general laws of this state, and that the defendant City of St. Louis is a municipal corporation of this state, it is set out that plaintiff is the owner of a certain lot situated on Minerva Avenue, in the City of St. Louis, and that the Cupples Company is about to erect in front of it, poles "whereon to string electric wires carrying a high voltage of electric current," without the consent or approval of plaintiff, and against his wish, and is about to do so with the license, permit and consent of the City of St. Louis, undertaken to be given and granted by the Board of Public Improvements of the city. Plaintiff prays for an injunction restraining the placing, erecting or maintaining of any poles by de-

defendant Cupples Company in front of, adjacent, or contingent to the property of plaintiff pending the hearing of the cause, and that on final hearing a permanent injunction be issued, restraining defendant from doing any of the acts aforesaid. Upon the filing of this petition a temporary injunction was issued. Thereafter proceedings were instituted for contempt for alleged violation of the temporary injunction. Each defendant made return to this, but this proceeding for contempt being afterwards abandoned, the returns, by leave of court, stood as answers to the petition and we will so treat them.

The answer of the Cupples Company, admitting its incorporation and that of its co-defendant, denies that it is about to or will erect "in front of the plaintiff's said property" any poles, and denies each and every allegation in the petition except those alleging the incorporation of itself and its co-defendant.

The answer of the City of St. Louis, after denying the allegations in the petition, sets up the adoption of ordinance No. 18,680, and its approval September 8th, 1896, this ordinance commonly known as the "Keyes Ordinance." The terms of the ordinance are set out, among them the provision that the corporations referred to, as a condition precedent to the acquisition of the privileges described, agree to comply with the terms and conditions of article 2, and article 9, chapter 15, of an ordinance in revision of the ordinance of the city approved April 7th, 1893, and that before the expiration of the period of 90 days after the passage of ordinance 18,680, the Cupples Company was duly authorized by its charter to operate wires, etc., and that on dates named, running from December 4th to December 30th, 1896, it duly filed with the City Register written acceptances of all the terms and conditions of articles 2 and 9, chapter 15 of the Revised Ordinance, approved April 7th, 1893, and of all the terms and conditions and obligations of ordinance 18,680, and had duly executed the bonds required by those articles and by ordinance No. 18,680, and that the bonds had been duly approved by the Mayor and Council of the City of St. Louis. It is further averred that Minerva Avenue is a public street in the city and that the part of it referred to is outside of the limits prescribed by ordinance No. 18,680, within which all wires, tubes, cables, etc., conveying electricity were required to be placed below the surface of the streets, alleys, etc.; that on or about August 3d, 1914, the Cupples Company duly applied to the Board of Public Improvements of the City of St. Louis for a permit to erect a pole at the point described in plaintiff's petition, for the purpose of placing wires and cables conducting electricity thereon, and that on or about August 5th, 1914, the Board of Public Improvements of the

city duly issued a permit to the Cupples Company pursuant to the terms of ordinance No. 18,680 and not otherwise.

General denials by way of replies to these returns, substituted as answers, were filed in due time, the cause was heard before the court, the temporary injunction dissolved and plaintiff's action dismissed, there being a judgment for the defendants.

From this an appeal was taken to the Supreme Court. That court holding that the City of St. Louis was not a necessary party to the proceeding and that its presence alone sustained the jurisdiction of the Supreme Court, transferred the cause to our court. *Frolichstein v. Cupples Station Light, Heat & Power Co. et al.*, not yet officially reported, but see 201 S. W. 897.

At the trial it was stipulated by counsel that permits were issued to the Cupples Company, among others, in accordance with ordinance No. 18,680, and that the Cupples Company acquired whatever authority it had through the permit issued to it under that ordinance; that within ninety days after the passage of ordinance No. 18,680, the defendant Cupples Company was duly authorized by its charter to operate wires, tubes and cables conducting, transmitting or employing electricity for public use in the City of St. Louis, and that it did, on or about the 4th day of December, 1896, file with the City Register its written acceptance of all the terms and conditions of article 2, and also article 9, of chapter 15, of the Revised Ordinances of the City of St. Louis, approved April 7th, 1893; that on or about December 5th, 1896, said Cupples Company duly executed its bond to the City of St. Louis in the penal sum of \$20,000, conditioned that it would comply with all of the conditions of article 2 and article 9, chapter 15, of the Revised Ordinances of the City of St. Louis, approved April 7th, 1893; that said bond was duly approved by the Mayor and Council of the City of St. Louis; that on the 5th day of December, 1896, the defendant Cupples Company executed its bond to the City of St. Louis in the sum of \$50,000, conditioned that all of its conduits, ducts, manholes and other appurtenances should be constructed in strict accordance with plans approved by the Board of Public Improvements of the City of St. Louis and to hold said city harmless from all suits for damages which might arise from the construction of said appliances, and that it would faithfully comply with all the terms of article 2, as amended, of chapter 15, and of article 9, of chapter 15, of the Revised Ordinances of the City of St. Louis, approved by the Mayor and Council of the City of St. Louis; that on or about the 30th day of December, 1896, the Cupples Company duly executed its bond to the City of St. Louis in the sum of \$20,000, conditioned that it would comply with all of the con-

ditions of article 9, chapter 15, of the Revised Ordinances of the City of St. Louis, approved April 7th, 1893; that said bond was duly approved by the Mayor and Council of the City of St. Louis; that the acceptances and these bonds were all required of companies seeking to qualify and to secure the benefits of the provisions of what is known as the Keyes Ordinance (ordinance No. 18,680), to qualify the companies under that Keyes Ordinance; that the street where these poles were being erected or threatened to be erected, is a public street of the City of St. Louis, and that that part of the street where the poles were threatened to be erected is outside of the restricted limits specified in the limits of the Keyes Ordinance (No. 18,680).

Plaintiff introduced no oral evidence.

Defendants introduced in evidence ordinance No. 11,976, approved March 20th, 1882. An analysis of this ordinance, as far as necessary, will be found in the opinion of the learned circuit judge hereafter embodied. Also ordinance No. 12,723, approved March 15th, 1884. See Revised Ordinances 1887 (Sullivan's Edition), adopted by ordinance No. 14,000, approved April 12th, 1887, and there appearing as sections 581 to 592, article 2, chapter 15. The concluding two sections of ordinance No. 12,723 (sections 12 and 13) do not appear in Sullivan's Edition, section 12 repealing all ordinances or parts of ordinances inconsistent with the terms of this ordinance, and section 13 being a reservation on the part of the city of the right to amend, alter or repeal the ordinance at any time. Also ordinance No. 16,894, approved October 26th, 1892, which struck out sections 581, 582, 584, 585 and 586, as there appearing in article 2, chapter 15, and substituted 5 sections in lieu of them. As amended they appear as sections 603, 605, 606, 607 and 608, of the revision of revised ordinance No. 17,188, approved April 7th, 1893, article 2, chapter 15, Krum's Edition. Also ordinance No. 18,157, approved July 31st, 1896, which amends section 604, article 2, chapter 15, Krum's Edition, supra, by inserting a new section in lieu thereof. As this is one of the ordinances repealed by the Keyes Ordinance it is not necessary to set it out.

The next ordinance offered was No. 18,480, approved April 20th, 1896. As it was agreed at the hearing that this ordinance had never been accepted or acted upon by any one, and as it was repealed by the Keyes Ordinance, it is not necessary to set it out. The next ordinance introduced in evidence was No. 18,680, the Keyes Ordinance. As that is fully commented on in the opinion of the learned circuit judge, hereafter referred to, it is not necessary to set it out, further than to say that it first appeared in McQuillin's Municipal Code of

1900, as parts of article 6, chapter 12. Article 2, chapter 15, of the Revised Ordinance (No. 17,188, approved April 7th, 1893), and article 9 of the same chapter (see Krum's Edition of 1895) were also in evidence.

The only oral testimony was given by a witness called by defendants, who testified that he had entered into office as supervisor of city lighting in St. Louis in 1890, and was in that office in the fall of 1896. He testified that he was familiar with the conditions that existed throughout the City of St. Louis in respect to electric light conduits, wiring systems and things of that sort; that up to and before 1896, electricity was conducted through the streets of the city for commercial purposes by overhead conductors, that being the plan prevailing throughout the whole city, that is conducted by lines and wires supported by poles; that prior to September, 1896, there were some conduits laid for conveyance of electric current, known as mutual or neighborhood conduits, but these were not of much, if any, commercial importance; remembered the passage of ordinance No. 18,680, commonly known as the "Keyes Ordinance," which was passed in September, 1896, which created a so-called underground district within which wires conveying electric current were required to be put underground. The only conduits outside of that district up to that time were in Benton and Waverly Places, probably covering about 2,000 feet, the electricity used for lighting those private places. These were afterwards connected with the public conduit for commercial purposes. It was admitted that what was known as ordinance No. 11,976, approved March 30th, 1882, and before the adoption of the Keyes Ordinance, was never accepted by any person or corporation; that ordinance No. 18,480, approved April 20th, 1896, was never accepted by any person or corporation and nothing was ever done or undertaken under it and it was abandoned.

Plaintiff then offered in evidence five exhibits, being the acceptance by the Cupples Company of all the terms and obligations and conditions of ordinance No. 18,680, as also of "all the terms, conditions and obligations in all respects of article 2 and article 9, of chapter 15, of the Revised Ordinances of the city of St. Louis, approved April 7th, 1893, and of an ordinance amendatory thereof, being ordinance No. 18,680, approved September 8th, 1896," as also two bonds for \$20,000 each, required by those articles, as well as the bond for \$50,000, required by ordinance No. 18,680, all of which bore the certificate of the City Counselor that they were in due form of law, were approved by the Mayor on various dates from December 4th to December 30th, 1898, and by the City Council and duly filed with the City Register.

The assignments of error by the learned counsel for the appellant are to the action of the trial court in holding and adjudging that persons, corporations or associations, who had complied with ordinance No. 18,680, and no more, were entitled to permits or a franchise to place wires above the surface of the ground in the streets, alleys and public places of the city, here referring to Minerva avenue in front of the abutting property of plaintiff, that point being outside of the prohibited district within which all wires were required to be placed underground.

Learned counsel for the city contend that the issuing of the permits to the Cupples Company was regular and in conformity with the ordinances, and that therefore the judgment of the circuit court should be sustained.

Learned counsel for the Cupples Company also argue that the respondent had complied with all the requirements of ordinance No. 18,680, commonly known as the Keyes Ordinance, and that the record shows that, and that it is not questioned in the case; that the provisions of article 2, of chapter 15, of the Revised Ordinances of the city, after the enactment of the Keyes Ordinance, granted to all those who comply with the requirements of these ordinances, an electric wire franchise to use the streets and alleys and public places in the city for the transmission of electricity in serving the public, and as bearing upon the construction of these ordinance provisions, it is suggested that after the adoption of an amendatory ordinance, the amendment forms part of the ordinance amended and the two form one complete ordinance and must be read as one in its application to future transactions; that the ordinance is to be construed as a whole, including the title, and that a fair and reasonable meaning shall be accorded, giving the full effect to all the language and discarding none of it as meaningless; that Acts granting franchise rights in the streets should be construed so as to prevent monopolies; that the Keyes Ordinance was authority from the Municipal Assembly as required by section 603, of article 2, of chapter 15, of the revised ordinance granting to respondent, upon compliance with its terms, the privilege of placing wires, etc., along the streets and alleys and public places of the city, and that the title of the Keyes Ordinance is sufficient to justify provisions relating to overhead as well as underground electric wires and appurtenances.

By a reply brief learned counsel for appellant contend that the Keyes Ordinance is confined to and must be construed as only granting underground and conduit privileges.

It is not out of place to note that the learned judge of the Supreme Court who wrote the opinion in this case, said:

"In passing it might be stated that the Union Electric Light & Power Company, though not a party to the record, is also interested in the case, in that it does not want the Cupples Company to enter that field as a competitor in business, and is assisting the plaintiff in the prosecution of this case."

That is still the situation.

We have before us the opinion filed with his decision in the case by the learned circuit judge who heard and determined it. As that judge was the author and annotator of the Municipal Code of 1900, as also author of a very extensive and accepted work on municipal corporations (McQuillin on Municipal Corporations), we have no hesitation in following his analysis of the history of the municipal legislation on this matter and avail ourselves of the opinion which he filed by extracting therefrom the following:

After stating the claims of the several parties that learned judge says:

"The precise question presented for determination, therefore, is whether the defendant company is entitled to maintain poles and wires for the distribution of electricity in those parts of the City outside of the underground district defined by Ordinance No. 18,680, usually called the Keyes Ordinance.

"Whatever right, if any, the defendant Company has in this respect is in the nature of a franchise duly obtained from the municipality, and in the City of St. Louis such franchise right can be granted legally only by ordinance, either general or special. No special ordinance is claimed to exist here, but defendant Company relies alone on the general ordinances of the City of St. Louis.

\* \* \* \* \*

"The state of the legislation on the part of the City discloses the following facts:

"By virtue of Section 1158, Revised Code of the City of St. Louis, 1912 (Section 1093, Revised Code, 1903), and Section 1070, Municipal Code, 1901, which provision is part of Ordinance 16,894, approved October 26, 1892, wires, tubes and cables conveying electricity for the production of light, heat or power can be placed along or across any of the streets, alleys and public places in the City, by any person, corporation or association, on one of two conditions only:

"1. By having, prior to October 26, 1892, accepted and complied with Ordinance No. 12,723, approved March 15, 1884.

"2. By due authorization by the Municipal Assembly (by ordinance) and then only as provided by ordinance.

"The first ordinance on this subject is No. 11,976, approved March 30, 1882, and the first section thereof provides:

"That no wires or cables conveying electricity for the production of light or power shall be placed along or across any of the streets or alleys in the City of St. Louis, except as hereinafter provided."

"Section 1 of Ordinance 12,723, approved March 15, 1884 (being the second ordinance on the subject), employs the same language.

"Section 2 of Ordinance 11,976 provides that all such wires or cables along or across any of

the streets or alleys 'shall be placed at such a distance below the surface of the ground, and in such manner, as shall be prescribed by the Board of Public Improvements.'

"Section 2 of Ordinance 12,723 provides that all such wires, tubes and cables along or across any of the streets, alleys or public places 'shall be placed at such distance above or below the surface of the ground, and secured in such manner as shall be prescribed by the Board of Public Improvements.' The latter ordinance does not repeal section 2 of Ordinance 11,976 or any part thereof, by express terms, but contains the common general statement 'That all ordinances or parts of ordinances inconsistent with the terms of this ordinance be and the same are hereby repealed.' (Section 12.)

"Ordinance No. 12,723 provides a complete method for placing wires, etc., and Section 3 thereof conferred the right in broad terms on 'any person or persons, corporation or association,' but Section 1186, R. C. 1912 (Section 1118, R. C. 1907, and Section 1095, M. C. 1901, which is a part of Ordinance No. 16,894, hereinafter mentioned, and which repeals Section 3 of Ordinance No. 12,723), restricts the right to such 'person or persons, corporation or association duly authorized to do business in the City,' etc.

"Ordinance 12,723 was incorporated in the revision of the general ordinance of 1887, under the designation of Article II, Chapter 15, and its several provisions became Sections 581 to 592, both inclusive; and Section 2 thereof, above quoted, became Section 582 of that revision.

"Ordinance No. 16,894 was approved October 26, 1892. It is an amendment to certain sections of Article II, Chapter 15, of the Revision of 1887, by striking out Sections 581, 583, 584, 585 and 586, and enacting new sections in lieu thereof; but Sections 582, 587 to 592, both inclusive, were not altered by this legislation. The new Section 581 of Ordinance 16,894 provides 'that no wires or cables conveying electricity for the production of light, heat or power shall hereafter be placed along or across any of the streets, alleys or public places in the City of St. Louis by any person, corporation or association not having previous to the passage of this ordinance (October 26, 1892) accepted and complied with Ordinance 12,723, now amended, or shall be duly authorized by the Municipal Assembly, and that only as hereinafter provided.'

"This new Section 581 became Section 603 of the revision of general ordinances approved April 7, 1893, and Section 582 of the revision of 1887 became Section 604 of the revision of 1893, which section is Section 2 of Ordinance 12,723.

"By comparison of Ordinances 12,723 and 16,894, it appears that the latter ordinance, by amendment of Article II, Chapter 15, of the revision of 1887, repealed Sections 1, 3, 4, 5 and 6 of the former ordinance, and permitted the following sections to stand: 2, 7, 8, 9, 10, 11, 12 and 13.

"Section 2 of Ordinance 12,723, although not repealed by express terms, is superseded by Section 1159, R. C. 1912 (Section 1084, R. C. 1907, and Section 1071, M. C. 1901), as the latter provisions are not inconsistent.

"Section 7 is now Section 1190, R. C. 1912 (Section 1122, R. C. 1907, and Section 1099, M. C. 1901).

"Section 8 is now Section 1191, R. C. 1912

(Section 1123, R. C. 1907, and Section 1100, M. C. 1901).

"Section 9 is now Section 1192, R. C. 1912 (Section 1124, R. C. 1907, and Section 1101, M. C. 1901).

"Section 10 is now Section 1193, R. C. 1912 (Section 1125, R. C. 1907, and Section 1102, M. C. 1901).

"Section 11 is now Section 1194, R. C. 1912 (Section 1126, R. C. 1907, and Section 1104, M. C. 1901).

"Section 12 relates to repealing of inconsistent ordinances.

"Section 13 is now Section 1195, R. C. 1912 (Section 1127, R. C. 1907, and Section 1104, M. C. 1901).

"As already stated, Section 3 of Ordinance 12,723 extended the right to place wires, etc., on the conditions therein specified in broad terms 'to any person, persons, corporation or association.' Ordinance No. 16,894 restricted the right—first, to such persons, corporations or associations as are duly authorized by ordinance to do business in the City, etc.; second, to those who had qualified under Ordinance 12,723 prior to October 26, 1892, or who should obtain permission by ordinance (either general or special).

"Ordinance 18,157, approved July 31, 1895, struck out Section 604 of the Revision of 1893 and inserted in lieu thereof a new section which, in substance, provided that wires placed above the surface of the ground should be under the direction of the Board of Public Improvements, and that an ordinance was necessary to confer the power to place wires below the surface of the ground, and that the work should be done under the supervision of the Board of Public Improvements, etc.

"Ordinance No. 18,480 was approved April 20, 1896, and was an amendment to Section 604 of the Revision of 1893 (although, as above mentioned, Ordinance No. 18,157 struck out this section and in lieu thereof enacted new provisions), by striking out that section and enacting several new sections relating chiefly to placing wires underground.

"Ordinance No. 18,680 was approved September 8, 1896, and amended Section 604 of the Revision of 1893, as amended by Ordinances 18,157 and 18,480 by striking out that section and inserting in lieu thereof several new sections. This legislation is commonly called the Keyes Ordinance.

"As mentioned above, Ordinance 18,157 amended Section 604 of the Revision of 1893, and after that time Ordinance 18,480 sought to do the same thing. The first section of the Keyes Ordinance ignores the attempt made by the latter ordinances and expressly limits its legislative scope to amending Section 604 of the Revision of 1893, as amended by Ordinance 18,157, by striking out that section and inserting in lieu thereof the following:

"Section 604. All wires, tubes or cables conducting or transmitting electricity along or across any street, alley or public place of the City of St. Louis, which are to be placed above the surface of the ground, shall be secured and placed in such manner as the Board of Public Improvements may prescribe."

"This is in substance the amendment contained in Ordinance 18,157, and the precise language employed in Ordinance No. 18,480, which



latter ordinance, it should be mentioned, having been regarded as invalid, was never conceived to be in force.

"Section 604-V of the Keyes Ordinance repealed by express terms Ordinances 18,157 and 18,480.

"Following the amendment of Section 604, as above set forth, the Keyes Ordinance proceeds to enact twenty-two new sections, numbers 604-A to 604-V, inclusive.

"From the above recited, it is evident that the general ordinances of the City of St. Louis, concerning electric light franchises, exhibit a patchwork of legislation seemingly more or less incongruous—an inevitable result in the process of providing reasonable contractual and police regulation of a business presenting intricacies and complications as it developed by the application of skill and science, and the keen competition, as well as the desire to thwart it and thus secure exclusive municipal privileges, ever present when tempting pecuniary rewards are the spring to activity.

"Before the expiration of ninety days after the passage of the Keyes Ordinance, the defendant Company was duly authorized by its charter to operate wires, tubes and cables for the transmission of electricity for public use, and did within such time, in December, 1896, file acceptance of all the terms and conditions of Articles II and IX of Chapter 15 of the revision of general ordinances of 1893, and also of all terms and conditions of Ordinance 18,680, together with the required bonds.

"Section 604-H of the Keyes Ordinance provides by express terms that the acceptors thereof should also accept Article II and IX of Chapter 15 of the Revised Ordinance of 1893, and, in addition thereto, 'and all other ordinances in force at such time.' Article II of Chapter 15 of the Revision of 1893 was Ordinance 12,723, as amended in manner and form pointed out above, prior to 1896.

"Is it not manifest from this statement that the Keyes Ordinance deals directly with overhead electric work? If not, why does the ordinance demand acceptance of such of the provisions of Ordinance 12,723 then known to be in force?

"It thus appears that those who elected to qualify under the Keyes Ordinance were required to take the same kind of steps and perform the same kind of acts—file acceptances and bonds—as those who qualified under Ordinance 12,723. While this similarity of acceptances and bonds may not alone warrant the conclusion that like overhead wire privileges were to be extended, it is at least some evidence that one purpose of the latter ordinance was to continue the earlier provisions touching the placing of wires above ground and extend them to eligible applicants. Instead of passing sub silentio the provisions of Ordinance 12,723, pertaining to this matter, the Keyes Ordinance gave them at least a nod of recognition. But it may be urged with much plausibility that it did not and could not legally go so far as to reenact in form that provision of the former ordinance which, as mentioned above, had been repealed by Ordinance 18,894, without repealing 'by express terms' (St. Louis Charter, Article III, Section 28) that provision. Moreover, the mere repeal of such provision by express terms

would not have resulted in reviving in form the provision in Ordinance 12,723, which was repealed by Ordinance 18,894. (R. S. 1909, Section 8060; R. C. Secs. 50, 60; 2 McQuillin, Municipal Corporations, Sec. 834.)

"However, it was entirely competent for the Keyes Ordinance to remove the restriction imposed by Ordinance 18,894 (Section 1158, R. C. 1912; Section 1070, M. C. 1901) and reinstate therein in express language or in substance the provisions of Ordinance 12,723 concerning the placing of electric wires above the surface of the ground outside of the underground district defined by it.

"It will be noted that the second restriction, as above mentioned, is that no one can place wires, etc., along or across any of the streets, etc., 'unless duly authorized by the Municipal Assembly, and then only as provided by ordinance.' (Section 1158, R. C. 1912). Thus the question is clearly defined: Is the Keyes Ordinance such authorization?

"After the passage of the Keyes Ordinance, the municipal legislation relating to the subject appears to require that it should be read as follows:

"Section 604 of the Keyes Ordinance, which is Section 1159, R. C. 1912; Section 1004, R. C. 1907, and Section 1071, M. C. 1901, and a modification of Section 2 of Ordinance 12,723. Then Sections 7, 8, 9, 10, 11 and 13 of Ordinance 12,723. Then the five new sections enacted by Ordinance 18,894 in amending Sections 581, 583, 584, 585 and 586 of Article II, Chapter 15, of the Revision of 1887, which new sections stand in lieu of Sections 1, 3, 4, 5 and 6 of Ordinance 12,723. After this, the entire Keyes Ordinance is to be read from Sections 604-A to 606-V, both inclusive.

"Read in this manner, it is evident that the Keyes Ordinance is merely an amendment requiring the removal of poles and electric wires within a defined district and providing for placing them underground in that district and permitting the prior legislation as to placing of poles and electric wires beyond that district to stand as it then existed.

"That the Keyes Ordinance treats of overhead wires is clear from the mere reading of its title. Notwithstanding the English rule that the title cannot be restored (resorted to) in construing the enactment (Hunter v. Nickolds, 1 McN. & Cord. 651), from an early date in this country it has been recognized that the title of an ordinance or statute may be considered in its interpretation (Dart v. Bagley, 110 Mo. 42, 51, 19 S. W. 311; Martindale v. Palmer, 52 Ind. 411). This presumption is that the true intent and meaning is to be found in the title unless it is plainly contradicted by the express terms of the body of the act (Connecticut Mut. Life Ins. Co. v. Albert, 89 Mo. 181). Indeed, the Charter of the City of St. Louis, following in this respect the usual constitutional provision, expressly requires that no bill (ordinance) shall contain more than one subject, which shall be clearly expressed by its title (St. Louis Charter, Art. III, Sec. 13).

"The title of the Keyes Ordinance unequivocally recites that it is 'an ordinance amendatory of Article II, Chapter 15,' of the revision of general ordinances of 1893, 'and as the same was heretofore amended by Ordinance 18,157 \* \* \* and by Ordinance 18,480 \* \* \* and

to repeal Section 604 of Article II, Chapter 15, of Revised Ordinances of 1893, as amended by Ordinances 18,157 \* \* \* and by Ordinance 18,480 \* \* \* in relation to electric wires, tubes and cables, and authorizing the construction and operation of underground conduits, ducts, manholes and other appurtenances and replacing, operating and maintaining wires, tubes, cables and other electric conductors therein, and to regulate the terms upon which persons and corporations now having contracts with the City for doing public electric lighting, may place their wires underground, and to repeal Ordinance 18,157 \* \* \* and to repeal Ordinance 18,480. \* \* \*

"A mere reading of this title establishes the fact that the ordinance deals with both overhead and underground electric wires. By express terms it recites that one purpose of the ordinance is 'to repeal Section 604 of Article II of Chapter 15 of Revised Ordinances of 1893, as amended,' etc. It would be difficult to employ clearer or more explicit words. Since that Section 604 deals with overhead wires, the conclusion is inevitable that the title of the ordinance in question does deal with that character of electric work; and moreover, as above pointed out, the first section of the ordinance itself, namely, section 604, deals exclusively with wires 'which are to be placed above the surface of the ground.' \* \* \*

"The well established general rule is that the meaning of an ordinance must be gathered from the law itself, and not from contemporaneous statements of the individuals who framed it, or of those who voted for it. This rule is particularly enforced where the provisions of the ordinance are clear. In such cases, contemporaneous construction adopted by the municipal officers charged with its enforcement will be held inadmissible to aid its construction. However, in doubtful cases, where the language of the ordinance is ambiguous, the contemporaneous construction adopted by the parties interested in the enforcement of the ordinance, while not controlling, is entitled to great weight (2 McQuillin, Municipal Corporations, Sec. 813).

"In speaking of the power of courts in ascertaining the purpose of municipal legislation, Mr. Justice Field aptly observes: 'We may take notice of the limitation given to the general terms of an ordinance by its practical construction as a fact in its history, as we do in some cases that a law has practically become obsolete' (Ho Ah Kow v. Nunan, 5 Sawy. 552, 560, 561, Fed. Cas. No. 6546).

"Likewise a court may take notice of the construction of the scope of an ordinance immediately after its passage by the officers clothed with the power and duty of practically applying its provisions.

"Adopting this salutary rule, it is clear that when the then members of the Board of Public Improvements entertained the application of the defendant company, in December, 1896, within ninety days after the enactment of the Keyes Ordinance, they were of the opinion that this ordinance duly authorized such action. It also seems to be conceded in this case that at the same time like applications were entertained from other companies. Furthermore, the issuance of the license or permit by the Board of Public Improvements to place the poles and

string the wires thereon to defendant company in the case here is clear evidence that the members of the Board had no doubt that such action was justified under the terms of this ordinance. \* \* \*

"The construction here adopted does not and could not assert or indicate a municipal policy concerning future legislation on this subject. It asserts only that the municipality by the Keyes Ordinance authorized the companies therein described to qualify to do the things provided for by the then existing provisions of Ordinance 12,723, which they were forbidden from doing by Ordinance 16,894 after October 26, 1892, 'unless duly authorized by the Municipal Assembly, and then only as prescribed by ordinance.' It asserts that the Keyes Ordinance is such an ordinance. \* \* \*

"In view of the foregoing consideration, my opinion is that the ordinances of the City of St. Louis at present provide for both underground and overhead electric wires.

"The defendant company accepted and qualified under the Keyes Ordinance, and is therefore entitled to all the benefits and privileges conferred by the general ordinances of the City on any person or company who accepted and qualified under their provisions. That is, by accepting and qualifying under the provisions of the Keyes Ordinance, the defendant company in effect thereby accepted and qualified under ordinance 12,723 as amended after its passage. This, for the reason that the Keyes Ordinance is merely an amendatory ordinance relating to the placing and maintenance of wires for the distribution of electricity. It is not limited to legislation respecting conduits and other underground electric work, but as designed to supplement prior legislation on the subject and thus complete and perfect a plan by which both underground and overhead electric wires for the distribution of electricity could be safely placed and used in the City; and the defining of the underground district and providing for the conditions and manner of locating wires therein was only a part of the general purpose, and not the sole object. The provision therein concerning acceptances related, therefore, to overhead as well as to underground electric wires, and was a privilege extended for the period of ninety (90) days to all persons and corporations which might be authorized to do an electric lighting business in the City.

"Therefore, the defendant company having fully accepted and complied with the provisions of the Keyes Ordinance, is clearly empowered by virtue of the permit duly issued by the Board of Public Improvements to proceed."

[1] It will be seen that the learned trial judge, reciting not only the Code revisions but the specific ordinance referred to, held that when the Keyes Ordinance authorized and required parties to file applications for permits under the ordinance, it also required them to file acceptances of the provisions of articles 2 and 9, of chapter 15, requiring the filing of this application within the time provided by the Keyes Ordinance, so it was immaterial whether they had, prior thereto and within the times designated in articles 2 and 9, filed an application or obtained a permit.

In this we think he was correct. It is to be noted that the language in section 604-H is that the Board of Public Improvements is authorized to grant permits to construct, alter and repair conduits, etc., "to any person or persons, corporation or association furnishing or using electricity for public use, on compliance by such person, persons, corporation or association with the terms and conditions of this article, and article 9 of this chapter, and all other ordinances in force," etc., provided also that they shall file a penal bond in the sum of \$50,000 for compliance with the terms of the Keyes Ordinance as to the construction of conduits, etc. The language there used is not "shall have complied with the provisions of articles 2 and 9 of chapter 15," but "on compliance by such person," etc., "with the terms and conditions of this article" (which is article 2), "and article 9 of this chapter" (chapter 15), etc. So whatever time limit there may have been in article 2 and in article 9, was removed by this provision or, more accurately speaking, was brought down to the date named in the Keyes Ordinance.

We may here note that the only case in which the Keyes Ordinance has been before our Supreme Court, to which our attention has been called or which we have found, is that of Missouri Valley Realty Co. v. Cupples Station Light, Heat & Power Co. et al., not officially reported but see 199 S. W. 151. There the Keyes Ordinance is recognized as a valid ordinance, but then points here involved were not before the Supreme Court.

At the argument of the case before us, counsel for appellant, with the consent of counsel for the respondents, left with us for our use a compilation of the germane ordinances and of the various (and variant, it may be said) constructions of it by the various city counselors. With this compilation we find one of date February 8th, 1897, addressed to the Mayor of the city, signed by the then City Counselor, the Honorable William C. Marshall, passing on the applications and bonds hereinbefore referred to, in which communication to the Mayor that learned City Counselor set out that he was in receipt of a communication from the president of the Board of Public Improvements, transmitting to him a copy of the resolution of that Board, adopted December 7th, 1896, in which his opinion is asked as to whether the named companies, which, on December 9th, 1896, had presented to the Board, pursuant to advertisement under authority of ordinance 18,680, applications for permission to construct underground conduits, are qualified applicants under the terms of that ordinance. Among other companies named is the Cupples Station Light, Heat & Power Company, a defendant here, it, including the City of St. Louis, being one of the eighteen applicants. The City Counselor advised the Mayor, that

upon receipt of the request, he had notified all of the companies and parties mentioned to appear before him and show whether or not they had complied with the provisions of ordinance No. 18,680, in such manner as to entitle them to a permit to construct underground conduits. Setting out that all of them, except one company had appeared and exhibited their articles of association, certificates of incorporation, acceptance and bonds, the City Counselor states that upon the first hearing it appeared that none of the applicants, except the City of St. Louis, were entitled to a permit; that in no single instance had any one company complied with all the requirements of the law and nearly all of them insisted that they had complied with so much of the ordinance as applicable to them, and that they were not obligated to comply with all the requirements of the ordinance. Stating that at the outset he had held against this contention, the City Counselor stated that no company was entitled to a permit unless it could show that it had complied with the following requirements, to-wit: First, that it was authorized by its charter to operate wires, tubes and cables, etc., and that it had within ninety days after the passage of ordinance No. 18,680, made application to the Board of Public Improvements for a permit to construct conduits, etc., and had accompanied the application with full, general and detailed plans showing the route, etc. Second, that it had accepted ordinance No. 18,680, as required by section 604 thereof. Third, that it had given bond in the sum of \$50,000, as required by that ordinance. Fourth, that it had accepted the terms and conditions of article 2, chapter 15, Revised Ordinances 1892, and had given the \$20,000 bond required by that article. Fifth, that it had accepted the terms and conditions of article 9, chapter 15, of the same ordinance and had given the \$20,000 required by it. It appears from this report of the City Counselor that all the companies named, including among them the defendant Cupples Company, had, since the first hearing, complied with all the requirements stated, and in conclusion he advised the Mayor that all of them named were entitled to permits to construct underground conduits. We are not quoting this as controlling on the courts, but as throwing some light on the executive view of what was necessary to compliance with the law.

[2] It is claimed by learned counsel for the appellant that the Keyes Ordinance has nothing to do with overhead wires. Judge McQuillin did not agree to this proposition, nor do we. Section 604, repeated again in the Keyes Ordinance, with slight verbal change, specifically refers to wires, tubes or cables conducting or transmitting electricity along or across any street, alley or public place in the city, which are to be placed above the surface of the ground, requiring

them to be secured and placed in such manner as the Board of Public Improvements may prescribe. Furthermore, section 603 of the same article was in no manner amended or repealed, and that section, in so many words, forbids the placing of wires, tubes or cables for the production of light, etc., along or across any of the streets or alleys or public places in the city by any person, corporation or association not having, previous to the passage of ordinance No. 16,894, accepted and complied with ordinance No. 12,723, unless duly authorized by the Municipal Assembly. This section is part of article 6, chapter 12, of the Revision of 1912.

Section 604-I, Keyes Ordinance, provides:

"Any person or persons, corporation or association, who shall string or cause to be strung any wire, tube or cable above or beneath the surface of any street, alley or public place without a permit, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than fifty dollars nor more than five hundred dollars."

Companies desiring a permit under the Keyes Ordinance are specifically required to accept the terms and conditions of articles 2 and 9, chapter 15, of the Revision of 1907. Those articles relate almost exclusively to overhead wiring and are very specific regulations of that matter, and when the Cupples Company accepted the provisions of articles 2 and 9, it became subject to the provisions of and entitled to the rights conferred by those articles. So it cannot be assumed that the Keyes Ordinance related exclusively and entirely to conduits and the placing of wires in them. It most certainly embraced within it the subject of overhead wires within the district designated. The sections of article 2, chapter 15, and all of article 9 of that chapter remained in full force after the enactment of the Keyes Ordinance, and each of them treated of overhead wires. For instance, section 607 of the Krum Edition specifically authorized the placing of wires on poles. Section 608 prescribed where the poles should be placed—in alleys, if practicable—and section 609 prescribed the dimensions of poles. Article 9 relates to telegraph and telephone poles, all to be "along and across" public streets and alleys. See sections 1186 and following, Rombauer's Edition of 1912, as also section 1243 and following of that edition for these same provisions.

Thus persons and corporations accepting and complying with articles 2 and 9 were "duly authorized to erect and place and maintain overhead wires," otherwise why should they be required to accept those articles.

Criticism is made of the title of ordinance No. 16,880, it being claimed that as the only matter referred to in the ordinance relates to underground wiring, to construe the ordinance as granting rights relating to surface

wiring, would extend the ordinance to matters concerning which the Municipal Assembly, under the title of the ordinance, could not have legislated. We do not think this criticism is maintainable. The amendatory ordinance relates to electric wiring. See *St. Louis v. Liessing*, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. (N. S.) 918, 109 Am. St. Rep. 774, 4 Ann. Cas. 112; *St. Louis v. Warren Commission and Investment Co.*, 226 Mo. 148, 126 S. W. 166. Even if section 604 is not to be held as included in the Keyes Ordinance, still there remains enough of that ordinance and in the remaining sections of article II, chapter 15, which was not touched by the Keyes Ordinance to show that the matter of overhead wires was still within the provisions of the ordinance as amended.

[3] Without going further into the matter and attempting to analyze all of the several ordinances, we have concluded that the result arrived at by the learned trial judge is correct and that by acceptance of the terms prescribed by the Keyes Ordinance within the time there prescribed, and by acceptance of the terms and compliance with the provisions of articles 2 and 9, chapter 15, of the Code of 1895, Ordinance No. 17,188, approved April 7th, 1893, within the time designated in the Keyes Ordinance, that the defendant, the Cupples Station Light, Heat & Power Company, was authorized to erect poles and string wires thereon in the district in which it proposed to erect those poles, that district being outside of the restricted district, and that the judgment of the circuit court in dismissing the bill was correct.

It follows that that judgment should be, and it is, affirmed.

ALLEN and BECKER, JJ., concur.

(201 Mo. App. 223)

TRUST CO. OF ST. LOUIS COUNTY v.  
PHOENIX INS. CO. OF HART-  
FORD, CONN.

SAME v. GERMAN-AMERICAN INS. CO.  
OF NEW YORK.

(Nos. 14921, 14922.)

(St. Louis Court of Appeals. Missouri. March 4, 1919.)

1. INSURANCE ⇐665(3)—FIRE INSURANCE—  
CHANGE OF OWNERSHIP.

Evidence held to show that plaintiff mortgagee, suing upon fire insurance policy, had knowledge of the change of ownership of the property, but failed to notify the insurers.

2. CORPORATIONS ⇐428(7)—KNOWLEDGE OF  
ASSISTANT SECRETARY.

Knowledge of assistant secretary of corporation held knowledge of the corporation.

**8. INSURANCE**  $\Leftrightarrow$  328(1)—**VALIDITY OF POLICY—CHANGE OF OWNERSHIP—NOTICE TO INSURER.**

Where the owner of mortgaged property which was insured sold the same to another, and no notice thereof was given to the insurer, the policies became void as to both vendor and purchaser.

**4. INSURANCE**  $\Leftrightarrow$  311(3)—**FIRE INSURANCE—POLICY—STANDARD MORTGAGE CLAUSE.**

A union or standard mortgage clause attached to a policy constitutes a new and independent insurance contract between insurer and mortgagee for the latter's benefit, which contract is ingrafted upon the main policy, and the rights of the mortgagee or trustee and the insurer as to forfeiture must be determined by the provisions of the mortgage clause, construed with the policy.

**5. CONTRACTS**  $\Leftrightarrow$  174—**CONSTRUCTION—CONDITIONAL CLAUSE—"PROVIDED."**

While the word "provided" ordinarily indicates that a condition follows, a clause in a written instrument following the word is to be construed from the words employed and from the purposes of the parties gathered from the whole instrument.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Provided.]

**6. INSURANCE**  $\Leftrightarrow$  311(3)—**FIRE INSURANCE—MORTGAGE CLAUSE—CHANGE OF OWNERSHIP—NOTICE BY MORTGAGEE.**

A provision in a mortgage clause attached to a fire insurance policy that the interest of the mortgagee or trustee shall not be invalidated by any act or neglect of the mortgagor or owner ceases to be operative whenever a change of ownership becomes known to the mortgagee or trustee and he fails or neglects to notify the insurer as provided by the policy.

**7. INSURANCE**  $\Leftrightarrow$  146(3)—**FIRE INSURANCE—MORTGAGEE'S FAILURE TO NOTIFY INSURER OF CHANGE IN OWNERSHIP.**

Policy provisions must be construed as favorably to the insured mortgagee as possible.

**Appeal from Circuit Court, St. Louis County; John W. McElhinney and Gustave A. Wurdeman, Judges.**

Suits by the Trust Company of St. Louis County against the Phoenix Insurance Company of Hartford, Conn., and against the German-American Insurance Company of New York upon policies of insurance upon the same property, were heard together, but by different judges, and resulted in a judgment for defendant in the first case and for plaintiff in the second, from which the losing party in each case appeals. Judgment in the first case affirmed, and in the second reversed and remanded, with directions to enter judgment for defendant.

Thomas K. Skinner, of St. Louis, for Trust Co.

Ryan & Thompson, of St. Louis, for Insurance Companies.

BECKER, J. Plaintiff below instituted two suits upon policies of fire insurance—one against the Phoenix Insurance Company, in which judgment resulted for defendant; the other against the German-American Insurance Company, in which judgment resulted in favor of plaintiff. In due course appeals were brought here by the losing party in each case below.

While plaintiff filed both suits in the circuit court of St. Louis county, the case against the Phoenix Insurance Company was assigned to division No. 1, and the case against the German-American Insurance Company was assigned to division No. 2. Inasmuch as a trial to a jury had been waived, and the facts in each case being identical, excepting only the wording of the mortgage clause in each of the policies of insurance sued on, the judge of division No. 1 and the judge of division No. 2 of said circuit court sat and heard the cases together. In light of this fact both appeals are brought here upon a joint abstract of the record.

Each policy of insurance, as originally written, insured George C. and Martha L. Shanks against direct loss or damage by fire to a house numbered 6232 Chatham avenue in St. Louis county, Mo. The Phoenix policy was in the sum of \$500, and was issued July 6, 1909, and the German-American policy was in the sum of \$600, and was issued August 30, 1909; each policy insuring for a period of three years from date of issue.

The said Shanks borrowed from the plaintiff the Trust Company of St. Louis County the sum of \$1,100, for which they executed their principal note in said sum, payable three years from date, and their six semi-annual interest notes each in the sum of \$33. All of the notes were made payable to the order of F. J. Hollocher, who was the assistant secretary of the plaintiff company. To secure the payment of these said notes the Shanks executed a deed of trust on the property above described, wherein they conveyed the said premises to the Trust Company of St. Louis County as trustee for the said Hollocher, cestui que trust. In said deed of trust it was provided that the owners of the property were to keep the improvements upon the premises insured in the sum of \$1,100, and that the policies therefor were to be assigned to the trustee in the deed of trust, for the use and benefit of the holder of the notes in said deed of trust described.

Pursuant to such provision in said deed of trust, on August 30, 1909, at the direction of said Shanks and of the plaintiff, the Phoenix Insurance Company and the German-American Insurance Company each issued and attached a standard mortgage clause to the insurance policies in question in this suit. That part of the mortgage clause

which was attached to the Phoenix Insurance Company's policy which is pertinent to the issue in this case reads as follows:

"Loss or damage, if any, under this policy, shall be payable to the Trust Company of St. Louis County, mortgagee (or trustee), as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided that, in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

"Provided also that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee), and, unless permitted by this policy, it shall be noted thereon, and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void."

Whereas that part of the mortgage clause with which we are concerned in the German-American policy reads as follows:

"The interest of Chas. F. Vogel, trustee, having been satisfied, loss, if any, payable to the Trust Company of St. Louis County, mortgagee or trustee, as hereinafter provided; it being hereby understood and agreed that this insurance as to the interest of the mortgagee or trustee only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy; provided that, in case the mortgagor or owner neglects or refuses to pay any premium due under this policy, then, on demand, the mortgagee or trustee shall pay the same; provided also that the mortgagee or trustee shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge and shall have permission for such change of ownership or increase of hazard duly indorsed on this policy."

On March 26, 1910, the said Shanks conveyed said property by warranty deed to one J. R. Kennon, then of Eldorado Springs, Mo., in exchange for some property located at Eldorado Springs. This deed was not recorded. It appears that Kennon lived elsewhere than in St. Louis county, and placed this property with Surkamp & Givans, real estate agents at Wellston, in St. Louis county, who obtained a tenant for the same and accounted to Kennon monthly for the rents.

At the time Kennon purchased the property from Shanks the first interest note, which had fallen due January 17, 1910, had already been paid, and in July, 1910, when the next

interest note was about to or had just fallen due, Kennon sent the following letter to the plaintiff trust company:

"Eldorado Springs, Mo., July 18, 1910.

"St. Louis County Trust Co., Clayton, Missouri—Gentlemen: I herewith hand you check for \$33.00 to pay the semiannual interest on the \$1,100 deed of trust held by you, signed by George C. Shanks, secured by property No. 6232 Chatham avenue. I am the owner of the property and wish you would transfer the insurance.

"In future you can send notice to me or I will have Surkamp & Givans attend to paying the interest.

"Yours truly, J. R. Kennon.

"P. S.—Mail interest note to me."

The plaintiff replied to the above letter as follows:

"July 19, 1910.

"Mr. J. R. Kennon, Eldorado Springs, Mo.—Dear Sir: We are in receipt of your favor of the 18th instant, inclosing check for \$33.00 in payment of the George C. Shanks' interest note, for which please accept our thanks. We have made the proper memorandum in reference to sending the notices to you and will in the future do so.

"We are not canceling the note, as the check sent by you is a personal check, but as soon as we receive return on it, will mail you the note. These personal checks cost us \$0.15 to collect and we would therefore request that you instruct your bank to remit to us without charge on this one, or we will have to charge you whatever they charge us. In the future we must ask you to send us cashier's checks.

"Very truly yours."

It further appears that early in December of 1910 Kennon received a letter from the plaintiff requesting him to pay the taxes upon the property, in conformity with which Kennon, on December 16, 1910, sent the plaintiff a check for \$50 with which to pay the taxes and an interest note that was to fall due on January 17, 1911. An acknowledgment thereof is found in the following letter:

"Clayton, Mo., Dec. 23, 1910.

"Mr. J. R. Kennon, Little Rock, Ark.—Dear Sir: In accordance with our letter to you of a few days ago, we are inclosing you herewith the interest note for \$33.00, property canceled, together with the receipt for taxes paid and our check for \$2.41, being the balance due you out of \$50.00 which you sent us.

"Very truly yours, Charles N. Gilles,  
"Assistant Secretary."

It further appears that some time after the plaintiff made the loan to the Shanks on the property secured by the said deed of trust, and prior to the date upon which the premises were destroyed by fire, plaintiff sold the loan to one William H. Priess, who thereafter continued to be the owner and holder thereof until after March 16, 1911, on which day the premises were destroyed by fire. After the fire, and shortly prior to the insti-

tution of these cases, the plaintiff repurchased the loan from said Priess. During the time that Priess owned the loan the plaintiff trust company represented Priess in all matters with respect thereto, collecting the interest notes and giving attention to the payment of the taxes, etc. As to this agency the president of the plaintiff company, Mr. Hereford, testified:

"We were collecting agents for William H. Priess, who deposited the notes with us for collection as they became due, and we usually collected and deposited the money to his credit."

On the 21st day of March, 1910, plaintiff, by letter, notified the agents for both of the defendant insurance companies of the destruction of the building by fire, and later made proofs of loss. Plaintiff in due course having demanded payment of the policies from the defendants, and, the same being refused, thereafter brought suit.

The answers of each of the defendant companies set up as a defense to the action that before the fire occurred a change had taken place in the ownership of the property insured, that this fact had come to the knowledge of the plaintiff, and that plaintiff had failed to give notice of it to the defendants, in consequence of which the plaintiff had in each case forfeited all of its rights under the policies.

To such answers plaintiff replied:

"(1) That there is no such evidence before the court showing that a change of ownership came to the knowledge of the plaintiff before the fire as will warrant the court in inflicting upon the plaintiff forfeiture of its rights.

"(2) That, supposing there was a change of ownership known to the plaintiff, there is no provision in either of the policies entitling the defendant to claim a forfeiture for failure on the part of plaintiff to report it.

"(3) That at the time of the receipt of Kennon's letter of July 18th, and from that time forward until after the fire, the plaintiff was not the owner of the policies, but was a mere naked trustee in the deed of trust, and as such was not bound to give notice of a change of ownership even if one came to its knowledge."

After taking the case under advisement, Judge McElhinney, of division No. 1, found and gave judgment in favor of the defendant Phoenix Insurance Company, whereas Judge Wurdeman, of division No. 2, after taking the case under advisement, found and gave judgment in favor of plaintiff and against the defendant German-American Insurance Company for \$740.88. In due course appeals were taken in both cases.

[1, 2] I. We take up first the point raised by learned counsel for the plaintiff below, that there is no evidence that any change of ownership came to the knowledge of the plaintiff before the fire, as will warrant the court in inflicting upon the plaintiff for-

feiture of its rights under either of these policies. In support of this contention it is seriously urged that Kennon's letter to the plaintiff, set out in full in the statement of facts above, does not necessarily mean that there was a change of ownership of the property in question, and that neither did it impart knowledge to the plaintiff that there was in point of fact a change of ownership, but that, at most, the letter only gave information to plaintiff of a claim of ownership on the part of said Kennon. To this we cannot agree.

The fact that the Shanks sold the property in question to Kennon is undisputed, and the fact that the plaintiff company received Kennon's letter of July 18, 1910, is admitted, in which letter Kennon inclosed a check in payment of the then due interest note secured by deed of trust upon the property in question, and not alone notified the plaintiff company that he was the owner of the property, but requested that it attend to the transferring of the very insurance in question in suit. We can come to no other conclusion but that the plaintiff company must be held to have had knowledge of the change of ownership of the property from the date that it received Kennon's letter, dated July 18, 1910, in which appears the sentence: "I am the owner of the property and wish you would transfer the insurance." The receipt of this letter by the plaintiff company appears absolutely from the plaintiff's letter of July 19, 1910, acknowledging receipt of the said letter of Kennon, together with the inclosed check for \$33 in payment of the interest note. This letter was signed by Charles N. Gilles, assistant secretary of the said trust company, one of the executive officers of the plaintiff company; for, according to the testimony of F. J. Hollocher, who was secretary of the plaintiff company and a witness for the defendant, "during that year the executive officers of the plaintiff were Mr. Hereford, president, myself, secretary, and Mr. Gilles, assistant secretary." And it is undisputed that Mr. Gilles, as part of his duties as assistant secretary, received and opened the mail of the trust company and saw to its proper distribution to the several departments in the trust company for answering.

In view of all the facts in this case, we hold that whatever came to the knowledge of Gilles as one of the executive officers in his capacity of assistant secretary of this company was knowledge of the company, and as we hold the information in the letter of Kennon's of July 18, 1910, must be construed as containing sufficient information to put the one receiving same upon notice that he was the owner of the premises in question, we hold that the plaintiff company had knowledge of the transfer of the ownership of the property in question on July 19, 1910, and

we therefore rule this point against the plaintiff company.

[3, 4] II. Holding, as we do, that the plaintiff company had knowledge of the change of ownership, the question remaining that is decisive of the case must be determined upon the construction to be placed upon the mortgage clause attached to each of the said policies; in other words, what is the effect under the mortgage clauses of the plaintiff's failure to notify defendants of a change of ownership of the property in question, which change of ownership was known to plaintiff company?

It is conceded that, the insured, George C. and Martha L. Shanks, having sold the property covered by the policies of insurance in question to J. R. Kennon, and as we have above determined that no notice of such change of ownership was given to the insurance company, the policies are void as to said Shanks and Kennon. *Marcus v. Insurance Co.*, 187 Mo. App. 134, 173 S. W. 80.

The mortgage clause in each of the cases before us are the usual union or standard mortgage clauses, and are attached to the policies in question, and thereby constitute a new and independent contract of insurance between the insurance company and the trust Company of St. Louis County, trustee for the benefit of the cestui que trust. Such new contract is ingrafted upon the main contract of insurance contained in the policy itself to be rendered certain and understood by reference to the policy itself. Reference must be had to the original contract for the description of the property insured, the amount, rate, and terms of the policy. The rights and duties of the mortgagee or trustee, as well as those of the insurance company, must be determined then by the provisions of this independent contract as evidenced by the provisions of the said mortgage clause, taken in connection with the policy itself. *Syndicate Ins. Co. v. Bohn*, 65 Fed. 165, 12 C. C. A. 531, 27 L. B. A. 614; *Hellbrunn v. German Alliance Ins. Co.*, 202 N. Y. 610, 95 N. E. 823; *Reed v. Firemen's Ins. Co.*, 81 N. J. Law, 523, 80 Atl. 462, 35 L. R. A. (N. S.) 843.

[5] Does the proviso in said mortgage clause that the mortgagee or trustee shall notify the insurance company of any change of ownership of the property insured coming to its knowledge create a condition? We find many definitions for the word "provided."

"The word 'provided' always expresses a condition, unless it appears from the context to be the intent of the parties that it shall constitute a covenant." *Rich v. Atwater*, 16 Conn. 419.

"The word 'provided' means 'on condition.'" *Devitt v. Kaufman*, 27 Tex. Civ. App. 332, 66 S. W. 224.

"'Provided' . . . is the appropriate word

for creating a condition precedent." *Robertson v. Caw*, 3 Barb. (N. Y.) 410.

"The word 'provided' is recognized as implying a condition without the addition of any other words." *Paschall v. Passmore*, 15 Pa. 295, 308.

We feel safe in holding that the word "provided" ordinarily indicates that a condition follows, but that "there is no magic in the term," but the clause in a contract or written instrument following the word "provided" is to be construed from the words employed and from the purposes of the parties gathered from the whole instrument. *Boston Sav. Trust Co. v. Thomas*, 59 Kan. 470, 53 Pac. 472; *Heaston v. Randolph Co. Comm's*, 20 Ind. 398, 403.

[6] As we read each of the clauses which follow the word "provided," its meaning is readily apparent, and we find no ambiguity therein, nor does the language used indicate that the proviso is intended as a covenant. We therefore hold that the clause which provides that the interest of the mortgagee or trustee shall not be invalidated by any act or neglect of the mortgagor or owner of the property ceases to be operative whenever there is a change of ownership that comes to the knowledge of the mortgagee or trustee, and he fails or neglects to give notice thereto to the insurance company. The clauses in question can only be construed as meaning that the insurer has only agreed to suspend the terms of the policy itself as to the mortgagee's or trustee's interest not to be affected by any act or neglect of the mortgagor or owner, only so long as the said mortgagee or trustee shall comply with the conditions named, among them being the condition requiring the mortgagee or trustee to notify the insurer of any change of ownership in the property that comes to their knowledge. It must follow that when, as in the cases at bar, the plaintiff, though it had knowledge of the change of ownership of the property, failed or neglected to notify the insurers of such change, that the mortgage clause agreement cannot be held to be in force and effect from and after the time plaintiff had knowledge of such change of ownership and failed or neglected to notify the insurer thereof. In other words, we hold that the failure on the part of plaintiff to comply with the conditions in the mortgage clause suspends the operation of the same and leaves in force and effect the provisions of the policy as to the acts on the part of the owner or mortgagor which will operate to forfeit the policy. *Ormsby et al. v. Phenix Ins. Co.*, 5 S. D. 72, 58 N. W. 301; *Gasner v. Metropolitan Ins. Co.*, 13 Minn. 483 (Gil. 447); *Cole v. Germania Ins. Co.*, 99 N. Y. 86, 1 N. E. 38; *Continental Ins. Co. v. Anderson*, 107 Ga. 541, 33 S. E. 887; *Galantchik v. Globe Fire Ins. Co.*, 10 Misc. Rep. 369, 31 N. Y. Supp. 32.



[7] In coming to this conclusion we have in mind the well-recognized rule of law in this state that provisions in a policy of insurance such as the ones before us must be given as favorable a construction to the insured as possible. *Mathews v. Modern Woodmen*, 236 Mo. 328, 139 S. W. 151, Ann. Cas. 1912D, 483; *Brown v. Connecticut Fire Ins. Co.*, 197 Mo. App. 317, 195 S. W. 62, and cases cited. But one of the stipulations of the policy provided that the policy "shall be canceled at any time at the request of the insured or by the company by giving five days' notice of such cancellation." This provision was inserted, among other reasons, no doubt, to enable the insurer to cancel the policy in the event of a change of ownership of the property which in its judgment affected the character of the risk. Can we say in the instant case before us that the failure or neglect of plaintiff to notify the insurers was an immaterial matter? Even were this question one which should control the determination of this case, to which we do not agree, yet how could it be said but that the insurer would have canceled the insurance upon being notified of the change of ownership of the property, particularly when the new owner was not going to occupy the premises and was a nonresident of the county in which the property was located?

We accordingly rule that plaintiff, having violated the said condition contained in each of the mortgage clauses by failing to give notice to the insurance company of the change of ownership, cannot recover.

The judgment entered below in favor of the Phoenix Insurance Company of Hartford, Conn., is affirmed. The judgment rendered below in favor of the Trust Company of St. Louis County and against the German-American Insurance Company of New York is reversed, and the cause remanded, with directions to the circuit court to enter a judgment for said defendant.

REYNOLDS, P. J., and ALLEN, J., concur.

(200 Mo. App. 585)

QUIRK v. METROPOLITAN ST. RY. CO.  
(No. 13116.)

(Kansas City Court of Appeals. Missouri.  
Jan. 6, 1919.)

**1. CARRIERS §382—EJECTION FROM CAR—QUESTION FOR JURY.**

In boy's action for injuries, when ejected from defendant street railway's car as it was moving, question whether or not proximate cause of his getting off was the order of the conductor, or of the motorman, *held* for the jury.

**2. PLEADING §34(6) — PETITION — CONSTRUCTION AFTER VERDICT.**

After verdict for plaintiff, the petition must be construed liberally.

**3. CARRIERS §384(2)—EJECTION FROM CAR—INSTRUCTION—SUPPORT BY PETITION.**

In action against street railway for injuries to boy trespassing on car, when ordered by conductor and motorman to leave, instruction on theory that conductor ordered boy off while car was in motion, and that motorman negligently failed to stop car to permit boy to alight, *held* to follow petition as construed.

**4. CARRIERS §366—EJECTION FROM CAR—DUTY TO STOP CAR.**

Where street railway's motorman knew boy whom he was telling to leave car was on front steps, he should have stopped car to give boy opportunity to alight, and in failing to take such means to prevent injuries to him after knowing his peril, he was negligent, and street railway was liable for injuries when boy slipped under wheels.

**5. CARRIERS §381(4)—EJECTION FROM CAR—SUFFICIENCY OF EVIDENCE.**

In boy's action against street railway for injuries when ordered off moving car, evidence *held* to show motorman knew boy was on front step after having been told to get off, and in a position of peril.

**6. CARRIERS §384(1)—INJURIES TO TRESPASSER—INSTRUCTION—LAST CLEAR CHANCE.**

In action against street railway for injuries to trespassing boy forced off front steps of car by motorman, instruction on last clear chance, which concluded that plaintiff was entitled to recover if jury found that, while trying to alight, he fell as a direct result of negligence of street railway, *held* not erroneous, as permitting plaintiff to recover on any theory of negligence.

**7. NEGLIGENCE §85(3)—CONTRIBUTORY NEGLIGENCE—CHILDREN.**

In action against street railway for injuries to trespassing boy of 7, driven off front steps of car by motorman, instruction as to effect of concurring negligence *held* properly refused; the tender years of the boy excusing him therefrom.

**8. TRIAL §219—INSTRUCTION—ABSENCE OF DEFINITIONS.**

In action for injuries to 7 year old boy, driven off front steps of car by motorman, instructions requested by railway that motorman and conductor owed no duty other than to refrain from "willfully, wantonly, and recklessly" injuring the boy, *held* properly refused, as misleading, without definition of the technical terms.

**9. CARRIERS §366—EJECTION FROM CAR—DUTY OF CARE.**

It was duty of street railway's servants to use ordinary care in removing from its car a trespassing 7 year old boy.

**10. JURY §92 — EMPLOYE OF ASSOCIATED COMPANIES.**

In action for injuries to trespassing boy against Metropolitan Street Railway Company,

trial court properly excused, without challenge, a jurymen who worked for the Kansas City Electric Light & Power Company, and had been in the latter company's employ when it was connected with defendant, not the case at the time of trial.

# 11. NEW TRIAL $\S$ 41(1)—REMARK OF COUNSEL.

In action against street railway for injuries, where defendant objected to showing plaintiff, a boy, was ordinarily intelligent when hurt, and plaintiff's counsel stated, "You will raise it in the appellate court," court properly refused to discharge jury for such remark, probably improper as suggesting plaintiff expected to win and defendant would appeal.

Appeal from Circuit Court, Jackson County; William O. Thomas, Judge.

Action by Charles Quirk, by next friend, Maurice Quirk, against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Clyde Taylor, of Kansas City, for appellant.

McCuné, Harding, Brown & Murphy, of Kansas City, for respondent.

BLAND, J. This is an action for personal injuries. Plaintiff recovered a verdict and judgment for \$8,500 but voluntarily remitted \$1,000 of that sum, and defendant has appealed.

Defendant's first point is that its demurrer to the evidence should have been sustained. The evidence taken in its most favorable light to plaintiff shows that on the afternoon of July 4, 1910, plaintiff, a boy of the age of 7 years, was waiting at the end of the Thirty-First Street car line at Thirty-Third and Summit streets, in Kansas City, Mo., for his father to come home to take him to a picnic. He was playing with one Francis Eagan, and some other children. They were seated upon the curb of the sidewalk near which was standing a car of the defendant. This car is described as one of a type known as a "goat" car. The Eagan boy snatched a fire cracker from plaintiff and ran with the same onto the rear end of defendant's car, plaintiff after him. When both of the boys had gotten on the car, the motorman and conductor, who had been in a nearby drug store, came out of said store, and the motorman hollered to the conductor, "Let her go!" They boarded the car, the motorman in the lead. The latter released the hand brake on the rear of the car, and the car started forwards of its own momentum. After this the conductor, who was standing upon the rear step of the car, told the boys to get off—"that they had no business on the car." The boys then proceeded to the front end of the car, the motorman closely behind them. The conductor remained on the rear platform. The Eagan boy proceeded to the

front steps and jumped off the car ahead of the plaintiff, falling and hurting himself slightly. Plaintiff then got upon the front steps, when the motorman waved his controller at him saying, "Get off of here, boys." Plaintiff stood on the steps, attempting to get off. The car was coasting down grade and increased its speed as it moved. It increased its speed from 7 or 8 miles to 9 or 10 miles per hour and ran about 60 feet, while plaintiff was standing on the step.

Plaintiff attempted to get off the car by putting his foot down and raising it up again, evidently trying to touch the pavement. He testified that he was afraid to let go of the car; that he was afraid to get back into the car after what the motorman had said to him. Finally as before stated, when the car had gone about 60 feet, after plaintiff had gotten on the step, he fell off, his right leg going under the car resulting in it being cut off about 6 inches below the knee. The motorman was aware of the presence of plaintiff upon the step, as we will herein-after point out.

In connection with defendant's insistence that its demurrer to the evidence should have been sustained, it argues that the proximate cause of plaintiff's getting off the car, resulting in his injury, was the waving of the controller by the motorman at plaintiff, and that it was neither pleaded nor proved that the motorman was the agent of the defendant, with authority to eject trespassers from its cars.

[1] Plaintiff's instruction No. 1 told the jury that they must find that plaintiff attempted to get off the car at the order and direction of the conductor. The fact that the motorman joined in the request or order of the conductor, and that he threatened plaintiff, would not show as a matter of law that the plaintiff got off the car on account of being ordered by the motorman, and not by the conductor. Plaintiff did not testify that he was afraid of the motorman, and attempted to get off the car by reason of the fact that the motorman threatened him, but said that he was afraid to get back on the car on account of the threat of the motorman, and (as we construe his evidence) that he was afraid to get off on account of the rapid movement of the car. It was the conductor who gave the original order, and the question as to whether or not the proximate cause of plaintiff's getting off the car was the order of the conductor, or that of the motorman, was clearly one for the jury.

Defendant urges that there was error in the giving of plaintiff's instruction P-1. In support of this contention defendant argues that the proximate cause of plaintiff getting off or falling off the car was the conduct of the motorman. This point has already been decided against the defendant. This

instruction proceeded upon the theory that the conductor ordered plaintiff off the car while it was in motion; that the plaintiff was on the step, attempting to get off, in obedience to this order; that the motorman and conductor knew that he was attempting to alight therefrom while the car was in motion; and that the motorman negligently failed to stop the car for the purpose of permitting plaintiff to alight. It is the contention of the defendant that the petition proceeds upon the theory that the plaintiff was in a position of peril on the step of the car, and not on the theory that plaintiff was on the step attempting to alight from the car. A very ingenious argument is made that there is a substantial difference. There are many reasons why there is no merit in this contention, among which is this:

[2, 3] After verdict the petition must be construed liberally. Applying such a construction, the petition alleges that defendant's agents negligently ordered plaintiff off the car while it was in motion; that they saw plaintiff on the step in a perilous position, and did not stop the car to permit him to alight. The petition alleges, by inference, at least, that plaintiff was on the step and attempting to alight; that this was a perilous position; and that defendant's servants knew of it, and failed to stop the car to permit him to alight. The instruction follows the petition as we have construed it.

[4, 5] Defendant urges that there is no proof that the conductor and motorman knew that plaintiff was upon the step. Whether the conductor knew this fact, the motorman certainly did, and he should have stopped the car. The fact that the instruction required the jury to find that the conductor also knew it was an assumption of an unnecessary burden. The evidence shows that the boys were in front of the motorman and conductor as they proceeded to the front end of the car, to obey the order given by the conductor that the motorman must have heard; the motorman followed the boys to the front of the car. From this situation alone the inference is that he knew what the boys were doing. There was only one means of exit in the front of the car, and the boys had no way of obeying the conductor, except by going down the steps and getting off through this exit. Aside from this, the motorman, when he reached his position, which was before plaintiff fell, stood in the middle of the front vestibule of the car, within two feet of where plaintiff was standing on the step, holding onto the front handrail. The motorman testified that "I glanced around every once in a while"; but he said he did not see plaintiff on the step. Other witnesses testified that there was nothing to prevent the motorman from seeing plaintiff on the step if he had looked. So the jury had a right to disregard the statement of the motorman

that he did not see plaintiff. Taking all of this evidence in its most favorable light to plaintiff, it shows that the motorman knew plaintiff was upon the step and in a position of peril. Having had actual knowledge of the impending danger to plaintiff, and having failed to take means to prevent his injury after knowing that he was in a position of peril, defendant's servants were guilty of negligence, and defendant is liable. *Youmans v. Railroad*, 143 Mo. App. 393, loc. cit. 401, 127 S. W. 595.

[6] There was no error in the giving of plaintiff's instruction P-2. This instruction, like plaintiff's instruction P-1, is based upon the last chance rule. It not only detailed what facts were necessary to be shown by plaintiff to entitle him to recover, but required the jury to find that these constituted negligence on defendant's part, and concluded by telling the jury that if they found, while plaintiff was trying to alight, he fell "as a direct result of the negligence of the defendant," etc., plaintiff was entitled to recover. It is the contention of defendant that the portion of the instruction quoted permits plaintiff to recover upon any theory of negligence and does not confine the negligence to that pleading. There is nothing in this contention. The word "the" before the word "negligence" is a definite article, and refers to acts of negligence theretofore set out in the instruction, which acts were those alleged in the petition.

[7] The court did not err in refusing defendant's instructions D-3, D-4, and D-5. Defendant's instruction D-3 told the jury that if they found that—

"\* \* \* a lack of ordinary care upon the part of the motorman and a lack of ordinary care upon the part of the boy combined to bring about the casualty, then the plaintiff cannot recover; if you find that the casualty was caused solely and alone by the boy's own negligence, or by the mutual and concurring negligence of the boy and the motorman, and that any negligence on the part of the motorman, without the concurring negligence of the boy, would not have caused the casualty, then the plaintiff cannot recover, and your verdict must be for the defendant."

This instruction was properly refused for many reasons; one being that the tender years of the plaintiff excused him from concurring negligence. *Flower v. Penn. R. Co.*, 69 Pa. loc. cit. 218, 8 Am. Rep. 251; *Levin v. Traction Co.*, 194 Pa. St. 156, 45 Atl. 134; *Sherman v. Railroad*, 72 Mo. 62, loc. cit. 66, 37 Am. Rep. 423; *Holmes v. Railway*, 207 Mo. 149, loc. cit. 164, 165, 105 S. W. 624.

[8, 9] Defendant's instructions D-4 and D-5 told the jury that the motorman and conductor owed the boy no duty other than to refrain from willfully, wantonly, and recklessly injuring him. These instructions were properly refused, as they tended to mislead the jury. The words "willfully," "wantonly,"

and "recklessly" are ones of technical meaning and should be defined. These words, as applied to the facts in evidence, are not to be taken in their popular meaning. See *Drogmund v. Railway*, 122 Mo. App. 154, loc. cit. 160, 98 S. W. 1091. It was the duty of defendant's servants to use ordinary care in removing the boy from the car (*Brill v. Eddy*, 115 Mo. 596, 22 S. W. 488; *Farber v. Mo. Pac. Ry. Co.*, 139 Mo. 272, 40 S. W. 932; *Winn v. Railway Co.*, 245 Mo. 406, 151 S. W. 98; *Southard v. Railway Co.*, 191 S. W. 1101), and the jury would have been misled, had this instruction been given.

[10] Defendant urges that the court erred in excusing without challenge the jurymen Page. It appeared upon his voir dire examination that this jurymen was working for the Kansas City Electric Light & Power Company, and had so worked for six years; that, although this company and the defendant were separate companies at the time of the trial, the witness had been in the employ of the Electric Light & Power Company during the time that the two companies were connected. The court excused the jurymen on the court's own motion, because he had been employed by the Kansas City Electric Light & Power Company during the time in which the two companies were connected. We do not think the court abused his discretion in the matter. The position that this jurymen occupied toward the defendant, as we get it from the record, was substantially that of an ex-employee. This relationship of the jurymen to the defendant was certainly stronger and more intimate than that shown in the case of *Gardner v. Met. St. R. Co.*, 177 S. W. 737, cited by defendant. In that case there was no relationship whatever shown between the defendant and the jurymen; nothing was shown but that the jurymen was acquainted with the attorney for the defendant. In both that case and this the jurymen testified that his connection would not bias or affect his verdict. The trial court was not bound by the statement of the jurymen that he would not be biased under the circumstances present in this case. *Theobald v. Transit Co.*, 191 Mo. 395, 90 S. W. 354.

[11] The point is made that the court erred in refusing to discharge the jury on account of the alleged misconduct of plaintiff's counsel. Plaintiff attempted to show by his father that plaintiff was an ordinarily intelligent boy at the time he was hurt. This was objected to on the ground that it was not proper in rebuttal and that the mentality of the boy was not in issue. Plaintiff's counsel stated in the presence of the jury, "You will raise it in the appellate court." Defendant objected to this remark, on the ground that it was improper, and asked that the jury be discharged. The court refused to discharge the

jury, but reprimanded counsel for making the statement, and said, "This jury is too sensible to consider a thing like that." We think there was no error, under the circumstances, in the court refusing to discharge the jury. It was probably improper for plaintiff's counsel to make the remark. Taking it in its most unfavorable light to plaintiff, it was nothing more than a suggestion to the jury that plaintiff expected to win the case, and that defendant would appeal it. A jury certainly would not be influenced by an attorney, who intimated that he expects to win the case. Attorneys are supposed to entertain such hopes. Nor do we see how the jury could have been prejudiced by plaintiff's intimation that defendant would appeal the case. We are unable to see where there was any statement that defendant was trying to get some error in the case, so that it would be reversed, as contended by defendant. Plaintiff's counsel simply suggested that he ought to be permitted to show that the boy was not one above average intelligence, and asked defendant's counsel if he would agree not to raise the point in the appellate court, if plaintiff desisted in his efforts to prove the matter in the lower court.

The great weight of the evidence shows that defendant's motorman and conductor were guilty of culpable negligence, if not cruel conduct toward plaintiff. The size of the verdict does not indicate that the amount was influenced by any improper conduct of plaintiff's counsel at the trial.

The judgment is affirmed.

All concur.

(200 Mo. App. 598)

# QUIRK v. METROPOLITAN ST. RY. CO. (No. 13113.)

(Kansas City Court of Appeals. Missouri.  
Jan. 6, 1919.)

## 1. CARRIERS $\Rightarrow$ 383—INJURIES TO BOY—HUMANITARIAN DOCTRINE—JURY QUESTION.

It was not necessary for plaintiff to show anything more than that his son was on steps of defendant street railway's car, that he was a boy of 7, and that the car was moving at 7 to 10 miles an hour, to permit him to go to jury on question whether boy was in position of peril, such as on discovery by railroad's servants required them to stop or take boy back out of danger.

## 2. CARRIERS $\Rightarrow$ 366—EJECTION OF TRESPASSER—NEGLIGENCE.

Where a street railway's conductor ordered a trespassing 7 year old boy off the car, and the boy went on the front steps to obey the order, the motorman was negligent in failing to protect the child by stopping the car or drawing him back.

### 3. CARRIERS $\S$ 880(4) — INJURIES TO BOY — EVIDENCE.

In action against street railway for injuries to plaintiff's son, petition alleging boy was on step of car in a position of peril, it was competent to prove under such allegation he was attempting to alight as an incident of being on the step.

### 4. LIMITATION OF ACTIONS $\S$ 127(2)—IDENTITY OF CAUSES OF ACTION—TESTS.

Two ordinary tests whereby to determine whether a second petition is an amendment or statement of a new cause of action, barred by the statute of limitations, are: First, whether the same evidence will support both petitions; second, whether the same measure of damages will apply to both.

### 5. LIMITATION OF ACTIONS $\S$ 127(5)—IDENTITY OF CAUSES OF ACTION—MEDICAL ATTENTION AND LOSS OF SERVICES.

In father's action against street railway for medical attention, nursing, etc., of injured son, amendment of petition, to ask damages for loss of services, *held* not to state additional cause of action barred by 5-year statute of limitations.

### 6. CONTINUANCE $\S$ 30—AMENDMENT OF PETITION—DISCRETION OF COURT.

In father's action against street railway for medical attention to and loss of earnings of his injured son, trial court *held* not to have abused its discretion in denying to railway continuance asked on ground of surprise from filing of amendment to ask damages for loss of services.

### 7. EVIDENCE $\S$ 355(2) — DOCTOR'S BILL — WRITTEN STATEMENT FROM BOOKKEEPER.

In father's action against street railway for nursing, etc., of his injured son, court properly admitted written statement, consisting of doctor's bill, obtained from bookkeeper; statement tending to show amount of bill, which father testified was reasonable.

### 8. EVIDENCE $\S$ 487—CONCLUSION—DOCTOR'S BILL—REASONABLENESS.

In a father's action for medical attention to and nursing of injured son, testimony of father as to reasonableness of doctor's bill, obtained from doctor's bookkeeper, was admissible, against objection that answer was a conclusion and that doctor was only person competent to testify as to bill's reasonableness.

### 9. LIMITATION OF ACTIONS $\S$ 173 — BAR — RIGHT TO RAISE POINT.

In father's suit against street railway for medical attention to his injured son, father alone could raise point against doctor's bill that it was barred by statute of limitations, as bill was not barred unless father chose to raise it.

Appeal from Circuit Court, Jackson County; William O. Thomas, Judge.

Action by Maurice Quirk against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Clyde Taylor, of Kansas City, for appellant.

McCune, Harding, Brown & Murphy, of Kansas City, for respondent.

BLAND, J. Plaintiff recovered a verdict and judgment for loss of services, medical attention, and other damages suffered by him on account of an injury to his son, Charles Quirk. The latter, while attempting to get off of one of defendant's cars on July 4, 1910, fell from the front step thereof; his leg going under the car, causing the same to be cut off about six inches below the knee.

The facts in this case are substantially the same as those in the case of Charles Quirk, by next friend, Maurice Quirk, v. Metropolitan Street Railway Co. (No. 13116) 209 S. W. 108 decided at this sitting, but not yet officially reported. The two cases are dissimilar, however, in some respects. Plaintiff in his petition in this case alleged that his minor son was on the front steps of the car, in a position of peril, which was known to defendant's servants, and that after seeing him in such a position they failed to stop said car. There is nothing said in the petition about the boy being ordered from the car, or that he was attempting to alight therefrom when he fell. Plaintiff thus plants himself squarely upon the last chance doctrine. Plaintiff's instructions followed the petition and submitted the same negligence as alleged therein. A number of points raised in this case were disposed of in the other, so it is unnecessary for us to go into those points a second time.

Defendant urges that the evidence does not prove, but disproves, the allegation in the petition that plaintiff's son fell from the steps of the car, in that it proves that he fell, not by reason of the continued movement of the car, but in an attempt to alight therefrom.

It is defendant's contention that there was no duty upon defendant's servants to stop the car merely because they saw plaintiff's son upon the steps, in the absence of any other showing that it was dangerous for plaintiff's son to be upon them, such as a showing that the car was swaying or jerking by reason of some defect of the track, etc.

[1-3] That the humanitarian doctrine applies in cases where the circumstances are like those present in the case at bar is well established. See *Drogmund v. Met.*, 122 Mo. App. 154, 98 S. W. 1091. It was not necessary for plaintiff to show anything more than that his son was upon the steps and that he was a boy of tender years, to wit, 7 years of age, and that the car was moving at the rate of from 7 to 10 miles per hour, to permit him to go to the jury on the question that his son was in a position of peril, such as upon discovery by defendant's servants required them to stop the car, or to take the

boy back on the car out of danger. *Levin v. Traction Co.*, 194 Pa. 156, 45 Atl. 134; *Wynn v. City & Suburban Ry.*, 91 Ga. 344, loc. cit. 852, 17 S. E. 649; *Goldstein v. People's Railway*, 5 Pennewill (Del.) 306, 60 Atl. 975. In fact, it seems apparent to us that a child of 7 years of age, on the steps of a car moving at the rate of from 7 to 10 miles per hour, is in a position of peril. The evidence shows not only these facts, but further established the fact that he had been ordered off the car by the conductor, and was on the steps for the purpose of obeying such an order, all of which was known by the motorman. The motorman was guilty of negligence in failing to protect the child under the circumstances. But plaintiff was not under the necessity of proving these additional facts. He made out a case under the petition by showing that defendant's servant saw plaintiff's son upon the steps under the circumstances, and this even though plaintiff's son had not been ordered off the car. The petition does not allege that the boy was on the step attempting to alight from the car, but alleged, generally, that he was on the step in a position of peril. Under such an allegation it was competent to prove that he was attempting to alight as an incident of his being on the step. The fact that the evidence shows that plaintiff's son was attempting to alight at the same time he was on the step would not change the cause of action for the reason given. If the car had been stopped, plaintiff's son would not have fallen and been hurt. The evidence shows, then, that he was on the step, and that he fell therefrom on account of the fact that the car was not stopped to permit him to alight, and continued to move forward. Plaintiff may have proved more than was necessary, but by doing so did not disprove, or fail to prove, the case alleged.

The court did not err in refusing defendant's instructions D-1, D-2, and D-3. These instructions were substantially the same as defendant's instructions D-3, D-4, and D-5 in the other case, and as we ruled against defendant in that case our ruling will be the same in this.

[4, 5] Plaintiff's son was injured July 4, 1910. Plaintiff's cause of action, therefore, was barred 5 years after that date. The trial was had on May 1, 1917. The original petition asks damages for doctors' bills, medical attention, medicines, nursing, for an artificial limb, and for money that plaintiff would be obligated to pay out in the future for these things. During the trial of the case plaintiff was permitted to amend his petition by interlineation asking, in addition to the things mentioned, damages for the loss of services of his son. It is the contention of the defendant that at the time the petition was amended 5 years had elapsed since plaintiff's son was injured, and that the setting up of the prayer in the amended petition for

loss of services of his son amounted to an additional cause of action being stated, which was barred by the statute of limitations.

Two of the tests by which to determine whether a second petition is an amendment or a substitution of a new cause of action are: (1) That the same evidence will support both petitions; (2) that the same measure of damages will apply to both. *Scovill v. Glasner*, 79 Mo. 449; *Burnham & Co. v. Tillery & Co.*, 85 Mo. App. 453, loc. cit. 457; *Haines v. Pearson*, 107 Mo. App. 481, loc. cit. 484, 81 S. W. 645. It is held in *Cytron v. Transit Co.*, 205 Mo. 692, loc. cit. 700, 104 S. W. 109, that the proper judicial attitude toward amendments, with reference to the statute of limitations, is that such amendments are allowed expressly to save the cause from the statute, and the courts have been liberal in allowing them, when the cause of action is not totally different, and that the rule thus announced is steadily applied.

The gist of the cause of action in a case of this kind is the negligence or breach of duty of the defendant, and not the consequent injury resulting therefrom. 2 *Wood on Limitations* (4th Ed.) § 179; *Illinois Steel Co. v. Szutenbach*, 64 Ill. App. 642, loc. cit. 646. The court in the latter case permitted plaintiff to introduce an additional allegation in his petition, after the statute of limitations had run, alleging injuries to his mind and memory. It is stated in *Van Patten v. Waugh*, 122 Iowa, 302, loc. cit. 305, 98 N. W. 119, 121, that—

"Where the gist of the action remains the same, although the alleged incidents are different, the court has the right to permit plaintiff to withdraw his original declaration and file an amended one."

In the case of *Cooper v. Mills County*, 69 Iowa, 350, 28 N. W. 683, it was held that, where the action was begun before the time limited by the statute of limitations, an amendment may be filed after the time limited setting up additional damages arising out of the original cause of action, and such damages may be recovered, if proved, and that the statute of limitations does not bar the same. In the case of *Benson v. City of Ottumwa*, 143 Iowa, 349, 121 N. W. 1065, the court held that the addition of a new element of damages, where the gist of the action was not changed, is permissible, and is not barred by the statute. As the gist of the cause of action in this case was the negligence and breach of duty of the defendant, it is apparent that the same evidence will support both the petition before it was amended and after, and that the same measure of damages will apply to both. There is no question but that the amendment did not change the cause of action and that the new element of damage alleged was not barred.

[8] The amendment was made during the trial of the case, and defendant objected

thereto, and filed an affidavit of surprise, asking for a continuance, which the court refused. The court gave as his reason for refusing a continuance:

"I don't believe that this new allegation will render additional evidence necessary; that is, other than would be required in the ordinary course of the trial."

The trial court is vested with a discretion in these matters, but, of course, that discretion may be abused. We think that it was not abused in this case. As was said in *Blackwell v. Hill*, 76 Mo. App. 46, loc. cit. 55:

"The prospective loss of earnings is not susceptible of direct and conclusive proof, even in case of adults, and much less so in that of infants. The son of plaintiff is a mere child, who is only 8 years old. He has never earned anything, and what his ability to labor or his earning capacity in the business pursuits of life will in the future be is largely conjectural. In such cases it is held, in the absence of direct evidence, that much must be left to the judgment, common experience, and enlightened conscience of the jurors, guided by the facts and circumstances in the case."

There were no material facts and circumstances in the case at bar bearing on loss of earnings, save those that were brought out in connection with the main issues in the case; that is, the circumstances of the accident and the negligence of defendant. These matters were set out in the original petition, and defendant had 7 years to prepare to defend them. Defendant says it should have been given an opportunity to show whether there had been an emancipation of the son. In the case of *Schmidt v. Railway Co.*, 46 Mo. App. 380, loc. cit. 392, it was held that plaintiff proved there was no emancipation by a showing that the son was nine years of age; that he lived with his parents at the time of the accident, and was taken home after the accident, and nursed several months by his parents. The same facts appear in the case at bar, except plaintiff's son was 7 years of age at the time of the accident, and 14 or 15 at the time of the trial, and still living with his father. That plaintiff's son was emancipated was not within the realm of probability, and at best was only remotely possible. We think the court did not abuse the discretion vested in him in reference to the matter.

[7, 8] The court did not err in admitting in evidence the written statement, consisting of Dr. Horrigan's bill, obtained from the doctor's bookkeeper. Dr. Horrigan amputated the boy's leg and treated him for several months. Plaintiff went to see the doctor to get his bill, but the doctor was out of town, so plaintiff got the bill from the doctor's bookkeeper, and this was introduced in evidence. We think this statement was admissible as tending to show the amount of

the bill. Dr. Horrigan's bill amounted to \$192. The doctor was out of town at the time of the trial, and plaintiff was allowed to testify, over defendant's objections, that the bill was reasonable. The objection to the testimony was that no one but the doctor was competent to testify as to the reasonableness of the bill, and that the witness' answer was a conclusion. We think neither objection was sufficient. Of course, other competent witnesses could testify as to the reasonableness of the bill, and there was nothing to show that the witness was not competent to give his conclusion. There was no objection on the ground that it had not been shown that the witness was qualified to testify as to the reasonableness of the bill.

[9] There is nothing in the contention that the doctor's bill was barred by the statute of limitations. We do not find that the point was raised in the lower court, but, aside from this, only plaintiff could raise this point against the bill, as the bill was not barred unless plaintiff chose to raise it.

The judgment is affirmed. All concur.

(201 Mo. App. 27)

PORTER v. WITHERS ESTATE CO.  
(No. 13154.)

(Kansas City Court of Appeals. Missouri  
Jan. 27, 1919.)

1. MASTER AND SERVANT §330(2)—RELATIONSHIP—MODE OF PAYMENT.

While the mode of payment and question as to who is to furnish materials is not a decisive test by which to determine whether party employed is employé or independent contractor, such matters may be taken into consideration with other facts and circumstances throwing light on the questions, especially in connection with the matter as to whether the proprietor has control over person employed.

2. MASTER AND SERVANT §816(1)—INDEPENDENT CONTRACTOR—CONSTRUCTION OF CONTRACT.

Where a contract of employment is ambiguous as to whether the party employed was an independent contractor or an employé, resort must be had to the construction put upon it by the conduct of the parties subsequent to its execution.

3. MASTER AND SERVANT §330(3)—INDEPENDENT CONTRACTOR—EVIDENCE.

In action by painter for personal injuries, that plaintiff was apparently working for B. and for no one else, and on some occasions defendant was connected only remotely with transactions, and B. manually paid plaintiff, is not conclusive that B. was paying plaintiff with his own money so as to be an independent contractor.

**4. MASTER AND SERVANT §316(1) — INDEPENDENT CONTRACTOR.**

A contract, as construed by the parties to it, held not one creating relation of independent contractor, but rather one of hire making employed person agent to hire men for master.

**5. MASTER AND SERVANT §330(3) — INDEPENDENT CONTRACTOR—EVIDENCE.**

In action for personal injuries, evidence held such that jury might find that a written contract between defendant and person who employed plaintiff, claimed by defendant to create relation of independent contractor, was abandoned, and that plaintiff and person who employed him were defendant's servants.

**6. MASTER AND SERVANT §278(3)—INJURIES TO SERVANT—CAUSE OF INJURY—EVIDENCE.**

In action by a painter for personal injuries, evidence held to show that a scaffolding fell by reason of giving way of a leg of a stepladder, and not that ladder was broken by reason of fall.

**7. MASTER AND SERVANT §278(9)—PERSONAL INJURIES—DEFECTS IN LADDER—EVIDENCE.**

In action by painter for personal injuries, evidence held sufficient to sustain a finding that the leg of a stepladder which gave way was defective in that it was honeycombed with nail holes, although not rotten.

**8. EVIDENCE §122(2), 243(1)—ADMISSIONS—BY AGENT—RES GESTÆ.**

Where plaintiff, in action for personal injuries, testified that he talked to B. and that B. stated that the W. estate had a lot of work to do, and that they wanted to get a man to help, and plaintiff asked what "they were paying," issue being whether B. was an independent contractor or employé, plaintiff could testify as to a conversation with G., agent of estate, when he reported for work two days later, wherein G. said estate was employer, and contention that this was not a part of the *res gestæ* was without merit.

**9. EVIDENCE §471(29)—CONCLUSION.**

Where plaintiff, after a talk with B. relative to going to work as a painter on buildings belonging to the W. estate, reported for work and met G., agent of estate, a statement by G. that plaintiff "was working for us, the W. estate," and that the estate would not pay more than 40 cents an hour, was not a mere conclusion or opinion on the meaning of the contract made by B., issue being whether B. was an employé of defendant or independent contractor.

**10. CONTRACTS §1—CONCLUSIONS OF PARTIES.**

A contract is not invalid because it contains a conclusion of the parties within the meaning of the rule of evidence that a witness testifying in court may not give a conclusion.

**11. APPEAL AND ERROR §232(2)—MATTERS REVIEWABLE—OBJECTIONS TO EVIDENCE.**

An objection that evidence was incompetent, irrelevant, and immaterial because "G." was not authorized to make statements on behalf of defendant, that it was a statement of conclusion

of "G.," and was not a part of the *res gestæ* or occurrence, wherein plaintiff had a conversation with another person, is not sufficient to bring up for review the question that the evidence was not admissible because it was of a contract made long before the accident, and that plaintiff was not working under such contract at the time of his injury.

Appeal from Circuit Court, Jackson County; Daniel E. Bird, Judge.

Action by Stephen D. Porter against the Withers Estate Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Roy B. Thompson and Warner, Dean, McLeod & Langworthy, all of Kansas City, for appellant.

Brewster, Kelly, Brewster & Buchholz, of Kansas City, for respondent.

BLAND, J. Plaintiff recovered a verdict and judgment in the sum of \$3,000 for personal injuries sustained by him on June 8, 1917, as the result of the negligence of the defendant in whose employ he was at the time of his injury.

Defendant's first point is that its demurrer to the evidence should have been sustained. In this connection, it urges that one Batty, whom plaintiff claims to have been his foreman, was an independent contractor, and that plaintiff was the servant of Batty and not of the defendant. The facts in connection with this subject show that the defendant was the owner of a considerable amount of improved real estate in Kansas City, Mo., owned by the late Webster Withers. Upon his death defendant company was organized, and nearly all of its stock at the time of the trial was owned by his widow. Mr. W. W. Goodwin married one of Mrs. Withers' daughters and was the agent of the defendant. He looked after the renting of property, the collection of rent, and repairs to be made.

Plaintiff, hearing that the defendant desired the services of a painter, met Batty on March 17, 1917, at Southwest boulevard and Nineteenth street, and Batty told him that "he had, the Withers estate had, a lot of work to do and they wanted to get a man to help." Plaintiff asked Batty "what they were paying," and Batty replied, "40 cents an hour." Batty told him that the work was not piece work but day work and to report at 1120 Walnut street, a building owned by the defendant. On the 19th day of March, plaintiff reported as directed by Batty and found Mr. Goodwin, who, having known plaintiff for some time, greeted him by his first name. Plaintiff asked Mr. Goodwin for whom was plaintiff working, and Mr. Goodwin replied, "You are working for us, the Withers estate." Plaintiff said to him,



"Batty tells me that you are only paying 40 cents." Mr. Goodwin replied: "Yes, that is all I am paying. I can get plenty of men for 40 cents." Plaintiff said to Mr. Goodwin that he thought he ought to have more, but Mr. Goodwin replied that he could not pay any more. Mr. Goodwin further said to plaintiff: "Mr. Batty is your foreman. Go ahead; he will instruct you what to do." These conversations in the form testified to by plaintiff were denied by Batty and Goodwin. Plaintiff worked under Batty for five weeks at 1120 Walnut street and thereafter about eight days at Mr. Goodwin's residence; one week at the residence of Dr. Chambers; thereafter at Thirty-First and Paseo; at the Westover building, owned by defendant; at 3236 Main street, a residence owned by one of defendant's attorneys; the Withers building at Thirty-First and Troost, owned by the defendant; and, finally, at the Westover building, owned by defendant, where he was injured on June 8d. So he was injured not quite three months after the conversation had between Batty and plaintiff and between Mr. Goodwin and plaintiff, when the latter went to work. During all of this time plaintiff was working under Batty and the latter told him what to do.

At the trial defendant introduced a contract, dated March 6, 1917, or 13 days before plaintiff first went to work, executed between defendant and Batty. It is headed "Painting Contract," and recites that it is agreed that Batty "shall do all painting, both inside and outside, on the properties either owned or managed" by Goodwin, "in Kansas City, Mo., as ordered by" Goodwin, "during the spring and summer of the year 1917 on the following basis." Goodwin to pay the actual cost of all painting materials used in the work. Batty to be paid 50 cents per hour for all time actually put in by him on the work and the actual cost of all additional labor employed by him. Batty to furnish at his own expense all brushes, ladders, scaffolding, drop cloths, and equipment necessary to safely and economically carry on the work.

It is defendant's contention, if there was any verbal contract at all between plaintiff and Batty and plaintiff and Goodwin where-in defendant and not Batty employed plaintiff, that that employment was merely for the first job done, or for work in the building at 1120 Walnut street. This because plaintiff, between the time of the Walnut street work and the job where he was injured, did a great deal of other work under Batty on other buildings, some of which were not owned by the defendant, showing a change in plaintiff's employment. Consequently, defendant says that the work plaintiff was doing at the time he was injured was being done as an employé of Batty and not of defendant. There is no evidence of any other employment except the oral one with Batty

and Goodwin claimed by plaintiff and the painting contract claimed by defendant as engaging Batty as an independent contractor. Plaintiff does not admit that the "painting contract" was executed. We take it that defendant's contention is that the work being done at the time plaintiff was injured was being done under the written painting contract that defendant had with Batty. We prefer not to go into the matter as to whether the jury was required to believe that the painting contract was in fact executed, or, believing that it was so executed, that plaintiff was not working under the same at the time he was injured, but rather under his verbal contract with Batty and Goodwin. But, for the purpose of this case, we will assume that the work being carried on at the time plaintiff was injured was under the painting contract that Batty had with defendant, unless said contract was abandoned.

[1] The painting contract upon its face suggests that Batty was merely to be the employé of Goodwin, defendant's agent. It does not engage Batty by the job, but by the hour at a stipulated sum. Goodwin was also required to furnish or pay for all the materials. The men to be hired by Batty were to be paid what their services actually cost Batty. In other words, Batty was to be reimbursed by defendant for the money he should pay out for hire. While the mode of payment and the question as to who is to furnish the materials is not a decisive test by which to determine as to whether the party employed is an independent contractor or an employé, these matters may be taken into consideration with other facts and circumstances throwing light on the question, especially in connection with the matter as to whether the proprietor has control over the person employed. 1 Thompson on Neg. § 629, p. 578; Shearman & Redfield on Negligence (6th Ed.) § 165, p. 400; 1 Labatt's Master and Servant, § 66, p. 233; 16 Amer. & Eng. Ency. of Law (2d Ed.) pp. 189, 190.

[2] We think that the painting contract on its face by no means is to be construed as meaning that defendant's agent, Goodwin, was not to have control over the method and details of the accomplishing of the work or that Batty was not to be under the immediate supervision and control of Goodwin. The work was to be done "as ordered by" Goodwin. Whether this means, as defendant assumes, that Batty was to do the various jobs of work as ordered by Goodwin in accordance with his (Batty's) methods, defendant to have control only of the result of the work, or whether Goodwin was to have the right to order Batty, not only as to what jobs to be done but in reference to the details and method of the accomplishing of the work, is not clear. However, a reading of the contract suggests that Batty could not well re-

fuse to obey Goodwin's directions as to the mode in which the work should be done. But we will assume that the contract is ambiguous on this point, so we must resort to the construction put upon it by the conduct of the parties subsequent to its execution. *Sedalia Brewing Co. v. Sedalia Waterworks Co.*, 34 Mo. App. 49.

We think there is no question but that the subsequent conduct of Goodwin and Batty was such as to show that defendant was directing and controlling the manner of the execution of the work. In this connection, the facts show that at the time the written painting contract was entered into Goodwin told Batty that, instead of allowing 40 cents an hour for the men as provided in the contract, he would allow 45 cents an hour; that, if he (Batty) could get any "good men" for less than 45 cents an hour, Goodwin, nevertheless was to pay him 45 cents; and that, if Batty had to pay more than 45 cents an hour later, the defendant would reimburse Batty to the actual amount paid out by him. Goodwin testified that he was willing to pay Batty 45 cents an hour for the men that Batty should hire, even though Batty obtained such men for 40 cents an hour; that the men so hired must be "satisfactory to Goodwin." Plaintiff was hired at 40 cents an hour. Plaintiff testified that Goodwin was on the work at 1120 Walnut street, and that "he would give directions what to do and what colors to use and where to paint," and that he would direct Batty with a suggestion "about how high up we were painting this border," and that he directed Batty what to do, "how to paint it, and so on." We thus see that defendant was interfering in the work to the extent of insisting upon the kind of men that should be employed and giving directions to Batty as to details. All of which, in connection with the other facts in the case, is inconsistent with the idea that defendant was looking only to the result of the work. Taking all the facts in evidence, a different case is made than *Jackson v. Butler*, 249 Mo. 342, 155 S. W. 1071, *Salmon v. Kansas City*, 241 Mo. 14, 145 S. W. 16, 39 L. R. A. (N. S.) 328, and like cases cited by defendant.

[3, 4] Plaintiff testified that the work done on Dr Chambers' building was done for Batty and that Batty paid him. All the other work done between the time plaintiff was first employed and the time he was injured was either on defendant's property or for Goodwin and his friends, and there is a strong inference that the work done for Goodwin's friends was paid for by Goodwin and his agents; the inference being that Goodwin was reimbursed afterwards by the parties. We do not think that because on all these jobs plaintiff was apparently working under Batty and for no one else, or the fact that, on some of these occasions, the de-

fendant was connected only remotely with the transactions, changes the situation in any respect. If Batty was plaintiff's foreman, plaintiff would very naturally get his instructions from Batty. It is true that Batty paid plaintiff some of the time on defendant's work, but not on all of the work. Batty got the money at 1120 Walnut street, Goodwin's headquarters. The fact that Batty manually paid plaintiff is not conclusive that Batty was paying plaintiff with the former's own money. Of course, the money with which Batty paid plaintiff was obtained from defendant, and, even if it were paid Batty under the painting contract, it would not help defendant any, for, as we have already said, that contract, as construed by the parties to it, was one for hire and did not create the relation of independent contractor between Batty and defendant, but rather made Batty defendant's agent to hire men for defendant.

[8] In addition to all of this, the evidence was such that the jury might find that the written contract was entirely abandoned between the parties before the time plaintiff was injured. It was not only altered verbally in the respect we have stated, that is, the amount that Batty was to receive for the men employed by him was changed from the actual amount of the hire to 45 cents an hour regardless of whether the men cost Batty that much, but it was ignored in other respects. The contract provides that Batty was "to do *all* the painting, both inside and outside, of the properties either owned or managed" by Goodwin. (*Italics ours.*) Batty admitted that he was not given all of the painting provided for in this contract. On the first job that was done, that at 1120 Walnut street, Batty did not furnish the scaffolding, but was given lumber by Goodwin to use for scaffolding on that job. Most of the scaffolding used where plaintiff was injured was defendant's. One of the ladders belonged to the defendant. The plank used in the scaffolding on which the painters stood belonged to the defendant. However, Batty furnished "a piece" of one stepladder. The ladder that broke, causing plaintiff to fall, belonged to one of the tenants in the building and was borrowed by Batty. If the painting contract was abandoned, then, of course, the inference is that Batty and plaintiff were defendant's servants.

At the time of plaintiff's injury, he and Batty were doing interior painting in one of defendant's buildings located at Thirty-First and Troost avenue, in Kansas City, Mo. In order to paint the side walls of the rooms in the building, two ten-foot stepladders were procured and a board 2 inches thick, 10 inches wide, and 12 feet long was placed upon them to serve as a scaffold. At the time of the accident, the scaffolding was placed for painting the west wall. Plaintiff at the

time of his injury had just gotten upon the board that was resting upon the ladders to begin painting the "second stretch" and was reaching upward to begin painting the west wall, when the north ladder broke, precipitating him to the floor to his injury.

[8] It is defendant's contention that the ladder was not broken until after it fell. We are unable to agree with this contention. While there was evidence that the board fell upon the ladder where it was broken and a cracking noise was heard after the scaffolding started to fall, there is no evidence that plaintiff did anything to cause the scaffold to fall, or that he lost his balance, or that the scaffold or ladders were unbalanced in any particular. There is nothing contrary to physical laws in the contention that the ladder broke causing the fall. Aside from these facts, the ladder was shown to have been defective where it broke. These ladders were ten-foot ladders, that is, ten feet in height, with steps a foot apart. The steps were fitted in grooves on the inside of the side pieces or legs. These grooves were three-sixteenths of an inch wide. A leg of one of the ladders broke at the groove where the first, or lowest, step was attached. The evidence on the part of witnesses who examined the ladder after the accident shows that the piece below the lowest step was broken entirely off. This piece was six to ten inches in length and had five old and rusty nail holes in it, none of which had nails in them. Two nails remained in the end of the step that evidently had pulled through the outside piece. The evidence was that a good ladder has two nails to hold the step. One witness who examined the ladder after the accident was asked, "Tell the jury what was the condition of that piece where it fits in there," and the witness said:

"Well, it was—it looked like it was honey-combed and had three or four nail holes in it and had two nails sticking into the step."

We take this testimony to mean that on account of the numerous nail holes in it the piece that broke off looked like it was honey-combed. As we have stated, there were five of these nail holes. The evidence was that the wood was not rotten, but that the break was a "clean break." Defendant insists that there was no evidence of anything being wrong with the ladder, and that if the wood was rotten it was rotten on the inside and would not appear on inspection. We do not construe plaintiff's evidence to mean that the wood was rotten, but that it was in a weakened condition on account of having so many nail holes in it. The allegation in the petition in reference to the defect in the ladder was that—

"One of the legs of said stepladder was insufficiently strong for the purpose for which it

was intended, and was weak, insecure, insufficient, and defective."

There is no allegation that the wood in the leg was rotten.

[7] Plaintiff was a workman of 17 years' experience in the work he was doing, and he testified that he looked at the ladder "a little bit" before going on the same, and that it looked "fairly good," but he did not examine it closely. Batty, plaintiff's foreman, examined the ladder, tested it, testified that it was in good condition, and assured plaintiff that it was all right. From this and like evidence defendant says there is no dispute in the evidence that the leg was not defective. We are unable to agree to this. Plaintiff's inspection was but superficial, and the examination after the accident showed a defective leg. The jury was not required to believe defendant's foreman, or the testimony of the witness Taylor.

[8-11] Defendant contends that the court erred in permitting plaintiff to testify as to his conversation with Goodwin at the time plaintiff went to work at 1120 Walnut street. It is defendant's contention that plaintiff had already been employed by Batty, and that the statement of Goodwin, two days later, was not a part of the *res gestæ*. We think there is no merit in this contention. Plaintiff testified that he talked to Batty, and that Batty stated, "The Withers estate had a lot of work to do and that they wanted to get a man to help." Plaintiff did not ask Batty what Batty was paying, but what "they were paying," and before he went to work, not being satisfied with what Batty offered him in behalf of the defendant, evidently related to Goodwin his conversation with Batty and asked Goodwin to give him more. Also being desirous of knowing for whom he was working, asked Goodwin who it was. The jury could say that plaintiff did not make a contract with Batty, but left the matter of closing the contract open until he saw Goodwin, for the reason that had he closed the contract he would not have attempted to get Goodwin to pay more than 40 cents an hour, the amount mentioned by Batty, and the inference is that plaintiff did not go to work for Batty and had not agreed to the contract because he did not know whether the employment was between himself and Batty, and asked Goodwin if he was working for the defendant, desiring to work for the defendant and not Batty. We think the evidence was admissible; it was the agreement under which plaintiff went to work. Defendant says that what Goodwin said at the time was a statement of the latter's conclusion or opinion on the meaning of the contract made by Batty. We do not think there is any merit in this contention. Goodwin was the agent of the defendant, a corporation, for the purpose of keeping its

properties in repair. When plaintiff talked to him, he had not made a complete contract of employment, and Goodwin told him that he was working for the defendant; "that he was working for us, the Withers estate"; and, upon being requested to pay more than 40 cents an hour, stated that he could not pay any more. We fail to see why we must construe this evidence as a conclusion or opinion of Goodwin. Clearly, it was a statement of fact, a statement of the conditions of employment. If it is defendant's contention that no contract is valid that contains a conclusion of the parties within the meaning of the rule of evidence that a witness testifying in court may not give a conclusion, then, of course, the point is ruled against defendant. Defendant urges in this court that the evidence was not admissible because it was of an alleged contract made long before the time of the accident; that it was in reference to the job at 1120 Walnut street; and that plaintiff was employed in the interim by Batty on work other than defendant's. The objection to this testimony in the trial court was that it was incompetent, irrelevant, and immaterial because Goodwin was not authorized to make statements on behalf of the defendant; that it was a statement of the conclusion of Goodwin and was not a part of the res gestæ, that is, not a part of the res gestæ of the occurrence wherein plaintiff had a conversation with Batty at Southwest boulevard and Nineteenth street. None of these objections go to the point now made.

The judgment is affirmed.

All concur.

(201 Mo. App. 117)

**CARROLL CONTRACTING CO. v. NEW-SOME et al.** (No. 15175.)

(St. Louis Court of Appeals. Missouri. Argued and Submitted Oct. 10, 1918. Opinion Filed Nov. 6, 1918. Rehearing Denied March 25, 1919.)

**1. APPEAL AND ERROR ¶179(1)—RESERVATION OF GROUNDS OF REVIEW—MECHANIC'S LIEN ACTION.**

In action for excavation work and to establish mechanic's lien, demurrer to evidence as not sufficient to entitle plaintiff to recover, and objections made throughout introduction of testimony, *held* sufficient to raise point that owner was not bound by any contract between it and another defendant, which rendered its property liable for lien for work done, or that other defendant, in making contract for excavation with plaintiff, was not acting as agent for owner.

**2. MECHANICS' LIENS ¶61—RIGHT OF SUBCONTRACTOR — CONTRACT BETWEEN OWNER AND CONTRACTOR.**

To maintain lien against owner by subcontractor, it must appear work was done by the

chief contractor under a contract with the owner, for work and furnishing material, which was valid and subsisting.

**3. MECHANICS' LIENS ¶96—RIGHT OF SUBCONTRACTOR — CHIEF CONTRACTOR AND LICENSEE.**

Where contract of corporation and principal stockholder for erection of building rendered contractor a mere licensee to do the work, under no obligation to enter upon and go on with it, he could not bind the company's property for the work done and improvements made upon it through a subcontractor.

**4. APPEAL AND ERROR ¶117(6)—DISPOSITION—REMAND FOR FURTHER PROOF.**

In subcontractor's action to enforce mechanic's lien, after reversal because chief contractor was a mere licensee, not obligated to undertake the work, if the subcontractor can show that there was an agency between the owner and the chief contractor, or that the licensing contract between them was a mere subterfuge, it is entitled to do so, and to have remand of the case to permit it.

**5. MECHANICS' LIENS ¶73(8)—LIENABLE ITEMS—QUANTUM MERUIT ON CONTRACT.**

Where a contractor endeavors to establish a lien against the realty, he can charge it only for such work, labor, and materials as are lienable, whether the action be on quantum meruit or under contract.

**6. MECHANICS' LIENS ¶88—CHARGES FOR SUPERINTENDENCE—LIENABLE CHARACTER.**

Subcontractor's charges for superintendent and foreman, subcontractor being a corporation, and the charges not being those of an individual for his own superintendence, *held* lienable items.

**7. MECHANICS' LIENS ¶111(1)—EXCAVATION FOR FOUNDATION—ABANDONMENT OF PROJECT.**

Services and labor performed in excavation of a foundation *held* lienable, though no building or other improvement was constructed; the project being abandoned.

Appeal from St. Louis Circuit Court; Glendy B. Arnold, Judge.

Action by the Carroll Contracting Company against W. D. Newsome and the Merchants' & Consumers' Market House Association. From the judgment, defendant Association appeals. Judgment against defendant Newsome affirmed, judgment against the Association reversed, and cause remanded as to it.

Robt. W. Hall and Charles A. Houts, both of St. Louis, for appellant.

J. D. Johnson, of St. Louis, amicus curiæ. Connett & Currie, of St. Louis, for respondent.

REYNOLDS, P. J. Plaintiff, respondent here, brought his action against one Newsome for certain excavation work done in

the cellar or basement of a building proposed to be erected in the city of St. Louis, and to establish a mechanic's lien against the owner of the land, Merchants' & Consumers' Market House Association, the latter hereafter referred to as the Market House Association. His petition is in two counts. The first is on quantum meruit, the second on contract. The amount claimed under each is \$4,872.42.

At a trial before the court, a jury having been waived, the court found for plaintiff against the defendant Newsome on the second count of the petition in the sum of \$4,667.42, principal and interest, the latter from October 14th, 1914, to June 14th, 1915, and adjudged it to be a lien against the property of the defendant Market House Association, finding for the defendant on the first count of plaintiff's petition.

Filing a motion for new trial and excepting to the action of the court in overruling it, the Market House Association has duly appealed. Defendant Newsome did not appeal.

The second count sets out that plaintiff and the defendant Newsome entered into a contract to the effect that the plaintiff should and would provide all the materials and perform all the work in the excavation for the building known as the Merchants' & Consumers' Market House Association Building, and that the plaintiff should receive from defendant Newsome, for such work and labor the sum of \$6,328, said work to be done in accordance with the drawings and specifications prepared for said building by C. B. Yoder & Company, architects; that thereafter, and about September 15th, plaintiff, in performing the contract, commenced the work of excavating for the building, in accordance with the drawings and specifications, on the lot described, upon which the proposed market house building was to be erected and constructed, and that continuously from and after September 15th, up to and including October 7th, 1914, plaintiff did and performed the work and labor in and about the excavation for the building and duly performed all the conditions of the contract on his part to be performed, up to and including October 7th, 1914; that plaintiff had excavated and removed from the excavation for the market house building 13,514 cubic yards of earth, the work having been done down to and including October 7th, 1914, being and amounting to 89 $\frac{1}{10}$  per cent. of the entire amount of work required to be done under and in accordance with the terms of the contract between plaintiff and defendant. Then follows the itemized account. This consists of items, commencing with the date September 15th, 1914, and including that date ends with and includes October 7th of the same year, showing the number of hours of labor thus:

Foremen .....	20	hours
Laborers .....	60	"
Steam shovel.....	10	"
Wagons .....	70	"
Teams .....	70	"
Superintendent .....	10	"

No amount is given as showing the charges per hour.

In addition, under date of October 7th, is the item, "8,750 feet of lumber for runway, supplies for pipe line, hose, pipe and fittings," and closes with this entry:

Total price for excavation done.....	\$5,688.87
By cash paid on account by W. D. Newsome, September 30th, 1914.....	1,300.00

Balance due..... \$4,488.87

Following this it is set out that it was understood between Newsome and plaintiff that plaintiff was to receive payment from Newsome every two weeks for the work it had completed, less 15 per cent. of the amount due according to the estimate of the architects in charge of the building and work. Averring that Newsome had paid \$1,200 of this on account and no more, it is averred that the balance due, according to the terms of the contract, amounted to \$4,488.87, which Newsome had refused and neglected to pay, and that on October 7th, 1914, Newsome abandoned his contract and refused to perform any of the conditions thereby imposed upon him, although plaintiff was ready, willing and able to complete the excavation required for the erection of the proposed market house. Averring that the sum charged is the reasonable price and value of the work, it is averred that the balance is still due. It is further averred that this work and labor was done and performed in and about the excavation for the basement of the market house building proposed to be erected on the land described, and that at that time and when the work was done, this land was the property of the Market House Association; that Newsome was the original contractor with defendant Market House Association for the excavation required in the erection of the market house proposed to be erected upon the described lot; that the demand became due on October 7th, 1914. Following are averments showing filing of lien, due notice, etc., and judgment is demanded for \$4,488.87, with interest at the rate of 6 per cent. per annum from October 7th, 1914, and costs, and that it be declared a lien against the property described.

Newsome filed an answer, denying each and every allegation contained in the petition, and all knowledge or information sufficient to form a belief thereof and prays judgment. A motion to strike this out was filed and overruled.

The defendant Market House Association filed a demurrer to the petition, which was overruled and exceptions saved. It then

filed an answer, denying all the allegations of the petition. Subsequently it filed a motion to elect between the two counts, averring that the first was on a quantum meruit and the second upon a contract. This was overruled, defendant excepting.

The deposition of defendant Newsome was taken in the case and filed and read by plaintiff at the hearing.

The articles of association of the Market House Association were in evidence, by which it appeared that it was formed for the purpose of erecting a market house, the corporation incorporated with a named capital of \$125,000, divided into 1,250 shares, of which Victor Diesing owned 646 shares, his wife, brother-in-law and other parties owning a share each, Victor Diesing and these parties being named as the first board of directors, Diesing being president.

Plaintiff, to sustain the issues on his part, introduced an agreement, of date September 14th, 1914, between itself, a corporation, as party of the first part, and W. D. Newsome, party of the second part, for doing the excavating for the price and sum of \$6,828. Plaintiff then introduced in evidence an agreement of date September 12th, 1914, between Victor Diesing and the Merchants' & Consumers' Market House Association, parties of the first part, and W. D. Newsome, as party of the second part, which reads:

"This agreement entered into this 12th day of September, 1914, between Victor Diesing and the Merchants' & Consumers' Market House Association, a corporation, parties of the first part, and W. D. Newsome, party of the second part, witnesseth:

"1st. The parties of the first part hereby grant unto the party of the second part the right to begin, and to continue until the 12th day of October, 1914, the excavation required in the erection of a market house proposed to be erected on the property of the parties of the first part, situated on the north line of Laclede Avenue one hundred and fifty (150') feet west of the west line of Vandeventer Avenue in the City St. Louis; said excavation to be made in accordance with the plans and specifications hereto attached and made a part hereof.

"2d. The party of the second part agrees to pay the entire cost of such excavation, and shall save and hold harmless the parties of the first part from all claims, liens or demands which may in any way arise from the prosecution of the work of excavation hereby permitted, including all claims for damages of every kind, nature or description which may be made against the parties of the first part, or either of them, in any way arising from the making or maintaining of said excavation on said property.

"3d. The making of this contract by the parties hereto and the prosecution of the work of making said excavation by the party of the second part shall in no wise be construed as giving to the party of the second part any rights in and to said property except such as are herein defined.

"4th. Nothing herein contained shall be con-

strued as preventing the party of the second part from being reimbursed by the Merchants' & Consumers' Market House Association for his expenses in connection with the making of said excavation if said party of the second part and his associates should secure control of said Merchants' & Consumers' Market House Association under the option contract now existing between the party of the second part and the said Victor Diesing.

"5th. The party of the second part agrees to furnish to the parties of the first part a good and sufficient bond in the sum of six thousand dollars (\$6,000.00), to secure to the parties of the first part the performance by the party of the second part all the terms of this agreement by the latter to be performed.

"In witness whereof, the parties hereto have executed this instrument this 12th day of September, 1914. [Signed] Victor Diesing, Merchants' & Consumers' Market Association, by [Signed] Victor Diesing, Pres., Parties of the First Part. [Signed] W. D. Newsome, Party of the Second Part."

It was also in evidence that Newsome had given a bond to Diesing and to the Merchants' & Consumers' Market House Association in the penal sum of \$6,000, conditioned that as Newsome had entered into an agreement with Diesing and the Merchants' & Consumers' Market House Association, whereby he had agreed and bound himself to hold harmless the said Diesing and Market House Association from all claims, demands, liens or damages arising from the making and maintaining of an excavation in the contract above set out. The American Surety Company of New York is surety on this bond.

Evidence was introduced showing the amount of work that had been done, its value, and its proportion to the whole work to be done.

At the conclusion of the introduction of the evidence in the case the Merchants' & Consumers' Market House Association demurred to the evidence, asking a peremptory instruction to the effect that under the law and the evidence plaintiff was not entitled to a special judgment establishing a lien against the property. The court refused this, this defendant duly excepting. Motions for new trial as well as in arrest were filed by this defendant and these being overruled and exceptions saved, the appeal followed.

A member of the bar of our court, by leave, filed a brief with us in behalf of the defendant Market House Association, that counsel representing the surety company named. It had not been represented at the trial.

[1] It is objected by the learned counsel for respondent that as the principal point raised by this counsel in his brief is not included in the brief of counsel of record for the appellant, nor in his assignment of errors, and was not specifically mentioned at the trial of the cause, that we are not to consider this brief nor the points made in it. The principal point there made and relied

on by that counsel as *Amicus Curiae* is, that the evidence in the case shows affirmatively that Newsome was a mere licensee and in no sense contractor with the Market House Association and does not appear to have been its agent in the matter. It is true that this point is not made nor argued by counsel of record for the appellant, but at the trial there was a demurrer to the evidence as not sufficient to entitle plaintiff to recover. We cannot say what reasons were urged in support of the demurrer; for anything appearing to the contrary, this point may well have been urged in support of the demurrer, but by repeated objection to the admission of evidence, counsel for appellant did make the point that no case was made out to charge the Market House Association; that the lien paper was not admissible "for the reason that there has been no foundation laid; that it is being introduced at an improper time," etc. Again, when the notice of the claim to a lien was offered, counsel for the Market House Association said:

"I believe I can offer a general objection to the introduction of any evidence without specifically making my same old objection here and filling up the record and taking up time. I make the objection to any of the questions with reference to the work done there in accordance with the objection I have made to the lien paper that the court will understand it with the understanding that the same objection goes to each of these questions," etc.

The objection being overruled, counsel for appellant, Market House Association, further said that he was "only making this objection as far as the owner of the property is concerned." These and similar objections made throughout the introduction of testimony, as well as the demurrer, were sufficient to raise the point that the Market House Association was not bound by any contract between it and Newsome which rendered its property liable for a lien for the work done, or that Newsome, in making the contract for the excavation, was acting as agent for the Market House Association so as to bind it. On this state of the record, we think that question was left open for our consideration.

[2] It is the well established law of this state that to maintain a lien against the owner by a subcontractor, it must appear that the work was done by the contractor under a contract with the owner of the property; that he had a valid, subsisting contract with the owner of the property for doing the work and furnishing the material. That is clearly settled by our Supreme Court in *Ward v. Nolde*, 259 Mo. 285, 168 S. W. 596. Our own court followed it in the case of *Carey Co. v. Kellerman Construction Co.*, 185 Mo. App. 346, 170 S. W. 449. We refer to these opinions and the cases therein cited as settling this point in favor of the contention of the appellant.

[3] It follows, that on the face of the contract in evidence between Diesing and the Market House Association, on the one side, and Newsome on the other, Newsome was a mere licensee and was under no obligation to enter upon and go on with the work, and consequently cannot bind the property of the owner for the work done and improvements which he made upon it.

[4] We might close here as this is fatal to respondent's case, but as counsel on either side have raised other points which are in the case and deserving of attention, we will very briefly refer to them, especially in view of the fact that counsel for respondent seem to ask us, if we reverse the case to remand it, in order that they can introduce proof to establish an agency and to show that the contract in evidence between Diesing and the Market House Association and Newsome was a mere subterfuge. If the plaintiff, respondent here, can make that showing, or can show by competent evidence that after this contract was made it was agreed that Newsome was in fact doing the work under contract with the Market House Association, which obligated him to do it, we think that he is entitled to do it.

[5, 6] It is claimed that there are non-lienable items in that account, it being claimed that the charges for superintendent and foreman are not lienable items.

It is true that at an early day, in *Blakey v. Blakey*, 27 Mo. 39, our Supreme Court said (loc. cit. 40):

"The law gives the mechanic, builder, artisan, workman, laborer, or other person, who may do or perform any work upon or furnish materials for any building, a lien on the same to secure the payment of the work done or materials furnished; but it has no such elastic power as is claimed for it in this case, and it cannot be stretched to cover, besides the value of the work done and materials furnished, a claim for services performed by the builder for himself in superintending his own workmen."

In *O'Connor v. Current River R. Co.*, 111 Mo. 185, at page 194, 20 S. W. 18, our Supreme Court, in an action to enforce a lien by contractors for the construction of a railroad under the law governing such liens, cited *Blakey v. Blakey*, supra, with approval, but on the point that non-lienable work was so mingled with that which was lienable as not to be separately distinguished. Our court in *Nelson v. Withrow*, 14 Mo. App. 270, loc. cit. 279, cited *Blakey v. Blakey*, supra, approvingly, but in that case as well as in the *Nelson* Case the claim for superintendence was by the contractor himself for his own work in superintending.

In *Sweem v. Atchison, T. & S. F. Ry. Co.*, 85 Mo. App. 87, also an action under the lien law relating to the construction of railroads, Judge Ellison, speaking for the Kansas City Court of Appeals, reviewing *Blakey v. Blakey*, supra, and other cases, says (loc. cit. 94)

that the court felt it was left free, under the builders' lien statute and the railroad lien statute, to consider as an original proposition, whether the claimant, who was a mechanic or machinist, superintending the work, is entitled to a lien for his services. Holding the two statutes to be not entirely alike, that learned judge concludes that under the railroad lien law the claim of this mechanic was lienable and he intimates grave doubt as to the correctness of the Blakey decision on principle.

In the case at bar the evidence is that the superintending work was done by a person employed by the contractor. That distinguishes this case from those referred to. It is further to be borne in mind that when *Blakey v. Blakey* was decided, the rule in our state was, to construe the mechanic's lien law strictly on the untenable ground that that law was in derogation of common law. But all of our modern decisions have taken exactly the opposite view and hold that it is to be construed liberally. See *Joplin Sash and Door Works v. Shade*, 137 Mo. App. 20, loc. cit. 23, 118 S. W. 1196; *Powers & Boyd Cornice and Roofing Co. v. Muir*, 146 Mo. App. 36, loc. cit. 49, 123 S. W. 490, and authorities cited in these two cases.

A very able review of the Missouri decisions, most of which we have cited above, as well as others, will be found in *Continental & Commercial Trust & Savings Bank et al. v. North Platte Valley Irr. Co. et al.*, 219 Fed. 438, loc. cit. 442, 135 C. C. A. 154. Reviewing these decisions the learned judge, referring particularly to *Blakey v. Blakey*, supra, says:

"An examination of that case, however, shows that all that was decided was that where a builder took a contract for the erection of a house, he could not maintain a lien for superintending his own workmen."

He also refers to *Edgar v. Salisbury*, 17 Mo. 271, as merely holding that where lienable and non-lienable charges were stated together in one charge, so that it was impossible to ascertain how much was lienable, the entire lien would be lost. (Such was the case in *O'Connor v. Current River R. R. Co.*, supra). Citing *Murphy v. Murphy*, 22 Mo. App. 18, as disposing of the point in the same way, and *Nelson v. Withrow*, supra, as following *Blakey v. Blakey*, supra, Judge Carland, who wrote the opinion in the Circuit Court of Appeals of the United States for this circuit in the case cited, says:

"The old doctrine that these lien statutes, being in contravention of the common law, must be strictly construed has given way to a more liberal doctrine, in modern times, for the pur-

pose of carrying out the purposes of the statute."

His conclusion is that the charge for superintending, under circumstances such as here, was lienable. The finding in this case was on the second count, which proceeded on contract. That fact, however, does not change the law, which only gives a lien for certain work, material and services. If under contract to do the work for a lump sum, non-lienable items are included, the fact of it being done under contract does not change the situation. Where the plaintiff endeavors to establish a lien against the realty he can charge the realty alone only for such work, labor or material as are lienable, and this is true whether the action is on quantum meruit or under contract.

Our conclusion is that the item for superintendence as well as that for the foremen are lienable items and that the spirit of the more recent decisions of our state tend to support this view.

[7] It is urged that the services and labor performed in excavation, no building or other improvement being placed upon the realty, are not lienable; that as no building was constructed, no improvements made, no lien can be maintained for excavation for the cellar and foundation. We do not accede to this.

In 27 Cyc. p. 36, par. 6, it is said:

"Excavations and foundations for a building are generally held to be within the lien laws, even though the building is not completed."

And in this same work, at page 41, par. 16, it is said:

"The right to a lien for work done in the construction of a building is not dependent upon whether the building is actually completed but whether the construction is commenced. If this is done and lienable work is done in aid thereof the right of lien thereby becomes perfect, and cannot thereafter be defeated by any act of the proprietor."

While we have no authority in this state on that subject, the authorities cited in the compilation as above from other states fully sustain them. We hold that such work, being done in the excavation of this foundation, is lienable, although the project was afterwards abandoned and no superstructure erected.

The result is that the judgment against the defendant Newsome is affirmed, but the judgment against the defendant Merchants' & Consumers' Market House Association is reversed and the cause remanded as to that defendant.

ALLEN and BECKER, JJ., concur.



(301 Mo. App. 8)

**PORTERFIELD v. AMERICAN SURETY CO. OF NEW YORK. (No. 13141.)**(Kansas City Court of Appeals. Missouri.  
Jan. 6, 1919.)**1. INSURANCE ⇐84(4)—CONTRACT TO PLACE BOND—PERFORMANCE—COMMISSION.**

Where broker procured and placed contractor's bond with surety company under agreement to be paid a commission "on original premium and all renewal premiums \* \* \* as long as the bond remains in force," surety company could not deprive broker of right to commissions on renewal premiums during the life of the bond, by voluntarily relieving contractor from payment of further premiums.

**2. CUSTOMS AND USAGES ⇐17—VARYING TERMS OF CONTRACT.**

Where contract between surety company and contractor was a straight, clear, out-and-out obligation on part of contractor to pay annual premiums so long as bond remained in force, a custom whereby surety company charged no further annual premiums during additional time bond is continued in force by reason of delay in construction through no fault of contractor could not prevail over explicit terms of contract.

**3. CUSTOMS AND USAGES ⇐18—PLEADING.**

Where a custom is sought to change the terms of a written contract by showing real agreement in minds of parties at time of its execution, the custom must be pleaded.

**4. CUSTOMS AND USAGES ⇐8—NATURE OF CUSTOM—ELEMENTS.**

Before a course of procedure can be said to have arisen to the dignity of a custom so as to enter into and form part of a contract, it must be shown to possess those elements of certainty, generality, fixedness, and uniformity which are essential to constitute such a custom.

**5. CUSTOMS AND USAGES ⇐6—NATURE OF LOOSE PRACTICE.**

A loose and variable practice does not arise to the dignity of a custom so as to control the rights of the parties to a contract.

**6. CUSTOMS AND USAGES ⇐6—DISCRETION OF INDIVIDUAL.**

A usage which leaves some material element to the discretion of the individual does not constitute a custom.

**7. CUSTOMS AND USAGES ⇐8—PLACING OF BOND—ACTION FOR COMMISSION.**

In action to recover broker's commissions on contractor's renewal premium on bond placed by broker for defendant surety company, a custom whereby contractor is not required to pay premium on bond during delay for which he was not at fault, where not sufficient to constitute a custom in a legal sense, could not be relied upon to enter into and form a part of the broker's contract.

**8. INSURANCE ⇐84(2)—AGREEMENT TO PROCURE SURETYSHIP CONTRACT—MERGER WITH AGENCY CONTRACT.**

Contract whereby broker was employed to procure suretyship contract was not merged in broker's subsequent contract of agency, whereby he became a regular agent for the surety company, where the two contracts showed on their face that they were separate, and where broker's first contract provided that he was to receive commissions throughout life of bond regardless of whether he was in the company's employ.

**9. CONTRACTS ⇐245(1)—MERGER.**

Before one contract is merged in another, the last must be between the same parties as the first, must embrace the same subject-matter, and must have been so intended by the parties.

**10. CONTRACTS ⇐170(1)—CONSTRUCTION.**

The parties' own construction of a contract as disclosed by their course of conduct should be followed.

**11. INSURANCE ⇐79—BROKERAGE CONTRACT—MERGER WITH AGENCY CONTRACT.**

Broker's contract to place bond for surety company was not merged in his subsequent contract with the company, whereby he became an agent on an employé basis, where the brokerage contract was fully consummated before the agency contract was entered into.

**12. EVIDENCE ⇐244(1), 320—ADMISSIONS BY GENERAL MANAGER—HEARSAY.**

The admission of evidence as to what the general manager of a company had said as to a business transaction of the company with third party, whereby latter was seeking to be relieved of certain obligation, was not error, and as he was intrusted with the business in question, what he knew of it was not from hearsay.

**13. APPEAL AND ERROR ⇐1050(1)—REVIEW—HARMLESS ERROR.**

The admission of evidence, if error, was harmless, where the same evidence was properly admitted through another witness.

**14. APPEAL AND ERROR ⇐1052(8)—REVIEW—HARMLESS ERROR.**

Plaintiff's erroneous admission of incompetent evidence was harmless, where plaintiff was entitled to a directed verdict because of defendant's failure to make out any of the pleaded defenses.

**15. APPEAL AND ERROR ⇐1060(1)—HARMLESS ERROR—REMARKS OF COUNSEL.**

Improper remarks of plaintiff's counsel in his closing argument were harmless, where plaintiff was entitled to a directed verdict because of defendant's failure to make out any of the pleaded defenses.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by Edward E. Porterfield against the American Surety Company of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

Warner, Dean, McLeod & Langworthy and William E. Byers, all of Kansas City, for appellant.

M. M. Bogle and Henry L. Jost, both of Kansas City, for respondent.

TRIMBLE, J. This is an action to recover unpaid broker's commissions claimed to be due under a contract made by the American Surety Company with an insurance broker, Edward E. Porterfield, Jr., relative to the latter's procuring and placing with defendant the contract or right to furnish any part of the bond required of the contractor selected to erect the new Missouri state capitol.

After the broker had performed his part of the contract and had received from defendant a part of his commissions, he, for a valuable consideration, assigned all commissions due and to become due under said broker's contract to his father, Edward E. Porterfield, the plaintiff herein. After this assignment, which was on July 28, 1916, the defendant paid to the plaintiff, as assignee of his son, the commissions due and accrued up to November 28, 1916, but refused to pay any commissions claimed as due and accruing for the year following said last-named date. This suit was brought to enforce payment thereof, the petition being filed after the expiration of said year. Plaintiff obtained a verdict and judgment for the full amount demanded, with interest from November 28, 1916. Defendant appealed.

The Forty-Sixth General Assembly of Missouri by an act approved March 24, 1911 (Laws 1911, p. 108), authorized the erection of a state capitol and created a "state capitol commission board," with power to prepare plans, submit bids, and award a contract for the erection of said building, all of which things were duly and regularly done, and the "John Gill & Sons Company," a corporation, was awarded the contract. The law provided, and the contract required, that the contractor give a bond for the faithful performance of its contract, the latter fixing the penal sum of the bond to be given at \$1,350,000. The contract was formally awarded to said John Gill & Sons Company November 21, 1913.

Prior to and at this time young Porterfield was busy on his own account as an insurance broker, endeavoring to secure the right to furnish said bond. With matters in this shape, Valentine, the resident vice president of the defendant at Kansas City, communicated with young Porterfield over the telephone, and the latter was employed to get the bond, or any part thereof, for the defendant surety company. This telephone contract was, on the 25th of November, 1913, confirmed by a letter from said Valentine, which, among other things, stated that—

"If this company acts as surety or cosurety on such bond procured by you, you will be paid

a commission of thirty-five per cent. (35%) on the original premium and all renewal premiums received by this company as long as the bond remains in force. You to receive commissions as above whether your connection with this company continues throughout the life of the said bond or not."

(It may be well to here state that in the telephone conversation Valentine had tried to also engage young Porterfield as the company's regular agent, but the latter would not close a contract on that matter until he had first closed a separate and distinct broker's contract relative to the procuring of the aforesaid state capitol bond. Afterwards, and on December 4, 1913, young Porterfield entered into a contract whereby he became the defendant's regular agent, but it is manifest that the two contracts are wholly separate and distinct and have nothing whatever to do with each other. And the services under the broker's contract were rendered before the agency contract was entered into.)

There is no question but that young Porterfield performed his part of the broker's contract and succeeded in obtaining one-third of said bond to be placed with the defendant surety company. Neither is there any controversy over the fact that the annual premiums charged by and paid to said defendant was \$4,517 and 35 per cent. of this sum, or \$1,581, was paid by defendant each year to young Porterfield and his assignee up to November 28, 1916, as hereinabove stated.

The application to the defendant surety company for the bond in question, which was the contract the broker was to obtain for defendant, was signed by the contractor on November 26, 1913. In it the contractor agreed and bound itself to pay in advance to defendant the original premium or charge for executing such obligation and continuing the same in force for one year, and that it would "thereafter pay a like sum, annually, in advance, until the surety shall be discharged and released from any and all responsibility upon each such obligation and until the indemnitor shall serve upon the surety competent, written, legal evidence of its final discharge from each such obligation and all liability by reason thereof."

The contract for the erection of the capitol building was, concurrently with the contractor's bond, executed November 28, 1913. The former was very long, containing many things the contractor was to do, not only with reference to the erection of the building complete in every respect and of its necessary equipment and accessories with materials of the very best quality in strict accord with the plans and specifications, but also with reference to the payment for all materials and of all subcontractors, laborers, and other employes, the obtaining of releases therefrom, the correction of imperfections, etc., all of which were declared to be essential parts of

the contract. The contract further provided that time was of the essence thereof, and that the building should be completed by July 1, 1916, and, if not completed by that date, the contractor should pay the state \$250 per day liquidated damages for the failure to complete the same within that time, but provision was made whereby in case of failure to complete from any cause entirely beyond the control of the contractor, the state capitol commission board would grant an extension of time. The contract required that the bond given by the contractor should "guarantee the faithful, prompt and efficient performance by the contractor herein of all of the covenants, the agreements, undertakings, conditions and requirements of this contract on the part of the contractor or of any subcontractor's assignee of the contract, according to the strict terms of this contract, or according to any change or modification thereof or addition thereto, that may be made, as herein provided."

The building was not completed by July 1, 1916. However, it seems that extensions were asked and granted, and the record shows that finally an extension was granted by the board from May 15 to August 22, 1917.

On this last-named date, the contractor asked the board for a conditional acceptance of the building, such acceptance not to apply, however, to the completion of the main entrance, the elimination of certain stains on the walls, the restoration of their surface to a proper finish, the finishing and erection of 17 self-winding electric clocks, and various other items of adjustment and repairs necessary to complete the work in accordance with the contract; and the conditional acceptance was also to be "without affecting in any manner the bond" given. The request for such conditional acceptance also stated that if it were given, the contractor would then be in a position to obtain the certified releases required by the contract to be obtained from materialmen, subcontractors, and laborers.

On September 8, 1917, the state capitol commission board conditionally accepted said building, with the exception of the things above specified and the replacing of certain cracked stones in the building with proper stones. The order of conditional acceptance recited that none of the provisions or requirements of the original contract, plans, specifications, or bond, with reference to the exterior walls or any other part of said building, were waived, and that the conditional acceptance should not become effective until the consent in writing of the contractor's sureties had been obtained, nor until the contractor should obtain and deliver the releases hereinabove mentioned. Both the contractor and the board expressly stipulated that the bond should remain and continue in force to guarantee the performance of those things

which were required to be performed within one year from the date of the acceptance, to wit, September 8, 1917. This conditional acceptance was agreed to by the defendant surety company on September 12, 1917. The board, on the 28th of September, 1917, waived all claim upon the contractor for the \$250 a day specified as liquidated damages for failure to complete the building in the time specified by the contract. (The court permitted the defendant to show that this \$250 a day feature was waived by the board, but excluded that part of the board's minutes containing a long statement of their reasons for releasing this feature of the contract.)

Up to the time suit was brought no order of the board was made discharging the contractor's bond or relieving the contractor or its sureties from any further liability upon the contract or bond. Consequently, there is no question but that the bond was in force throughout the year involving the commission for which suit is brought, namely, from November 28, 1916, to November 28, 1917.

The answer of defendant, among other things, set up that it "agreed to and did not charge or collect any premium or premiums on said bond for a longer period than three years," and that "no premiums on said bond for the year beginning November 28, 1916, or for any time subsequent to that date, have been charged, paid, or collected by or remitted to this defendant."

The evidence on both sides disclosed that defendant, at the solicitation of the contractor, relieved and excused the contractor from further payments of premiums after November 28, 1916. The defendant was not compelled to forego such premiums; but did so for reasons of its own, and without consulting the broker or obtaining his consent thereto.

The case then, to restate it in a condensed form, is one wherein a broker has been employed to procure for defendant the contract or right to furnish the suretyship on a certain required bond, and the terms of the broker's employment are that he is to "be paid a commission of 35 per cent. on the original premium and all renewal premiums received by this company as long as the bond remains in force," and that too whether the broker's contemplated connection with the company "continues throughout the life of the said bond or not." The broker, concededly, obtained the contract for the suretyship, said contract expressly binding the one seeking the bond to pay the original premium on the date of the execution thereof which would continue the bond in force for a year, and to thereafter pay "a like sum annually in advance until the surety shall be discharged and released from any and all responsibility \* \* \* and until the indemnitor shall serve upon the surety competent written legal evidence of its final discharge from \* \* \*

such obligation and all liability by reason thereof." The bond was given and the premiums were paid up to the 28th of November, 1916, but, notwithstanding the fact that the bond was in force throughout the year succeeding said date and the principal in said bond was obligated under its contract to pay and was fully able to pay the premium for said year, the defendant surety company saw fit to forego said premium. The question is, what effect does this have upon the right of the broker, or of his assignee, to the stipulated commission under the broker's contract?

[1] Defendant's position, when stated in its bare and plainest terms, is that, as the broker's contract says he was to get 35 per cent. "on the original and all renewal premiums received by this company," the contract should be regarded as rigidly limited to a strict and literal interpretation of the word "received." Under this interpretation, if the company did not actually receive or collect a premium the broker was not entitled to his percentage thereon, even though the fact that the premium was not received was due wholly to the voluntary renunciation thereof by the company. It is not conceived that the contract should be interpreted to mean that the obligation to pay the broker's commission was to be left to the company's voluntary choice or volition, nor is this view in any wise weakened by the further provisions that the broker was to be paid his commissions "as long as the bond remains in force," and he was to receive his commissions whether his contemplated connection with the company continued "throughout the life of the said bond or not." Similar contracts in reference to broker's commissions have not been so interpreted. In *Knisely v. Leathe*, 178 S. W. 453, 455, the broker was employed to procure a contract of sale which he did, and his commissions were to be paid him out of the purchase price and as the owner received it. The owner refused to comply with the contract, or, in other words, he voluntarily chose not to receive the purchase money. It was held, not only that the broker was entitled to his commissions, but that the court should have peremptorily instructed the jury to find for him. At page 459 of 178 S. W., Judge Graves, speaking for the court en banc, says that as between the broker and his employer the latter "could not refuse to enforce the contract" which the broker's efforts had obtained, and thereby defeat the broker's right to his compensation. And on page 461 of 178 S. W., Judge Graves says that the owner, having accepted the contract secured for him by the broker, "owed the duty to enforce that contract" to the end that the purchase price would be paid and the deferred payments of commissions would become due. The owner could not say he would not enforce the contract the broker

had obtained for him, and that therefore no commissions were due. It would seem that likewise in this case the employer in this case could not say to the broker:

"You have done all you agreed to do, I have accepted the contract you obtained for me, but I will forego a part of the benefits thereof; and, as I have not received the benefits thus willingly foregone, you will have to also forego a part of your compensation."

In *Currier v. Mutual Reserve, etc., Ass'n*, 108 Fed. 737, 47 C. C. A. 651, the agent's contract was that no commissions under the contract should be payable to plaintiff "unless the payment from which the same is to be allowed [i. e., premiums] has been received in cash" by the defendant. It was held that since the agent had performed his services and obtained the contracts he was employed to secure, the defendant principal could not escape payment of the commissions by refusing to enforce the contracts it had. To the same effect are the following authorities: *Goldsberry v. Thomas*, 178 Mo. App. 334, 338, 185 S. W. 1179; *Knisely v. Leathe*, 256 Mo. 341, 372, 166 S. W. 257 (first appeal); *Webster v. Meyers*, 52 Mo. App. 338, 341; *Reed v. Union Central Ins. Co.*, 21 Utah, 295, 61 Pac. 21, 23; *Ketcham v. Axelson*, 160 Iowa, 456, 142 N. W. 62, 65; *Graves v. Cook*, 115 Minn. 34, 131 N. W. 854; *Ely v. Wilde*, 62 Or. 111, 122 Pac. 1122; *Pinkerton v. Hudson*, 87 Ark. 506, 113 S. W. 35; *Pedersen v. North Yakima, etc., Co.*, 63 Wash. 636, 116 Pac. 279; *Alvord v. Cook*, 174 Mass. 120, 54 N. E. 499; *Ward v. Cobb*, 148 Mass. 518, 20 N. E. 174, 12 Am. St. Rep. 587.

[2] The defendant sought to prove that a custom existed among surety companies whereby, in case the completion of a building is delayed through no fault of the contractor and no increased liability is incurred by the delay, no further annual premiums are charged during the additional time the bond is continued in force by reason of such delay. The alleged custom sought to be shown was not, primarily and directly, a custom among brokers and their principals whereby the former did not receive commissions on premiums voluntarily released for cause; but a custom on the part of surety companies, in their dealings with contractors obtaining such companies as their surety, to waive the payment of premiums due for the time covered by delay in the completion of a building where the delay was without fault of the contractor, and no increased liability was placed on the surety by reason of the delay. It will be observed, however, that the contract between the defendant surety company and the contractor herein (which was the object for which the broker was employed and of the services which he rendered), was a straight, clear, out-and-out obligation on the part of the contractor to pay an-

nual premiums so long as the bond remained in force. There was nothing therein providing for a release or adjustment of premiums due. Hence, in any suit based on such contract, no custom could be allowed to prevail over the explicit terms of the written agreement to pay. *Hefernan v. Neumond*, 196 Mo. App. 667, 680, 201 S. W. 645; *State ex rel. v. Public Service Comm.*, 269 Mo. 63, 75, 189 S. W. 377. In other words, the defendant surety company could not have been compelled, by reason of any such alleged custom, to relieve the contractor from the payment of any premiums. Such a custom, even if pleaded and proven, would have proved unavailing to the contractor. Since the employment of the broker had for its object the securing of a suretyship contract which allowed no room for the operation of a custom, the question might arise whether the broker's contract of employment could be affected by any such custom unless definite and explicit provision was made therefor in said broker's contract. There was neither in the contract of employment nor in the contract of suretyship any clause giving scope to a custom.

[3-6] However, defendant's position or theory no doubt is that the broker's contract of employment was entered into in the light of such a custom, and hence the said contract must be interpreted in that light. In such case the object in showing a custom would seem to be, not for the purpose of explaining the technical meaning of any term used in the contract, but to show what the real agreement was in the minds of both of the parties to that contract, or, in other words, that the alleged custom entered into and became a part of the contract. But, in order to do that, custom would have to be pleaded. *Staroske v. Pulitzer Publishing Co.*, 235 Mo. 67, 76, 138 S. W. 36; *Sherwood v. Home Savings Bank*, 131 Iowa, 528, 532, 109 N. W. 9; *Mendenhall v. Sherman*, 193 Mo. App. 684, 687, 187 S. W. 271. This was not done. The court, however, did not refuse to allow the claimed custom to be shown, but excluded the proffered testimony because it did not tend to establish any such custom. And clearly it did not. On the contrary, it showed there was no such custom in the legal sense of that term. Before a course of procedure can be said to have arisen to the dignity of a custom so as to enter into and form a part of a contract, it must be shown to possess "those elements of certainty, generality, fixedness and uniformity which are essential to constitute such a custom." *Staroske v. Pulitzer Pub. Co.*, 235 Mo. 67, 75, 138 S. W. 36, 38. None of these were shown. On the contrary, all that was shown was that oftentimes or "sometimes" the surety company would investigate the facts of a case, and, if it was deemed by the company a case where a waiver or excusal of the payment of commissions should be made, they would do it; but

whatever was done depended upon the facts of that particular case and of what the company chose to do, and not because of the operation of any certain and uniform rule or course of procedure. One witness said he could not say there was such a custom, but that it had been done in many cases. Another witness said there was such a custom, but this was clearly only his conclusion, while his whole testimony shows that it was not a "custom," as that term is used in legal parlance. A "loose and variable practice" does not rise to the dignity of a custom so as to control the rights of the parties to a contract, nor is a custom constituted by an alleged usage which leaves some material element to the discretion of the individual. 29 *Am. & Eng. Ency. of Law* (2d Ed.) 391.

[7] It is argued that both the contractor's contract to build the capitol and the bond show that it was not contemplated that the bond would be in effect for a longer period than 2½ years, and that, whether the custom claimed was shown to be a custom in the legal sense or not, it should have been admitted as bearing upon what the broker and defendant meant when they made their contract. But the building contract, the contract for suretyship, and the bond itself all showed, and it was clearly in contemplation, that the bond might well continue in force much longer than that, and the contract with the broker also shows that such possibility was clearly in view. Consequently, anything short of a custom in the legal sense cannot be relied upon to enter into and form a part of the written contract between the broker and the defendant. If said contract was dealing with the broker's right to commissions on premiums which, under certain circumstances, might or might not be charged and collected by the surety company according as it saw fit, then, in order to escape the payment of the commission on premiums thus foregone, the surety company should have inserted a provision to that effect. *Hefernan v. Neumond*, supra. Instead of that the defendant contracts to pay a commission of 35 per cent. on the original premium and all renewal premiums received by the company as long as the bond remains in force, and that the broker is to receive commissions whether he continues with the company throughout the life of the bond or not.

[8-11] The contention that the agency contract young Porterfield made with defendant on December 4, 1913, superseded or merged the contract sued on is wholly untenable. They were wholly separate and distinct, each dealt with different matters, and the agency contract in no way referred to the other contract, which dealt solely with the obtaining of the state capitol bond. The two contracts show on their face that they are separate, and the conceded conduct of the parties show they intended them to be separate. The bro-

ker's contract says he was to receive commissions throughout the life of the bond, regardless of whether he was in the company's employ or not; the agency contract says the termination of his agency terminates his interest in commissions. The plaintiff's assignor ceased to act as agent under the agency contract in February, 1914, and yet the company continued to pay the commissions due under the broker's contract concerning the state capitol bond during 1914, 1915, and 1916 to November 28th of that year. "Before one contract is merged in another the last must be between the same parties as the first, must embrace the same subject-matter and must have been so intended by the parties." 18 Corpus Juris, 598. *Maddin's Adm'r's v. Edmondson*, 10 Mo. 643, 647. The parties to the contract have, by their course of conduct, disclosed their own construction thereof, and this should be followed. *Knisely v. Leathe*, supra, 178 S. W. loc. cit. 458; *Miller v. Pepperling*, 185 Mo. App. 222, 228, 170 S. W. 328; *St. Joseph Union Depot Co. v. Chicago, etc., R. Co.*, 181 Mo. 291, 805, 31 S. W. 908. Besides, the broker's contract was fully consummated before the agency contract was made. The former was therefore not merged into the latter. *England v. Houser*, 163 Mo. App. 1, 8, 145 S. W. 514.

[12, 13] It is complained that the court committed error in the admission of certain testimony, to wit: Evidence that Zimmerman, the resident vice president and general manager of the defendant in the district covering the surety bond in question, said that the contractor, John Gill & Sons Company, was seeking to be relieved of the payment of further premiums on the promise of giving the defendant future business in the way of furnishing the contractor other surety bonds, and that the defendant, surety company, when requested to waive the payment of further premiums, said they could probably waive their rights in the matter, but could not waive the broker's rights, and therefore would have to take an indemnity bond from the contractor to protect it against the payment of the broker's commission. It is difficult to see why the evidence of what Zimmerman said to Judge Porterfield concerning the "future business" matter and the waiver of further premiums on that ground should be regarded as reversible error. Zimmerman was vice president of the defendant company; he succeeded the man who made the contract with the broker; and he paid Judge Porterfield, as his son's assignee, the commissions that were paid after the assignment. Judge Porterfield was interviewing and demanding of this officer payment of the last year's commission. As this officer was intrusted with the management of the business concerning this bond, what he knew of it was not from hearsay, nor were his admissions or declarations relative to the business

incompetent or inadmissible. *Wharton on Ev.* (3d Ed.) § 1177; *Phillips v. St. Louis & San Francisco R. Co.*, 211 Mo. 419, 111 S. W. 100, 17 L. R. A. (N. S.) 1167, 124 Am. St. Rep. 786, 14 Ann. Cas. 742; *Malecek v. Tower Grove etc., Co.*, 57 Mo. 17, 21; *Nickell v. Phoenix Ins. Co.*, 144 Mo. 426, 431, 46 S. W. 435. The answer admitted the defendant "agreed to and did not charge or collect" the premium in question, and then attempted to justify such course, and the evidence admitted went to show why it agreed to not charge them. As to the evidence relating to the taking of indemnity against the payment of the broker's commission if the premium was waived, it should be said that the same evidence came into the case as a part of the cross-examination of the president of the John Gill & Sons Company, and was legitimately admitted there as throwing light on the interest he had in the matter to which he testified. Since the evidence properly got into the case, we think it would be treating the litigation as a mere game of technical skill to reverse the case because the same evidence also came in through a witness to whom the above rule of interest did not apply.

[14] But, without regard to all this, and even if the admission of the evidence complained of was technically erroneous, we are of the opinion that it should not affect the case or cause a reversal of the judgment. This for the reasons following: The suit is upon an admitted written contract, and performance thereof by the broker on his part is conceded. It is also beyond question that the bond was in force during the time sued for; that the suretyship contract which was the object of the broker's employment obligated the building contractor to pay premiums as long as the bond was in force; and the broker's contract provided that the broker was to be paid commissions "as long as the bond remains in force," no matter whether the contemplated connection of the broker "continues throughout the life of the said bond or not." It is, furthermore, beyond question that while the defendant did not "receive" the premium on which the commission sued for is based, yet the only reason was because the defendant made no charge against the contractor therefor, and did not see fit to enforce the contract which the broker's services obtained for it. There was therefore an absolute failure to make out any of the pleaded defenses to the contract sued on. Hence the plaintiff was entitled to a directed verdict. *Knisely v. Leathe*, supra, 170 S. W. loc. cit. 461. This being so, the question of error in the admission of the testimony above considered is not material, since the plaintiff was not helped by it nor was the defendant harmed.

[15] Likewise, we do not think that reversible error was committed in the closing re-

marks of plaintiff's counsel to which a general objection was made that the argument was "improper."

The judgment is affirmed.

All concur.

(201 Mo. App. 201)

**MAGNOLIA COMPRESS & WAREHOUSE  
CO. v. ST. LOUIS CASH REGISTER  
CO. (No. 15246.)**

(St. Louis Court of Appeals. Missouri. March 4, 1919.)

**1. CORPORATIONS §433(1)—GENERAL MANAGER—AUTHORITY—JURY QUESTION.**

In view of Rev. St. 1909, § 9990, providing that a party's signature may be made by a duly authorized agent, and requiring no particular form of appointment, where the corporation's note sued on was executed and signed by its general manager, *held* that his real and apparent authority was for the jury.

**2. CORPORATIONS §432(12)—AUTHORITY OF GENERAL MANAGER—NOTE—EVIDENCE—SUFFICIENCY.**

In an action against a corporation on a promissory note, evidence *held* to warrant the conclusion that the manager who signed and executed the note acted within the apparent scope of his authority, so as to bind the corporation.

**3. CORPORATIONS §414(6)—GENERAL MANAGER—AUTHORITY TO SIGN NOTES.**

The term "general manager" implies very broad powers, but whether such officer has authority to bind the corporation by notes executed by him in its name depends on the circumstances of the case.

**4. CORPORATIONS §429—MANAGER—APPARENT AUTHORITY—LETTER TO PAYEE AS NOTICE.**

A letter to payee of a corporation's note advising payee of defendant corporation's policy of discontinuing the accepting of customers' notes does not preclude plaintiff from relying on corporation being bound by the acts of its agent to the extent of his apparent authority, or require plaintiff to prove actual authority where the note was given to cover a loan made to the company's agent to aid in carrying on its sales business.

**5. CORPORATIONS §426(10) — ESTOPPEL TO DENY AGENCY.**

A corporation may not deny the agency of its general manager to sign and execute its note where it has received and retained, and not promptly offered to return or tender back, benefits received thereunder.

Appeal from St. Louis Circuit Court; Wm. T. Jones, Judge.

Action by the Magnolia Compress & Warehouse Company against the St. Louis Cash Register Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Rassieur, Kammerer & Rassieur, of St. Louis, for appellant.

Fordyce, Holliday & White, of St. Louis, for respondent.

ALLEN, J. This is an action on a promissory note for the sum of \$2,638.35, of date November 7, 1914, due 120 days after date, with 6 per cent. interest from the date thereof, executed in the name of the defendant corporation to the order of Warrant Warehouse Company, a corporation, and which was indorsed and transferred to the plaintiff, the payee. The instrument is signed, "St. Louis Cash Register Company, J. G. R. O'Hara, Secy. & Mgr. E. O'Brien, Act. Treas."

The verified answer of defendant contains (1) a plea of non est factum, averring that the note was executed by agents of defendant who were wholly unauthorized so to do, and whose said act was never approved or ratified by defendant; (2) a plea of failure of consideration; (3) and a plea to the effect the plaintiff is not a holder in due course.

The trial, before the court and a jury, resulted in a verdict and judgment for plaintiff, and the defendant appeals.

In the year 1914 the defendant, a Missouri corporation with headquarters at the city of St. Louis, was engaged in manufacturing and selling cash registers. One J. G. R. O'Hara was secretary and general manager of the company, the other officers and the directors being business or professional men in the city of St. Louis engaged in other pursuits. The Warrant Warehouse Company, the payee in the note, and plaintiff, Magnolia Compress & Warehouse Company, were Alabama corporations, doing business in Birmingham; the former having a warehouse in Mobile, Ala. These two companies were closely affiliated, having certain officers and directors in common, and one W. D. Nesbitt being president of both companies.

One Herck was engaged in selling, in a certain territory in the southern part of the United States, cash registers manufactured by defendant. He is referred to in some of defendant's correspondence as defendant's district manager, but it is said that he merely bought machines from defendant which he sold on his own account. In any event, in the early part of 1914 he had a contract with defendant for selling its machines in said territory, and was operating under the same. In May, or early in June, 1914, Herck, with one Whipple, called upon Nesbitt, at the office of the Warrant Warehouse Company in Mobile, in regard to making arrangements with that company for the storing and forwarding of cash registers which Herck was handling under the contract with defendant. At the suggestion of Herck and Whipple, the Warrant Warehouse Company, through Nesbitt, wrote to the defendant concerning the matter,

with the result that O'Hara, defendant's general manager, went to Mobile and had a conference with Nesbitt. On O'Hara's return to St. Louis, defendant, through O'Hara as manager, wrote a letter to Nesbitt, under date of June 12, 1914, referring to the relations between the defendant and Herck, and the proposed arrangement between the latter and the Warrant Warehouse Company. On that date also defendant, through O'Hara, wrote a letter to the Warrant Warehouse Company, inclosing a financial statement from the St. Louis Cash Register Company as of June 1, 1914. On the following day the defendant, through O'Hara, as manager, wrote a letter to Nesbitt setting out the names of the officers and directors of the defendant, showing them to be well-known business or professional men in the city of St. Louis, and giving likewise a list of many of the principal stockholders of the company. These letters were signed, "St. Louis Cash Register Company, per J. G. R. O'Hara, Manager."

Thereafter a contract was prepared by the Warrant Warehouse Company, between Herck, operating under the name and style of "St. Louis Cash Register Distributing Company of Mobile," party of the first part, and defendant, party of the second part, and the Warrant Warehouse Company, party of the third part. This contract was executed by the parties under date of June 27, 1914, and was signed in behalf of defendant in the latter's corporate name, by O'Hara as secretary and manager. We are not concerned with the details of this contract, and it is sufficient to say that it made provision regarding the shipment of cash registers by defendant to Herck, the receiving and storing thereof by the Warrant Warehouse Company, and the forwarding thereof on orders of Herck; and provided also that, when cash registers amounting to a certain sum in value (or mortgaged notes received in payment for cash registers sold and delivered by Herck of said amount) had been deposited with the Warrant Warehouse Company, that company would then undertake to negotiate a loan for Herck, on additional mortgage notes of the same character, to the extent of \$3,000, during the 60 days following the execution of the contract, and, if collections on said notes were satisfactory, then to extend such loans to a total of \$5,000.

During August, September, and October, 1913, there was much correspondence between Nesbitt and the defendant, the latter acting almost entirely through O'Hara, its general manager. This correspondence grew out of the fact that it was found that Herck had deposited with the Warrant Warehouse Company notes said to have been fraudulently obtained upon forged signatures, and upon which he had borrowed money from that company. Herck, it is said, disappeared, leaving much confusion behind him.

After much correspondence with defendant,

Nesbitt, on October 21, 1914, wrote a letter to defendant inclosing the note in suit, which represented the balance due on account of the loan made by the Warrant Warehouse Company to Herck on the notes aforesaid. Thereafter defendant, through O'Hara as manager, wrote the Warrant Warehouse Company to the effect that defendant would execute this note if the warehouse company would turn over to defendant for collection the so-called "Herck notes," i. e., the notes which Herck had delivered to the Warrant Warehouse Company purporting to have been executed by purchasers and secured by mortgages upon cash registers, together with certain cash registers remaining in the warehouse of the Warrant Warehouse Company; and that defendant would apply upon this note whatever was collected on the Herck notes, and at the maturity of the note in suit defendant would execute a new note for the balance then remaining due, which defendant would pay at maturity. This was agreed upon, and Nesbitt, for the Warrant Warehouse Company, sent these Herck notes to the defendant, and the note in suit was executed in the manner aforesaid, and mailed by O'Hara to the Warrant Warehouse Company. Thereafter Nesbitt informed defendant that the payee desired to use this note at a bank, and that this could not be done unless the cash registers were retained for the time being in its warehouse; and defendant, through O'Hara, consented to this arrangement by letter of date November 13, 1914.

Subsequently the note was transferred by the payee therein, the Warrant Warehouse Company, to this plaintiff, for money, it is said, advanced by plaintiff to said payee. At the maturity of the note defendant refused to execute a new note except upon condition that its liability be limited to the amount which might thereafter be collected upon the Herck notes remaining in its hands. Plaintiff thereupon instituted this action.

The by-laws of defendant company were introduced in evidence by plaintiff. They contained no provision conferring express authority upon any officer or officers to execute contracts, notes, bills, checks, etc. Plaintiff also offered in evidence the minutes of a meeting of defendant's board of directors on March 5, 1912, showing that by resolution of that date the board, in accordance with authority conferred upon it by the by-laws, created the office of general manager, whose duty it should be "to have general supervision of the practical work of the company and its factory," etc. Minutes of other meetings of the board were offered in evidence showing the appointment of O'Hara as general manager of the company and fixing the amount of his salary.

Such further reference to the evidence adduced as may appear to be necessary will be made in the course of the opinion.

The only question before us relates to the



authority of O'Hara, as defendant's general manager, to bind defendant by the execution of the note in its name, under the circumstances shown in evidence. It is the contention of learned counsel for defendant, appellant here, that defendant was not bound by O'Hara's act in executing the notes, and that consequently the court erred in admitting the instrument in evidence over defendant's objections, and in overruling defendant's demurrer to the evidence.

[1, 2] It is not contended that O'Brien had any authority to execute the note. There is no proof of such authority, or, indeed, that he was authorized to act as treasurer. Plaintiff's case proceeds upon the theory that, under the circumstances shown in evidence, the act of O'Hara in executing the note, as defendant's manager, was the act of the defendant corporation. The trial court took the view that the evidence adduced made the case one for the jury, and submitted it under instructions which required the jury to find, in effect, that defendant conducted its business, or permitted O'Hara to conduct it, in such manner as to induce one dealing with it under the circumstances, and while in the exercise of reasonable diligence and caution, to believe that O'Hara, as secretary and manager, had power and authority to execute the note in defendant's name and behalf, and that defendant either knew that its business was so conducted, or by the exercise of reasonable diligence would have known thereof.

The question before us is one to be determined by our law. *Ruhe v. Buck*, 124 Mo. 178, loc. cit. 183, 27 S. W. 412, 25 L. R. A. 178, 46 Am. St. Rep. 439. Section 3090, Rev. Stat. 1909, in force at the date of the execution of the note, provides as follows:

"The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose, and the authority of the agent may be established as in other cases of agency."

The question as to O'Hara's authority, then, is one to be determined by the general law of principal and agent, as applied to corporate acts. The evidence shows that defendant made O'Hara its general manager, and placed him in charge of the practical work of the company, the other officers of the company, and its directors, being engaged in other pursuits, and not devoting their time to the practical conduct of its business and affairs; and it is made to appear that in the transactions leading up to the execution of the note, conducted by rather voluminous correspondence between the parties, extending over a period of some months, defendant acted almost entirely through O'Hara. Numerous letters addressed by Nesbitt to defendant in its corporate name were replied to by O'Hara, and, in reliance upon the authority thus apparently vested in O'Hara by defendant, the Warrant Warehouse Company entered into the arrangement with de-

fendant which involved the execution and delivery to it of this note, and thereafter accepted the note executed in the manner aforesaid. Under the circumstances, we think that the case was one for the jury; that plaintiff was entitled to recover upon a finding by the jury of the facts in plaintiff's favor under the instructions mentioned above. The evidence warrants the conclusion that O'Hara acted with the apparent scope of his authority, and under such circumstances the act of the agent is binding upon his principal. *Sublette v. Brewington*, 139 Mo. App. 410, 122 S. W. 1150; *Meux v. Haller*, 179 Mo. App. 466, and cases cited 162 S. W. 688. In the case last cited we said:

"The existence of the agency, or the extent of the agent's authority, need not be established by direct and positive proof, but may be inferred from facts and circumstances in evidence; and, if there is any substantial evidence from which the agent's authority may be fairly and reasonably inferred, the question is one to be referred to the jury. See *McCloud v. Telegraph Co.*, supra (170 Mo. App. 624, 157 S. W. 101); *Distillery Co. v. Van Frank*, 147 Mo. App. 204, 126 S. W. 222; *Phillips v. Geiser Mfg. Co.*, 129 Mo. App. 396, 107 S. W. 471; *Hackett v. Van Frank*, 105 Mo. App. 384, 79 S. W. 1018; *Hefferman v. Boteler*, 87 Mo. App. 316; *Bonner v. Lisenby*, 86 Mo. App. 666; *Harrison v. Railway Co.*, 50 Mo. App. 332; *Cummings v. Hurd*, 49 Mo. App. 139. The authority of the agent may be implied from the course of dealing between the principal and the agent. See *McCloud v. Telegraph Co.*, supra [170 Mo. App.] loc. cit. 630, 631 [157 S. W. 101], and cases cited. And 'the scope of an agency is to be determined, not alone from what the principal may have told the agent to do, but from what he knows, or ought to know, in the exercise of ordinary care and prudence, the agent is doing in the premises.' *Law Reporting Co. v. Grain Co.*, 135 Mo. App. 10, 115 S. W. 475."

In *Law Reporting Co. v. Grain Co.*, 135 Mo. App. 10, 115 S. W. 475, cited above, the principles here involved are discussed at length, and in making application thereof to the case in hand the court says:

"If Harroun, when he assumed to contract in the premises for his principal, went beyond his delegated powers, his act, nevertheless, bound his principal, on the ground that it had, by its negligence and omission of duty, permitted third persons to reasonably conclude that he was acting within the scope of the powers conferred. It was the duty of the defendant, in the exercise of ordinary care, to have known in what manner its agent was handling its correspondence."

[3] In the case before us it is the authority of O'Hara to execute the note that is drawn in question, and not his authority to sign a letter; but in view of the fact that he was defendant's general manager, apparently clothed with authority to conduct its business generally, and was permitted to carry on this correspondence in a manner to induce the

belief that he was authorized to bind the company by agreements made in its behalf in the premises, and to consummate the arrangement ultimately entered into between the parties by the execution of the company's note as previously agreed upon, we think that his act in so executing the instrument may properly be found to be the act of defendant. We do not say that O'Hara had implied authority to execute notes by virtue alone of his position as general manager, though in this connection it is to be noted that defendant's by-laws contain no provision lodging this authority in any particular officer or officers. Definitions of the term "manager," as applied to an officer of a corporation, will be found in *Robinson v. Mining Co.*, 178 Mo. App. 531, loc. cit. 539, 540, 163 S. W. 885. That the term "general manager" implies very broad powers must be conceded; but whether such an officer has authority to bind the corporation by notes and other like instruments executed by him in its name doubtless depends upon the circumstances of the case. In this connection see *Thompson on Corporations* (2d Ed.) § 1585. The facts of the instant case warrant a judgment in plaintiff's favor, we think, upon the ground that, under all of the circumstances present, the said act of defendant's general manager was one within the apparent scope of his authority.

The cases cited and relied upon by appellant are not persuasive, in view of the particular facts involved. In *First Nat'l Bank v. Hogan*, 47 Mo. 472, the suit was upon a draft executed by one Parker, the secretary of an insurance company, who alone had no authority to execute such instrument under the by-laws, and "apart from the by-laws there was no evidence tending to show authority in Parker to bind the company." In *Sanders v. Chartrand*, 158 Mo. 353, 59 S. W. 95, it was held that the secretary of a corporation had "neither authority, nor apparent authority," to sign the president's name to notes. None of the other decisions of our courts cited by appellant are controlling upon facts such as those here involved, and, if cases cited from other jurisdictions can be said to lend any support to appellant's contention, they are without influence, in view of the decisions of our own courts which appear to us to be in point.

[4] In its reply brief appellant says that the letter written by defendant through O'Hara of date June 12, 1914, "advising the respondent of the policy adopted by the appellant company of discontinuing the acceptance of customers' notes, precluded respondent from relying on the doctrine that a principal is bound by the acts of his agent to the extent of his apparent authority, and required respondent, in case it relied on O'Hara's authority to issue a note in purchasing such paper, to prove that O'Hara actually possessed authority to do so." Citing *Hicks v. Nat'l*

*Surety Co.*, 169 Mo. App. 479, loc. cit. 493, 155 S. W. 71. In this letter it is stated that defendant "had to discontinue" taking customers' notes because of the amount of capital which this required. Such statement could not have the effect ascribed to it by appellant, and a reading of the opinion in the *Hicks Case*, cited in this connection, will disclose that the letter there involved was of quite a different character.

[5] Finally, it is to be noted that defendant has retained whatever benefit accrued to it from the transaction involving the execution of the note in suit. Evidently some benefit accrued to it from the Herck notes, for it affirmatively appears that some collections were made thereon. Testimony for defendant tends to show that defendant's president did not learn of the existence of the note until "about a month or a month and a half" prior to the trial, though the suit had been then pending for some months. In any event, it was the duty of defendant to promptly return or tender back the benefits received, if it purposed to disavow the act of its agent. The judgment is accordingly affirmed.

REYNOLDS, P. J., and BECKER, J., concur.

#### STOUT v. EDWARDS et al.\* (No. 13075.)

(Kansas City Court of Appeals. Missouri. Feb. 17, 1919.)

##### 1. VENDOR AND PURCHASER ⇄143—PERFORMANCE—WAIVER—RESCISSION.

Although a contract for the sale of land provided that the vendor should furnish an abstract by a certain day, and that time should be of essence, the purchaser cannot rescind where, before the stipulated time, he waived delivery of the abstract within the time fixed.

##### 2. VENDOR AND PURCHASER ⇄143—PERFORMANCE OF CONTRACT—WAIVER—CONSIDERATION.

Where a contract for the sale of land made time of its essence, the purchaser's waiver of performance as to the time for delivery of an abstract need not be supported by a consideration.

##### 3. FRAUDS, STATUTE OF ⇄131(2)—SALE OF LAND—PAROL MODIFICATION OF CONTRACT—WAIVER OF TERMS.

Where the written contract for the sale of land provided for the furnishing of an abstract on a certain day, an oral waiver of such requirement by the purchaser was not a modification required by the statute of frauds to be in writing.

Appeal from Circuit Court, Boone County; D. H. Harris, Judge.

"Not to be officially published."

Action by A. D. Stout against J. R. Edwards and others. From an order setting aside a verdict for plaintiff and granting a new trial, he appeals. Affirmed.

Ralph H. Munro, of Fairfield, Iowa, and W. M. Dinwiddie, of Columbia, for appellant.

Arthur Braton and W. H. Hulett, both of Centrailla, and Don. O. Carter, of Sturgeon, for respondents.

ELLISON, P. J. Plaintiff's action was instituted for recovery of \$500 money had and received. There was a verdict for him which the court afterwards set aside and granted a new trial, whereupon he appealed.

The money was paid by plaintiff to defendant on a written contract for the purchase of a tract of land in Audrain county. The contract contained the following provisions:

"It is further agreed that party of the first part shall, on or before the 1st day of January, 1917, prepare and deliver a certified abstract of title to the above-described real estate to second party or his authorized attorney, for their examination and written opinion. The above abstract and written opinion shall be returned to first party or his authorized agent within 10 days from date of receiving same. Said first party shall comply with requirements in said opinion and deliver said abstract showing marketable title and good warranty deed of conveyance to above-described real estate on or before the 1st day of March, 1917, and shall pay all taxes against said real estate to the year 1917, and shall surrender and give possession on the 1st day of March, 1917."

"It is mutually agreed by and between the parties hereto that time shall be an essential part of this contract and that all the stipulations, covenants herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties."

It was alleged in plaintiff's petition that defendant failed to furnish the abstract on the 1st day of January as agreed; and that thereafter, on the 12th day of February, 1917, he notified defendant that he had rescinded the contract and demanded a return of the \$500 which he had paid.

It is conceded that defendant did not deliver the abstract by the 1st of January as he agreed; but that his reason for not doing so was because plaintiff, prior to that date, waived that provision of the contract by requesting defendant not to deliver, and that after the 1st day of January, to wit, on Feb-

ruary 5, 1917, plaintiff again waived performance by his letter of that date offering to go on with the deal by requesting that the abstract be sent to his attorney. The next day, in response to this letter, defendant wrote plaintiff asking if he would not take an "extension abstract," or an abstract of the entries made since an existing loan was made on the property. In response, to this, plaintiff, on February 12th gave notice of rescission, as already stated.

[1] Defendant received \$500 of plaintiff's money on the price of the land sold. The contract was not carried out. The failure to perform had its origin in defendant not furnishing the abstract on January 1, 1917; but defendant excuses himself on the ground that plaintiff, before the time arrived, waived that obligation. If he did waive it, then he should fall on that phase of his case, and the court was right in setting aside the verdict.

[2] In plaintiff's instructions there is embodied the idea that there must be a consideration for this waiver. It is apparent that none is needed in the sense submitted. Defendant was to do a certain thing for plaintiff by a certain time; the latter informed him he need not do it and, taking him at his word, the defendant refrained. What more could be needed? *Casner v. Meyer*, 191 S. W. 1119, 1120. So the instructions, instead of referring to a "valid consideration," would have avoided confusion by merely submitting the question whether plaintiff, before January 1, 1917, requested that the abstract not be delivered on that day, or consented that it should not. The instructions for defendant did not contain this error.

[3] We find the point made by plaintiff concerning one's right to make verbal changes in a contract required by the statute of frauds to be in writing, as ruled in *Rucker v. Harrington*, 52 Mo. App. 481, *Warren v. Mayer Mfg. Co.*, 161 Mo. 112, 61 S. W. 644, and other cases, has no application to the matter presented on this appeal. The contract here is in writing. There has been no effort made to change it, but only that a certain part as to an abstract being furnished on a certain day has not been required to be performed. There is nothing in the law hindering that. *Mastin v. Grimes*, 88 Mo. 478, 485; *Melton v. Smith*, 65 Mo. 315, 322.

The judgment in the trial court was manifestly right, and is affirmed.

All concur.

**FRIES v. ROYAL NEIGHBORS OF AMERICA.** (No. 15252.)

(St. Louis Court of Appeals. Missouri. Argued and Submitted Feb. 3, 1919. Opinion Filed March 4, 1919.)

**1. INSURANCE ⇨825(2) — MUTUAL BENEFIT INSURANCE—FRAUD OF REPRESENTATIVE OF INSURER—QUESTION FOR JURY.**

In husband's action on wife's certificate of mutual benefit society, whether society's representative, soliciting her membership, had written her answers untruly, *held* for jury under evidence.

**2. INSURANCE ⇨755(2) — MUTUAL BENEFIT INSURANCE—WAIVER OF BY-LAWS—STATUTE.**

A by-law of a mutual benefit society, attempting to provide that the chief officers of the society had not authority to waive any of the provisions of the by-laws, was beyond the provisions of Acts 1911, p. 292, § 22, and invalid.

**3. INSURANCE ⇨755(2) — MUTUAL BENEFIT INSURANCE — WAIVER OF FORFEITURE BY AGENT.**

Notwithstanding provisions in policies of insurance that no contract, alteration, or discharge of contract, waiver of forfeitures, nor granting of permits of credit, shall be valid unless in writing, signed by president or vice president of benefit association, an agent may waive a forfeiture, and his act estops the association.

**4. INSURANCE ⇨724(3) — MUTUAL BENEFIT INSURANCE — ANSWERS TO AGENT — FALSE TRANSCRIPTION—ESTOPPEL.**

Despite by-law provision of mutual benefit society that no officer or local camp could waive provisions of by-laws relating to contract between member and society, if true answers were given by applicant for membership to agent of main lodge of order, and the agent wrote them down untruly or incorrectly, knowing what true answers were, her knowledge was knowledge of society, and estops it to deny truth of answers.

**5. INSURANCE ⇨826(1)—FRATERNAL BENEFIT INSURANCE — INSTRUCTIONS — MISLEADING CHARACTER.**

In husband's suit on benefit certificate of deceased wife, member of defendant benefit association, instruction *held* not erroneous, as misleading, in referring to agent of society who procured wife's application merely as agent, without saying whether of supreme or of local camp or lodge.

**6. TRIAL ⇨234(7)—FRATERNAL BENEFIT INSURANCE—INSTRUCTION—"ESTABLISH."**

In husband's suit on deceased wife's benefit certificate, instruction that under admissions burden was on defendant fraternal order to establish its nonliability on certificate, *held* not erroneous on any ground that "establish" placed a greater burden on order than law imposed, meaning only that, plaintiff having made prima facie case, it was for order by its proofs to establish defense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Establish.]

**7. INSURANCE ⇨826(1) — MUTUAL BENEFIT INSURANCE—INSTRUCTION.**

In husband's suit on deceased wife's benefit certificate in fraternal order, instruction that if wife made truthful answers to all questions asked her, and that agent for society wrote in her application untrue answers, and wife signed without knowledge, then society waived untruthfulness of "all" the answers, *held* not erroneous as misleading in its use of "all."

Appeal from Circuit Court, Franklin County; Hon. R. A. Breuer, Judge.  
"Not to be officially published."

Suit by Frank Fries against the Royal Neighbors of America. From a judgment for plaintiff, defendant appeals. Affirmed.

Benj. D. Smith, of Mankato, Minn., W. L. Cole, of Union, and Barbour & McDavid, of Springfield, for appellant.

James Booth, of Pacific, for respondent.

**Statement.**

REYNOLDS, P. J. Plaintiff in his petition alleges that he was the husband of one Emma Fries; that on December 8, 1915, defendant executed and delivered to Emma Fries its policy of insurance or certificate, by which it promised to pay to plaintiff, as husband, the sum of \$1,000 upon the death of the insured; that she died February 17, 1915; that plaintiff gave notice and proof of the death of the insured to defendant, and demanded payment of the amount named in the certificate, which demand was refused. Averring that plaintiff has duly performed all the conditions of the policy on his part to be performed, he prays judgment for \$1,000, with interest and costs.

The answer, admitting averments as to incorporation, etc., admits that defendant executed the benefit certificate mentioned; that Emma Fries died about February 17, 1915; that demand had been made on it by plaintiff for the amount of the indemnity; that it had refused payment; and, denying liability on the certificate, denies all the other averments of the petition. For its affirmative defense defendant sets up that it is a fraternal beneficiary society organized under the laws of Illinois relating to such societies, and authorized to do business as such in this state at the times mentioned. Further answering, defendant pleads its by-laws and the application for a benefit certificate thereunder, and that the certificate was issued under the by-laws and on the faith of the statements in the application, alleged to be warranties; that among other answers in the application, Mrs. Emma Fries stated that she was then of sound body, mind, and health; that she had not consulted any person, physician or physicians, in regard to personal ailment; that within the last three years she had not used any patent or

proprietary medicines; had never "had any disease of the following named organs, or of any of the following named diseases or symptoms," including among those enumerated "fits," and it is averred that all and each of the answers were untrue. It is averred specifically that Mrs. Fries, when she accepted the benefit certificate, was suffering from nervous disorders, and in a weakened and run-down condition of health, brought about, among other things, by the presence of worms in her system; that she had been treated for nervous disorders and for oxyuris vermicularis and a run-down condition of health within seven years prior to the date of the application; that she had advised with and consulted one Dr. Miller, of Labaddle, Mo., for these complaints and disorders; had used and taken patent and proprietary medicines within a period of three years, and had been treated by Dr. Miller and other physicians, whose names are unknown to the defendant, within seven years prior to the date of her application.

Sections of the by-laws are then pleaded, and are alleged to have been violated by Mrs. Fries, which we will notice, so far as material, hereafter.

Averring that during her membership in the order Emma Fries had paid in by way of dues, assessments, etc., \$7.25, it is averred that this had been tendered back to the plaintiff prior to the filing of the suit, but was refused by him, and that defendant now brings it into court, tendering it to the clerk for the use and benefit of plaintiff, in view of all possible liability therefor.

A general denial was filed by way of reply.

From a verdict and judgment in favor of plaintiff, defendant has duly appealed, saving exceptions.

Plaintiff introduced the certificate in evidence, which is in the usual form, and is indorsed as having been delivered to Emma Fries, December 8, 1914, by the recorder of the subordinate camp, of which Emma Fries was a member. Following this is a statement signed by Mrs. Fries that she warrants she is in good health on the date of receiving the certificate.

Plaintiff read a stipulation as to agreed facts to the effect that the Royal Neighbors of America is and was, at all times during the pleadings named, a fraternal beneficiary association, as defined by the laws of Missouri, and particularly by Rev. St. 1909, art. 9, c. 61, thereof, and acts amendatory thereof; that it is a corporation organized under the laws of the state of Illinois, and during all of the times covered by the pleadings authorized to conduct, and was conducting, the business of a fraternal beneficiary association in the states of Illinois and Missouri. Printed copies of the by-laws of the society in force were also agreed to and are in evidence. It is further agreed that Em-

ma Fries died on or about February 17, 1915; that plaintiff is her husband and the beneficiary in the certificate named. Plaintiff thereupon rested.

Defendant introduced in evidence its book of by-laws, reading from it various sections.

Section 22 gives the titles of officers, naming the elective officers of the supreme camp of the society as supreme oracle, vice oracle, recorder, receiver, chancellor, marshal, inner sentinel, outer sentinel, five supreme managers, three supreme auditors, five supreme physicians, and provides that all elective officers shall be women who are beneficial members of the society.

Section 34 provides:

"The supreme oracle shall have the power to appoint and remove deputy supreme oracles and prescribe rules for their government. Every deputy appointed by the supreme oracle shall be a woman who is a member of the society in good standing in her local camp."

Section 190 provides that, upon the receipt of the benefit certificate by the recorder of the local camp, she is to notify the applicant to appear for adoption, if not already adopted; and the applicant shall, if in sound health, and if a woman and not pregnant, sign the benefit certificate, receipt for it, and pay current assessment at date of acceptance, together with local camp dues pro rata; provided that if the benefit certificate is not delivered to and accepted by the applicant while in sound health, and within 60 days from the date of issue by the supreme recorder, it shall, ipso facto, be absolutely null and void, and be returned to the supreme recorder.

Section 211 provides, among other things, that the liability of the society on any benefit certificate issued by it shall not begin until the certificate has been countersigned by the oracle and recorder of the local camp, and actual manual possession delivered to the member applying therefor, on payment to the local recorder of the assessment current at time of delivery of the benefit certificate, and while said member is in sound health.

Section 212 provides:

"No officer of this society, except as provided in section 32 hereof, nor any local camp or officer or member thereof, is authorized or permitted to waive any of the provisions of the by-laws of this society which relate to the contract between the member and the society, whether the same be now in force or hereafter enacted. Neither shall any knowledge or information obtained by, nor notice to, any local camp or officer or member thereof, or by or to any other person, be held or construed to be knowledge of or notice to the supreme camp and the officers thereof, until after said information or notice be presented in writing to the supreme recorder of the society." (Section 32, referred to above, is not here material.)

**Section 215 provides:**

"The contract for beneficial membership between the society and its beneficial member shall include the application for beneficial membership, the medical examination furnished by the applicant, the benefit certificate issued thereupon, and the by-laws of the society, as they exist at the time of the issuance of the certificate, or as they may be thereafter amended, modified, or changed; all with the same force and effect as if written into the face of the benefit certificate. This provision shall be construed not only to govern the rights and conduct of the member, but also to determine the financial liability of the member to the society and of the society to the member and his or her beneficiary or beneficiaries."

It was admitted that due and timely proofs of death were made in the case, and these were put in. It was also admitted that subsequent to the death of Mrs. Fries defendant tendered to plaintiff all sums of money by her paid to the defendant society, and that the tender and offer were refused by plaintiff.

A copy of the application was put in evidence by defendant. It is in usual form, applying for membership and death benefit in the sum of \$1,000, payable to plaintiff as her husband, and stating that the application and laws of the society shall form the sole basis of her admission to a membership therein, and of the benefit certificate to be issued her by defendant; that any entry, statement, or answer made in the application or to the examining physician, or concealment of facts, intentional or otherwise, in the application, or being suspended or expelled from or voluntarily severing her connection with the society, or the beneficiary department thereof, shall forfeit all rights of herself and beneficiary or beneficiaries. After matters here immaterial, follow the questions and answers set out in defendant's answer. Then follows the warranty as to the truth of all answers. Following, and attached to the application, is the certificate of the camp physician, who, after giving details of the appearance and condition of Mrs. Fries, her physical measurements, etc., recommended her as qualified for membership.

The usual proofs of death were introduced. Physicians certified that the immediate cause of death was peritonitis, and that Mrs. Fries had been sick and under treatment for that for about 10 days prior to her death, and that a surgical operation had been performed on her just prior to her death.

Dr. W. C. Miller, of Labbadie, who furnished proof of death, certified that he had known Mrs. Fries about seven years; had attended her a year or so before her marriage (date of marriage not given); had treated her prior to her last illness for "oxyuris vermicularis and nervousness"; that this was from July 4, 1913, to June, 1914, and the result of his treatment of her for this trouble

had been good; had been called in consultation at her last sickness, which he pronounced pelvis abscess or peritonitis; that there was no special cause, direct or indirect, in the habits, occupation, or residence of the deceased, for the death. In answer to a question in the blank as to whether he had any knowledge or had heard that deceased suffered from any other disease prior to her last illness, he stated that on July 4, 1913, she had had reflex convulsions. This physician, called as a witness by defendant, testified practically as in the proofs furnished, but somewhat more in detail, testifying, further, that convulsions and fits were not the same.

Plaintiff also filed his statement of the death of his wife.

Plaintiff, called in rebuttal, testified that he was present with his wife at Dr. Williams' office, the physician acting as physician for the local camp, when she made and signed her application. A Mrs. Wendt was getting members for the defendant society, and came to his house to see his wife. This was along in November or December, 1914. Plaintiff testified that he heard questions propounded to his wife by Mrs. Wendt, who had this application blank, and heard the answers she made. Asked what his wife said in answer to the questions, defendant objected on the ground that this was an attempt to vary or contradict the terms of a written contract by oral testimony. Counsel for plaintiff claiming that in a case of fraud that could be done, the court, evidently accepting that view, overruled the objection. Plaintiff identified his wife's signature to the application, and stated that when she answered the questions Mrs. Wendt wrote the answers down, but he was not in a position to see what she put down. Plaintiff heard this question asked: "Have you within the last seven years consulted any person, physician, or physicians in regard to any personal ailment?" And in answer to that his wife said: "I was treated by Dr. Miller for the mumps, measles, and seed worms." After Mrs. Wendt finished her questions, she asked his wife to sign the application, which she did. It was not read over to her. His wife received the certificate about two weeks after she was initiated, and brought it home with her and gave it to him, and he put it away.

It should be noted that all the questions as to contradiction of the answers as written in the application were objected to by counsel for defendant on the ground that they were varying by parol the terms of a written paper.

Mrs. Wendt, called by defendant, testified that she recalled making the application for Mrs. Fries in November, 1914, and that she got the information in that part of the application which she prepared from Mrs. Fries. This part of the application was the one containing the answers alleged to have been

false. Asked if she had failed to write down anything in response to any question as it was given her by Mrs. Fries, she answered, "No, not to the best of my knowledge and memory," had no recollection of Mrs. Fries making a statement that Dr. Miller had treated her for certain troubles prior to that time. The questions to which she wrote down "No" were answered in that way by Mrs. Fries, who signed the application in her presence; her husband was there at the time; it was after supper, in the evening. On cross-examination Mrs. Wendt testified that, as well as she remembered, she sent the applications to the supreme recorder; took so many applications, about 30 on this occasion; that she could not be positive what happened with this one; that at the time she held the office of oracle at the home camp. Asked this question, "But in your work at Pacific you weren't representing any subordinate lodge, you were representing the supreme lodge?" witness answered, "I was employed by the society to solicit members for them." Witness testified that part of her pay came from the head camp and part from the applicant. Asked what she meant by "head camp," if that was the supreme governing body of defendant she answered, "Yes, sir; it represents the laws and wishes between the delegates that form the head camp."

Plaintiff, recalled, testified that when Mrs. Wendt was at his house he was present and also his wife and mother, and it was his wife that made the remark about Dr. Miller treating her. This was before she signed the application. The transaction that he had previously testified to occurred at the office of Dr. Williams. His wife said just the same thing in regard to being treated by doctor Miller at the house as she did at the office.

Mrs. Lisette Fries, testifying for plaintiff, corroborated the testimony of plaintiff as to the conversation at the house.

At the close of the evidence in the case defendant requested the court to instruct the jury that, under the law and the evidence, their verdict should be for defendant. This was refused, defendant excepting.

At the instance of plaintiff the court then instructed the jury as follows:

"The court instructs the jury that it is admitted in this case that defendant issued and delivered the certificate or policy sued on, and that Emma Fries was the wife of plaintiff, and that she died on the 17th day of February, 1915; and that on February 18, 1915, plaintiff served defendant with due and timely notice of her death; now you are instructed that under these admissions the burden is on defendant to establish its nonliability on the certificate or policy sued on.

"Now, if you believe and find from the evidence that witness Mrs. Wendt was the agent of defendant, and as such agent propounded to said Emma the questions contained in the application offered in evidence, and if you believe and

find from the evidence that said Emma made truthful answers to all of said questions, and that witness Mrs. Wendt, acting as agent of defendant, wrote in said application untrue answers to any of the questions contained in said application, and that said Emma signed said application with no knowledge of what answers had been written in said application, then by these facts, if you believe them to be facts, defendant waives the untruthfulness of all of said answers.

"If you find the issues for the plaintiff, you will assess your finding at the sum of one thousand dollars, with interest thereon at the rate of 6 per cent. per annum from February 18, 1915."

At the request of defendant the court gave several instructions to the jury, most of them not material to be considered here, but going to the credibility of witnesses, and cautioning the jury not to be influenced because one party was an individual and the other an insurance association. One of them, however, was to the effect that if the jury found and believed from the evidence that Emma Fries was not, on November 18, 1914, of sound body, mind, and health, and free from disease or injury, then their verdict should be for defendant.

The defendant also requested a number of instructions (5) which we do not think it necessary to notice, as we think that they were properly refused.

#### Opinion.

[1] Failure of the court to sustain the demurrer to the evidence is assigned as error by the learned counsel for appellant, those counsel claiming that there is no evidence to support the verdict. We do not agree to this assignment. There was competent and relevant evidence to take the case to the jury, to the effect that the appellant had answered the questions one way, but that the representative of the defendant had written them down in another way. Which version was correct was for the jury to determine. *Floyd v. Modern Woodmen*, 166 Mo. App. 166, loc. cit. 170, 148 S. W. 178.

The instruction given at the instance of plaintiff is attacked as error, in that it told the jury that, if Mrs. Wendt was the agent of defendant, defendant waived the untruthfulness of all of the answers, and that it was erroneous, in that it required that the defendant establish its nonliability.

[2, 3] Learned counsel for the appellant invoked section 22 of the Act of the General Assembly approved March 30, 1911. That section provides:

"The Constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power(s) or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society, and each and every member thereof, and on all beneficiaries of members." See Acts 1911, p. 292.

This section does not apply here. Mrs. Wendt was not acting as subordinate officer or member of the local camp, a subordinate body; she was acting as agent and representative of the supreme governing body. It is true that section 212 of the by-laws, which we have set out, provides that no officer of the society, nor any local camp or officer or member thereof, is authorized or permitted to waive any of the provisions of the by-laws of the society, which relate to the contract between the member and the society. In so far as this section of the by-laws prohibits any local camp or officer or member thereof to waive any of the provisions of the by-laws of the society, it is but following section 22, Acts 1911, above quoted. But when it attempts to extend that nonliability to all the officers of the society—that is to say, the chief officers of the society—it is beyond the provisions of that section, and cannot be recognized as a valid by-law. It has long been the settled law of our state that notwithstanding provisions in policies of insurance to the effect that no “contract, alteration, or discharge of contract, waiver of forfeitures, nor granting of permits of credit, shall be valid unless the same shall be in writing, signed by the president or vice president and one other officer of the association,” that the agent may waive a forfeiture, and his act estops the corporation. Referring to this provision, which was urged in *James v. Mutual Reserve Fund Life Ass’n*, 148 Mo. 1, 11, 49 S. W. 978, 980, Judge Marshall, speaking for our Supreme Court, says:

“This is not a new proposition. It has been much discussed, and the rule is established by the great weight of authority that an agent may waive a forfeiture notwithstanding such a restriction as that above quoted in this policy.”

Many authorities from other states are cited in support of this, and it has been followed by many cases in our own courts. This rule was recognized by our Supreme Court in *McMahon v. Supreme Tent Knights of the Maccabees of the World*, 151 Mo. 522, 52 S. W. 384, a fraternal society organized and doing business under the same law and plan as the defendant here. In that case it is said (151 Mo. loc. cit. 537, 52 S. W. 387):

“The general rules of waiver of forfeiture are the same in association insurance as in ordinary insurance [citing authorities]. A member of such society is presumed to know its laws, and the contract of insurance is to be construed as having been made under the limitations of those laws. But a member has a right to look to the general conduct of the society itself, in respect of the observance of its laws, particularly those relating to its own duties.”

In that case it appeared that the payment of an assessment, the timely payment of which was controverted, had been made to the finance keeper of the local body, in the presence of the deputy supreme commander,

and the court held that the deputy supreme commander represented the supreme body, and that his knowledge was the knowledge of the supreme body.

See, also, *Gold Issue Mining & Milling Co. v. Pennsylvania Fire Ins. Co.*, 287 Mo. 524, 184 S. W. 999, beginning at page 602, where it is held, on the authority of a multitude of cases, that knowledge by a general agent of the existence of any fact communicated to him estops the company from interposing as a defense a violation of such conditions of forfeiture. *Ross-Langford v. Mercantile Town Mut. Ins. Co.*, 97 Mo. App. 79, loc. cit. 84 et seq., 71 S. W. 720; *Shottliff v. Modern Woodmen of America*, 100 Mo. App. 138, loc. cit. 151, 73 S. W. 326; *Manning v. Connecticut Fire Ins. Co.*, 176 Mo. App. 678, 159 S. W. 750; *Schuler v. Metropolitan Life Ins. Co.*, 191 Mo. App. 52, 176 S. W. 274; *Kring v. Glove Farmers' Town Mutual Fire, Tornado, Cyclone & Windstorm Ins. Co.*, 195 Mo. App. 133, loc. cit. 136, 189 S. W. 628; *Snyder v. Loyal Protective Ins. Co.*, not to be officially reported, but see 196 S. W. 1022—are all to the same effect.

In *Manning v. Connecticut Fire Ins. Co.*, supra, we held that the local agent of an insurance company, authorized to represent the company in making contracts of insurance, signing policies, and collecting premiums thereon, has authority to waive conditions in the policy, either in writing by parol, or conduct in pais, and that notice to such agent is notice to the company. A multitude of authorities are there cited in support of this proposition on page 688 of the report of that case.

In *Schuler v. Metropolitan Life Ins. Co.*, supra, we held, on the authority of the *James and McMahon Cases*, supra, that the knowledge of the local agent who negotiated the contract was the knowledge of the company.

There are a number of cases decided by the courts of our state holding that the knowledge of the officers of the subordinate council is binding on the order, but the very object, it must be assumed, of section 22, Acts 1911, was to do away with that rule of decision, and to confine knowledge on the part of the agents which was binding on the order to superior agents, and not extend it to the agents of the subordinate organizations.

[4] Notwithstanding this provision in the by-laws of the company, therefore, we think that if it is a fact, and so the jury found, that true answers were given by the applicant to Mrs. Wendt, and that Mrs. Wendt wrote them down untruly or incorrectly, knowing what the true answers were, then her knowledge was the knowledge of the order itself.

[5] It is argued, however, that Mrs. Wendt was in a dual capacity, both as deputy oracle for the supreme body and also as a member



and officer of the subordinate camp, and that this instruction was erroneous in referring to her as agent without saying agent of which body. That could not by any possibility mislead the jury, for there was not a particle of evidence that, in her transaction with Mrs. Fries, Mrs. Wendt was acting for the local camp.

[8] It is further argued that this instruction is wrong in that it told the jury that, under the admissions in the case, "the burden is on defendant to establish its nonliability on the certificate or policy sued on." It is argued that by the use of this word "establish" there is a greater burden on defendant than the law imposes. We are cited to two cases which criticize the use of the word "establish" in instructions. One is that of *Eberhardt v. Sanger*, 51 Wis. 72, 8 N. W. 111, the other is that of *Knights of Pythias v. Steele*, 107 Tenn. 1, 63 S. W. 1126, also cited under the title of *Endowment Rank of Order of Knights of Pythias v. Steele*. It is true that in those cases the use of the word "establish" in an instruction is condemned as being too strong. But an examination of those cases does not persuade us that they are applicable here. Their use in those cases was not as in this instruction; here, in effect, merely placing upon defendant the proof of the matters it relied on in defense, but in those cases went much further and repeated it; in one case it was a repetition of that term in connection with other matters; in the other case fraud was involved, and the question was whether fraud had been "established." We think, as used in the instruction before us, all that this word "establish" means or could have meant to the jury was that, the plaintiff having made out a prima facie case, it was for the defendant by its proofs to establish its defense; that is to say, to produce such evidence as, when considered by the jury, was sufficient to make out the defense relied on. That is the way that the jury must have understood it, and we do not

think that its use here was misleading. Its use here was very much like the use of the term, "to the satisfaction of the jury," in *McMahon v. Knights of Maccabees*, supra, 151 Mo. loc. cit. 543, 52 S. W. 390. As to that our Supreme Court there held that its use was not reversible error.

[7] It is further argued that this instruction was erroneous in telling the jury that if they believed and found from the evidence that Mrs. Fries made truthful answers to all the questions propounded, and that Mrs. Wendt, acting as agent for defendant, "wrote in said application untrue answers to any of the questions contained in said application, and that said Emma signed said application with no knowledge of what answers had been written in said application, then by these facts, if you believe them to be facts, defendant waived the untruthfulness of all of said answers." This use of the word "all" is criticized as improper. Considering the instruction and the preceding part of it, we do not think that this criticism is sustainable. We think that this word "all" is to be construed in connection with the words previously used, "untrue answers to any of the questions contained in said application," and the word "all" related back to such answers. We do not think it could possibly have misled the jury.

The remaining assignments are to the refusal of the court to give the instructions asked by the defendant. We have examined them, and think that all of them were properly refused.

As this covers all of the errors assigned before us by the learned counsel for the appellant, in so far as concerns matter arising and determined at the trial, we do not think it necessary or serviceable to go into a further discussion of the case.

Finding no reversible error, the judgment of the circuit court is affirmed.

ALLEN and BECKER, JJ., concur.

(187 Ark. 530)

**GUNTER v. WILLIAMS. (No. 122.)**

(Supreme Court of Arkansas. Feb. 24, 1919.)

**1. APPEAL AND ERROR ⇨231(9) — RESERVATION OF GROUNDS OF REVIEW—OBJECTION TO INSTRUCTION.**

Where defendant did not make specific objection in the court below to an instruction, not happily framed, he cannot complain of the instruction on appeal.

**2. PRINCIPAL AND AGENT ⇨23(5)—AUTHORITY TO SELL—SUFFICIENCY OF EVIDENCE.**

In action of replevin for iron tank claimed to have been sold by defendant's agent, evidence held to warrant finding that claimed agent was agent of defendant for sale of property.

**3. PRINCIPAL AND AGENT ⇨174—RATIFICATION OF SALE BY AGENT—QUESTION FOR JURY.**

In action to replevy an iron tank claimed to have been sold to plaintiff by defendant's agent, whether there was a ratification of the agent's sale held for jury.

**4. REPLEVIN ⇨72 — VALUE OF PROPERTY — EVIDENCE.**

In action to replevy an iron tank claimed to have been sold by defendant's agent to plaintiff, testimony of defendant that he could have sold the tank for \$150 or \$200 was sufficient to warrant finding that the value of the tank was \$175.

**5. REPLEVIN ⇨81—INSTRUCTION—EVIDENCE TO SUSTAIN.**

Where defendant in replevin, who had cross-complained for the property, testified that he had sold a pump sought to be replevied to one other than plaintiff, the court properly instructed that if defendant had so sold to another he was not entitled to recover such pump.

**6. TRIAL ⇨253(3)—INSTRUCTION—IGNORING ISSUES.**

In action to replevy property claimed to have been sold to plaintiff by defendant's agent, instruction that the burden was on plaintiff to prove the agent was such to make a sale, etc., held properly refused as taking from the jury all consideration of question of ratification of sale by the agent.

**7. APPEAL AND ERROR ⇨216(4) — RESERVATION OF GROUNDS OF REVIEW—REFUSAL OF INSTRUCTION.**

One who has not asked a proper instruction on a subject cannot complain of the ruling of the court in refusing the instruction as asked.

**8. TRIAL ⇨260(5) — INSTRUCTION — REPETITION.**

In action to replevy property claimed to have been sold to plaintiff by defendant's agent, instruction requested by defendant that if agent exceeded authority, and defendant repudiated transaction within reasonable time, no ratification would follow, etc., held properly refused as covered by another charge given on court's own motion.

Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

Action of replevin by D. R. Williams, doing business as Williams Bros., against John Gunter. From a judgment for plaintiff, defendant appeals. Affirmed.

D. R. Williams, doing business as Williams Bros., brought an action in replevin against John Gunter to recover an iron tank alleged to be of the value of \$200. John Gunter filed an answer in which he denied that Williams was entitled to the possession of the tank, and filed a cross-complaint against Williams for the recovery of certain valves, pipes, and tubes, with the value and particular description of each article stated therein.

According to the testimony of H. A. McDonald, a witness for the plaintiff, he sold the iron tank to the plaintiff, together with some fittings and shaftings attached thereto, and John Gunter gave him the authority to make the sale. He sold the tank to Williams for \$75, and gave him a written bill of sale therefor as agent for John Gunter. He also procured the brother of John Gunter to sign the bill of sale. John Gunter had bought some old distilling property from the government, together with the land on which it was situated. He carried McDonald down to view the property and appointed him as his agent to sell it. He pointed out some wooden tanks as well as the iron tank in question. Subsequently John Gunter went to the state of North Carolina on account of the illness of his father, and while he was gone McDonald sold the two wooden tanks for the prices designated by Gunter, and paid the price, less his commission, to the brother of Gunter. McDonald thinks that the defendant put the price of \$100 on the iron tank; but before he sold the tank to Williams, McDonald went to the defendant's son and asked him if his father had put any price on the iron tank, and the son replied that his father had put a price of \$75 on it just as it stood, with the shaftings and other fixtures attached to the tank. McDonald then sold the tank to Williams with the fixtures attached for the sum of \$75, and kept \$25 as his commission, and paid the remaining \$50 to the brother of the defendant.

On cross-examination McDonald stated that he met the defendant on the street after he had returned from North Carolina, and he complained that McDonald had sold the tank for \$75, saying that he had put a price of \$100 on it to him. McDonald told him that his son had stated that his father had left a price of \$75 on the iron tank, and the defendant did not deny that he had done this. The defendant made no complaint until a week or ten days after he came back

from North Carolina, and this was several weeks after the sale had been made. McDonald further stated on cross-examination that he had general authority from John Gunter to sell all of the property at the distillery, and that Gunter had told him to sell everything there, including the building and lot.

According to the testimony of D. R. Williams, he bought the iron tank, and paid \$75 for it on the 31st day of July, 1917. He did not remove the tank right away because he had no particular need for it, and on about the 15th day of September John Gunter came into his office and complained about the sale of the tank. He said that McDonald had not gotten enough money for it, and that he could sell it for \$200. He offered Williams his money back, but the latter refused to take it, saying that he had bought the property in good faith. Williams denied that he had gotten some of the property mentioned in the cross-complaint, and stated that the property he did get was junk and not worth over \$6; that it was attached to the tank when he bought it, and was regarded as a part of the tank in the contract of sale; that Gunter had told him he had sold the pump to Leo Bercher.

According to the testimony of John Gunter he never appointed H. A. McDonald to sell the distillery property for him. He only showed him the property, and told him if he could find a buyer and he made a sale that he would pay McDonald for his trouble. He told McDonald the price of the small tanks was \$20 each, and the iron tank was \$100; that he did not want to sell anything but the tanks, and that nothing was offered for sale except the tanks and the pump which he himself sold to Leo Bercher for \$25; that he went to North Carolina in July to attend the bedside of his father, and remained with him until the 7th day of September, 1917; that his brother wrote him that McDonald had sold the iron tank for \$75 and paid him \$50; that he wrote back and asked what had become of the other \$25, and that his brother replied that McDonald had kept it; that he repudiated the whole transaction and offered Williams his \$75 back when he returned to Ft. Smith; that he would not have sold the property for \$75 because he could get \$150 or \$200 for the tank alone; that as soon as he found out all the facts, he repudiated the transaction and offered Williams his money back; that his brother only represented him in running his barbecue stand, and did not have any authority to sell the property in question.

According to the testimony of Hugh Gunter, a son of John Gunter, before the latter went to North Carolina he told the former that he could put a price of \$75 on the iron tank just as it stood. McDonald went to see him one day, and asked him what price

the defendant had put on the tank. Hugh Gunter took McDonald down and showed him the tank, and told him that the defendant had put a price of \$75 on it just as it stood, and that he (Hugh Gunter) could sell the tank for that price.

The jury first returned a verdict for the plaintiff and assessed the value of the property at \$200. The court then told the jury that the plaintiff had all the property in his possession except the tank, and that it was the duty of the jury to find the value of the tank alone in its verdict. Thereupon the jury retired, and later brought into court a verdict for the plaintiff, and placed the value of the tank at \$175. The case is here on appeal.

T. S. Osborne, of Ft. Smith, for appellant.

Harry P. Dally, of Ft. Smith, for appellee.

HART, J. (after stating the facts as above). It is first contended that the court erred in giving instruction No. 1 at the request of the plaintiff. The instruction is as follows:

"The jury are instructed by the court that if John Gunter authorized the sale of this property, and after McDonald had sold same ratified his action, plaintiff should recover, even if you should find that McDonald exceeded his authority in the first instance."

[1] The instruction is not very happily framed, but this could have been met by a specific objection to it. Having made no complaint in the court below on this account, the defendant is in no attitude to complain here.

[2-4] His chief objection, however, to the instruction, is that there was not sufficient evidence in the record upon which to predicate an instruction on ratification. We do not agree with counsel in this contention. According to the testimony of McDonald the defendant made him his agent to sell the property involved in controversy. The defendant himself admits that he put a price on the property, and was to pay McDonald for his trouble in assisting him in case he made a sale of the property himself. Be that as it may, under the evidence of McDonald the jury was warranted in finding that he was the agent of the defendant for the sale of the property. An agent acting in excess of authority is a very different thing from one acting in the absence from all authority. Hence, in considering whether the facts and circumstances of a particular case are sufficient evidence of a ratification, the distinction has been made between the unauthorized act of an agent, where the relation of principal and agent already exists, and that of a mere volunteer or stranger. In the former case it is said that an intention to ratify will always be presumed from the silence of the principal after being

informed of what has been done on his account, while in the latter case it has been said there exists no obligation to repudiate the transaction, nor will silence be construed into a ratification. *Dierks Lumber & Coal Co. v. Coffman*, 96 Ark. 505, 132 S. W. 654.

The jury might have found from the evidence that McDonald sold the tank together with the pipes and other things attached to it to Williams on the 31st day of July, 1917, and gave him a written bill of sale therefor; that this was done after the defendant's son had told McDonald that the defendant had placed a price of \$75 upon the tank as it stood; that Williams paid the purchase price of the tank; and that McDonald retained a commission of \$25, and paid the balance to the defendant's brother. The defendant by letter was apprised of this fact, and instead of repudiating the transaction he wrote and asked his brother what had become of the other \$25. It was not until about the middle of September when he had been home a week or ten days that he attempted to repudiate the transaction. He had knowledge of all the material facts when the sale was first made. The question of whether or not McDonald was to have a commission out of the sale from the defendant was one that did not concern the plaintiff as purchaser, Gunter knew that he had placed a price of \$100 upon the tank in his conversation with McDonald. He knew that McDonald had sold the tank for \$75. He knew that he had put a price of \$75 on the tank to his son. At least the jury might have found this to be true from the testimony of his son. His chief objection to the sale at the time seems to have been that all the money was not paid to him. Hence, under all the circumstances, we think there was sufficient legal evidence upon which to submit to the jury the question of ratification of the sale by the defendant. According to the defendant's own testimony (and this seems to have been all the testimony on the subject) he could have sold the tank for \$150 or \$200. This testimony was sufficient to warrant the jury in finding the value of the tank to be \$175.

It is contended that the court erred in giving instruction No. 2. The instruction reads as follows:

"If you find that McDonald was the general agent to sell the property at the old distillery, then Gunter is bound by all his acts within the apparent scope of his authority."

It is claimed that there is no testimony upon which to base this instruction. We do not agree with counsel in this contention. McDonald testified in positive terms that he had general authority from the defendant to sell all of the property at the distillery.

[5] It is next contended that the court erred in giving instruction No. 3 at the request of the plaintiff, which is as follows:

"If you find from the evidence that John Gunter sold the pump to Leo Bercher, and that Bercher is the owner of the same, then Gunter is not entitled to recover same."

There was no error in giving this instruction. According to the testimony of the defendant himself (which was all the evidence there was on the subject) he had sold the pump to Leo Bercher. Assuming that to be true, he is not concerned with who has possession of the pump. It does not belong to him. If it belongs to Bercher, that is a question that does not concern the defendant. The defendant could only be interested in recovering his own property. He does not show that he had any special ownership in the property which would entitle him to recover possession of it from the plaintiff.

[6, 7] It is next insisted that the court erred in refusing to give instruction No. 1 asked by the defendant. The instruction is as follows:

"The burden of proof is on the plaintiff to prove by a preponderance of the evidence that McDonald was the agent of John Gunter, the defendant, to make a sale of the tank and property involved in this action, and before you can find for the plaintiff you must so find that such authority was given."

There is no error in refusing to give this instruction. It takes from the jury all consideration of the question of ratification of the sale, and makes it its duty to find for the defendant, unless it should find that the plaintiff had authorized McDonald to make the sale of the tank. One who has not asked a proper instruction on a subject cannot complain of the ruling of the court in refusing the instruction as asked. *West. Union Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528; *Horton v. Jackson*, 87 Ark. 528, 113 S. W. 45; *Holmes v. Bluff City Lbr. Co.*, 97 Ark. 180, 133 S. W. 819; *Hays v. State*, 129 Ark. 324, 196 S. W. 123; *McCain v. State*, 132 Ark. 497, 201 S. W. 840.

[8] It is also contended that the court erred in refusing to give instruction No. 2 asked by the defendant. The instruction is as follows:

"If you find that McDonald exceeded his authority in making said sale, and the defendant, John Gunter, repudiated the transaction within a reasonable time after he learned all the facts in the case, the defendant had a right to repudiate the transaction, and the same would not be ratified, although a part of the purchase price may have been deposited to Gunter's credit. And if you find that Gunter repudiated said sale within a reasonable time after he learned all the facts in the case, and that McDonald exceeded his authority, it is your duty to find for the defendant."

The court did give instruction No. 1, which is as follows:

"If the jury find that McDonald exceeded his authority in the sale of this property, and that

Gunter on learning all the facts in connection with the same repudiated the transaction and tendered back the purchase money within a reasonable time, you should find for the defendant."

A comparison of the two instructions will show that essentially all the matters embraced in instruction No. 2 asked for by the defendant are embraced in instruction No. 1, given on the court's own motion.

We find no prejudicial error in the record, and the judgment will be affirmed.

(137 Ark. 523)

**TERRAL, Secretary of State, v. ARKANSAS LIGHT & POWER CO. (No. 142.)**

(Supreme Court of Arkansas. March 10, 1919.)

**1. MUNICIPAL CORPORATIONS §108—REFERENDUM — ORDINANCE INVOLVING "POLICE POWER."**

Passage by city council of ordinances permitting plaintiff light and power company to charge consumers during the war and for six months thereafter an increased rate over maximum fixed in original franchise was not, in view of Acts 1913, p. 569, § 10 an exercise of police power within section 1 not allowing referendum upon ordinance for exercise of police power.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Police Power.]

**2. MUNICIPAL CORPORATIONS §108—REFERENDUM PETITION — VERIFICATION — SUFFICIENCY.**

Although form for affidavit on sheets of referendum petition given by Acts 1913, p. 567, § 5, directs that names of signers be included in affidavit, affidavit on back of sheet of petition, to the effect that signers on opposite side were legal voters, was sufficient; Kirby & Castle's Dig. § 4448, as to forms given, being directory and not mandatory.

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit by the Arkansas Light & Power Company against Tom J. Terral, Secretary of State. From findings and decree, defendant appeals to the Supreme Court for trial de novo. Decree reversed, and complaint dismissed.

John D. Arbuckle, of Little Rock, and Hardage & Wilson and McMillan & McMillan, all of Arkadelphia, for appellant.

Callaway & Huie, of Arkadelphia, for appellee.

**HUMPHREYS, J.** Appellee brought suit against appellant in the Pulaski chancery

court to enjoin him, in his official capacity as Secretary of State, from certifying to the election commissioners, under the referendum, two ordinances passed by the city council of the city of Arkadelphia, on August 5, 1918, by which appellee was permitted to charge the consumers of water and electricity in said city an increased rate of 25 per cent. over the maximum rate fixed in the original franchises during the period of the war between the United States and the Imperial Government of Germany and for six months thereafter. Two allegations in the complaint, material to the issues to be determined on appeal, were: (1) That the raise in rate to consumers in said city, of water and electricity, was an exercise of the city's police power, within the meaning of section 1, Act No. 135 of the General Assembly of 1913, and therefore not subject to a referendum vote of the electors of said city; (2) that the sheets of the petitions for referendum were not verified in the manner required by section 5, Act 135 of the General Assembly of 1913, providing for the referendum of certain ordinances. Upon these allegations, appellant joined issue.

The cause was submitted to the court upon the pleadings, exhibits attached thereto, and two petitions for referendum, from which it was found that the ordinances raising the rates of water and electricity to the consumers of said city were enacted by the city council in the exercise of its police power and not subject to referendum. A decree was rendered perpetually enjoining appellant, in his official capacity, from certifying the ordinances to be voted upon by the electors of said city. From the findings and decree, an appeal has been prosecuted to this court for trial de novo.

In 1914, the city of Arkadelphia granted franchises in separate ordinances to appellee for supplying water and electric lights to the city and inhabitants thereof. Provision was made in the ordinances for water hydrants and street lights at fixed rates, and maximum rates were fixed therein for private consumption of water and lights by the inhabitants of said city. On the 5th day of August, 1918, by and with the assent of appellee, the city council passed ordinances fixing the maximum charge to consumers for water and lights at a 25 per cent. increase above the maximum price fixed in the franchises granted in 1914. One hundred and twenty-five electors of said city petitioned the appellant, in his official capacity, to certify the ordinances raising the rate for vote by the legal electors of the municipality under the general initiative and referendum act (No. 135 of the General Assembly of 1913). The following affidavit appeared on the back of each sheet to the petitions for referendum:

"State of Arkansas, County of Clark:

"I, C. F. Cooley, being first duly sworn, state that the names of the legal voters who signed on the opposite side of this sheet to the foregoing petition and each of them has stated his name, residence, post office address and voting precinct correctly and that each signer is a legal voter of the city of Arkadelphia.

"C. F. Cooley.

"Post office: Arkadelphia, Ark.

"Subscribed and sworn to before me this the 14th day of September, 1918.

"[Seal.] J. O. W. Hardy, N. P."

Learned counsel for appellee have tersely stated the two questions to be determined on appeal, as follows:

(1) Were the two ordinances of August 5, 1918, abstracted by appellant, an exercise of the police power of the city and therefore not subject to referendum?

(2) Were the sheets of the petitions verified by the person who circulated the petitions in the manner required by law?

[1] 1. It is provided in section 1, Act 135 of the General Assembly of 1913, that—

"No order of referendum shall be allowed upon any ordinance \* \* \* for the exercise of police powers."

Learned counsel for appellant insist that "the exercise of police power" was used by the Legislature in this section in a limited and restricted sense so as not to include the granting of franchises or matters in relation thereto. Their interpretation of this section is clearly correct. The following provision appears in section 10 of said act:

"After petition shall have been filed and a referendum ordered as provided for herein, ordinances granting franchises may be submitted to the electors of the municipality at special election."

By the use of this language, it is manifest that the Legislature did not intend to include matters pertaining to or relating to franchises, when it reserved from the referendum ordinances passed and adopted in the exercise of police power. The clear intentment of the act was to allow the legal electors in the municipality to adopt or reject, by vote, ordinances relating to the granting of franchises. For this reason, the court erred in holding that the passage of the ordinances, raising the rates, was an exercise of its police power within the meaning of said initiative and referendum act.

[2] 2. It is said by appellee, however, that, even if the ordinances were referable under the referendum act, the sheets of the petitions were not properly verified by the per-

son who circulated same in the manner required by law. Section 5 of Act 135 of the General Assembly of 1913 provides that the person who circulated the separate sheets of the petition shall make an affidavit thereon, and as a part thereof, in substantially the following form:

"State of Arkansas, County of ———, ss.:

"I, ———, being first duly sworn, state that (here shall be legibly written or printed the names of the signers of the sheet) signed this sheet of the foregoing petition, and each of them signed his name thereto in my presence. I believe each has stated his name, residence, postoffice address, and voting precinct correctly, and that each signer is a legal voter of the city or incorporated town of ———, Arkansas.

"Signature: \_\_\_\_\_.

"P. O.: \_\_\_\_\_.

"Subscribed and sworn to before me this \_\_\_\_\_ day of ———, 191—.

"\_\_\_\_\_,

"\_\_\_\_\_,

"The forms herein given are directory, and not mandatory, and if substantially followed in any petition shall be sufficient, disregarding clerical and technical errors."

Kirby & Castle's Digest, § 4448.

The objection urged by appellee to the form of the affidavit is that the affidavit itself fails to include the names of the signers of the sheet, or sheets. The act only requires a substantial compliance with the form of affidavit prescribed. By reference to the affidavit on the back of each sheet of the petition, set out in the statement of this case, it will be observed that the party circulating the sheet made oath that the signatures on the opposite side of the sheet were legal voters in the city of Arkadelphia and that they signed their respective names in his presence. The affidavit was clearly to the effect that every signer on the opposite side of the page was a legal voter and that every legal voter who signed his name did so in the presence of the parties circulating the sheets of the petition. It seems to us that nothing could be more specific than this affidavit and that it is a substantial compliance with the form set forth in said section. The ordinances being referable under said act, and the petition for reference being in accord with the provisions of the act, the court was in error in perpetually enjoining appellant, in his official capacity, from certifying the ordinances for adoption or rejection by the legal voters in the city of Arkadelphia.

The decree is therefore reversed and the complaint dismissed.

(138 Ark. 79)

**PARKS v. THOMAS. (No. 140.)**

(Supreme Court of Arkansas. March 10, 1919.)

**1. ADVERSE POSSESSION §57 — TACKING SUCCESSIVE POSSESSIONS — EXPLANATORY EVIDENCE.**

In suit for trespasses on land, where, to make title by adverse possession, it would have been necessary for defendant to tack his possession to that of his predecessors, on issue of adverse possession it was competent for defendant's predecessor to explain character and extent of his possession.

**2. EVIDENCE §251(1) — ADMISSION BY GUARDIAN—DEROGATION OF WARD'S TITLE.**

A guardian could make no admission in derogation of his ward's title.

**3. TRESPASS §45(5) — GOOD FAITH — EVIDENCE.**

In action for trespass by minor owner's guardian, testimony that guardian had stated, before defendant cut a fence in committing a trespass, that certain gravel involved was on his (defendant's) land, was admissible on question of punitive damages as bearing on defendant's good faith.

**4. TRESPASS §46(3)—PUNITIVE DAMAGES—SUFFICIENCY OF EVIDENCE.**

In action for trespass and conversion of gravel, etc., no circumstances of force or intimidation having accompanied defendant's acts in twice cutting a fence, evidence held insufficient to justify infliction of punitive damages.

**5. TROVER AND CONVERSION §44—MEASURE OF DAMAGES—VALUE OF PROPERTY.**

Where property is wrongfully taken from owner, measure of damages is its market value, in absence of testimony showing circumstances of taking to have been such as to warrant infliction of punitive damages.

Appeal from Circuit Court, Logan County; Jas. Cochran, Judge.

Action by Bryan Thomas against G. W. Parks. From a judgment for plaintiff, defendant appeals. Judgment reduced, and, as modified, affirmed.

The parties to this litigation are coterminal proprietors of tracts of land which are made irregular in shape by Booneville creek, a tortuous stream running through the land, or, rather, forming the boundary of both tracts. Both parties deraign their title from one James Ross, who at one time owned the land on both sides of the creek at the point in controversy. Ross sold the land east of the creek to one J. P. Henderson, and this is the land owned by appellee, Thomas, at the time of the institution of this suit; his father (from whom he had title by descent) having acquired the title by mesne conveyances from Henderson. Ross died, but his son and heir disposed of all the land west of the creek, except a 22-acre tract, which

he sold and conveyed to one Sweeney, who conveyed to Bruer, who conveyed to appellant Parks. These deeds described the land by reference to Booneville creek.

Appellee brought this suit to recover damages, both compensatory and punitive, to compensate the alleged unlawful and malicious trespasses committed by appellant on the land of appellee. The complaint contained two counts. In the first count it was alleged that appellant, by force of arms, had broken and entered appellee's close, and had willfully, wantonly, and unlawfully cut down and destroyed appellee's post and wire fence there situated, and had injured and damaged appellee's grass, herbage, and soil. In the second count it was alleged that appellant had willfully, wantonly, and unlawfully broken and entered appellee's close, and had taken and carried away appellee's soil, sand, earth, rock, and gravel, and had converted the same to his own use. There was a prayer in each count for damages, both compensatory and punitive.

The answer specifically denied the allegations of both counts of the complaint, and further alleged that—

"In 1871 J. P. Henderson sold to — Ross the land now owned by the defendant, and that the said J. P. Henderson, who owned the land now owned by the plaintiff and — Ross, had an agreement about the line between their land, and that the said J. P. Henderson built his fence inclosing his land on the west side on the west bank of the creek where the fence is now standing, and that the — Ross joined his fence inclosing the land now owned by the defendant to the J. P. Henderson fence as it is at this time; that said fencing has been standing as it is at this time for the past forty years; that defendant and his assignees have had peaceable, open, adverse possession against the plaintiff and his assignees for the past forty years, paid the taxes thereon, and have continuously exercised ownership over same for the said time of about forty years.

"Defendant further states that the gravel bed is west of the creek, near the ford, on defendant's land, and that defendant and his assignees have continuously exercised ownership over said gravel bed for the past forty years or thereabout."

There was a verdict for appellee on the first count for \$800, and on the second count for \$200, and this appeal has been prosecuted to reverse the judgment rendered for the sum total of the two verdicts. The court instructed the jury that appellee was entitled to recover compensatory damages on the first count, and under instructions, which are not questioned, submitted the right to recover compensatory damages under the second count, and gave instructions declaring the conditions under which punitive damages might also be assessed on either or both counts.

As grounds for reversal of the judgment,

It is chiefly insisted that the court erred in directing a verdict on the first count, and in submitting the question of punitive damages on either count. Other errors are assigned which will be discussed in the opinion; while other assignments of error need not be discussed, as they relate to the punitive damages, which question we have disposed of upon the grounds stated in the opinion.

A. S. McKennon, of McAlester, Okl., and Kincannon & Kincannon, of Booneville, for appellant.

Jno. P. Roberts and Evans & Evans, all of Booneville, for appellee.

SMITH, J. (after stating the facts as above). [1] Appellant complains of the admission of the testimony of Sweeney to the effect that he did not buy or claim the gravel bed in controversy, that he did not buy or claim any portion of ground across Booneville creek from the west where appellant cut appellee's fence, and that he did not buy or claim or take into his possession any portion of the ground on the east side of the creek where the fence was cut; the ground of the objection being that the conveyances are the best evidence of what any vendee took by his deed. It will be observed, however, that appellant did not allege ownership of the land where the alleged trespasses were committed by reason of any deed to him. The claim of title alleged was based upon adverse possession for a period of 40 years. Appellant obtained his deed in October, 1913, and could not, therefore, of course, have had such possession as would have ripened into title. Sweeney was one of his immediate predecessors in title, and it would have been necessary for appellant to tack his possession to that of Sweeney's to give title by adverse possession. The deeds in the chain of title from Ross were not introduced by appellant, but were introduced by appellee over appellant's objection, and on the issue of adverse possession it was competent for Sweeney to explain the character and extent of his possession. *Welch v. Welch*, 132 Ark. 227, 228, 238, 200 S. W. 139; *King v. Slater*, 96 Ark. 589, 590, 593, 133 S. W. 178; *Waldroop v. Ruddell*, 96 Ark. 171, 175, 131 S. W. 670; *Hughes Bros. v. Redus*, 90 Ark. 149, 151, 118 S. W. 414; *Jeffery v. Jeffery*, 87 Ark. 496, 497, 498, 113 S. W. 27; *Foster v. Beldier*, 79 Ark. 418, 426, 96 S. W. 175; *Seawell v. Young*, 77 Ark. 309, 315, 316, 91 S. W. 544; *Eaton v. Sims*, 59 Ark. 611, 613, 28 S. W. 429; *Richardson v. Taylor*, 45 Ark. 472, 478.

There was no testimony in regard to any agreement fixing the boundary, and there was no testimony legally sufficient to support a finding that appellant had title to any land not described in his deed, and the court did not err, therefore, in so directing the jury.

Appellant calculates the compensatory damages recoverable on the first count at \$8, and on the second count admits a liability of \$37, if liable at all, and appellee makes no showing that the compensatory damages exceeds the sum of \$45, so that appellee is entitled to have the judgment affirmed to the extent of \$45 on account of compensatory damages; and it remains only to determine whether the judgment should be affirmed for the balance of the verdict of the jury, which necessarily represents the amount assessed by way of punitive damages.

Appellant admits that he twice cut the fence, but no circumstance of force or intimidation accompanied his act on either occasion. There was no threat of violence in doing so, and there was no willful or wanton destruction of property, and no damage was done to the freehold except to the extent of the value of the gravel taken. Appellee's land was in possession of one Suttles, who was using it as a pasture, and he testified on behalf of appellee as follows:

"I was pasturing this when this high water came. My cow was in the pasture at that time, and I went down and cut the fence next to the meadow, and brought the cow out that way. Mr. Parks [appellant] had fenced up his pasture and joined the fence across at the upper end, and in putting this fence back where we had it I joined onto his fence at the north end, joined the fence where I joined it before in the bend of the creek, on the creek on the west side. I went probably six or eight feet nearer the water. The fence stayed there, I don't know, three or four days, and Mr. Parks spoke to me about the fence; said, 'You got a little too far over.' I said, 'Yes, sir.' He said it was his, and I told him he would have to see Bryan Thomas or Mr. Roberts about it, and a day or so afterwards it was cut and thrown back."

He further testified that "the fence was cut in two places where I joined onto him, and it was cut where I went to the creek, and posts pulled up and thrown back where the fence used to set."

It appears, therefore, that appellant was only attempting to restore the fence to the line where it ran before Suttles moved the fence out towards appellant's land. Suttles restored the fence a few days after it had been cut down to its advanced line, and appellant again pulled it down; but no circumstance of force, threat, or violence accompanied that action. Suttles testified that appellant said to him that he would have the line located by a survey, "as Bryan Thomas was coming twenty-one years old." This suit was brought originally by appellee's guardian, but appellee attained his majority before it came to trial, and it proceeded to trial in his own name after an order to that effect had been made.

[2, 3] As bearing upon the question of good faith, appellant offered to show that appellee's brother-in-law, who was also appel-



lee's guardian, had stated prior to the time the fence was cut that the particular gravel here involved was on appellants' land; but this testimony was excluded. This testimony was incompetent on the question of title, as the guardian could make no admission in derogation of his ward's title. But the testimony should have been admitted as bearing on the question of good faith. It affirmatively appears that there was a genuine controversy which was submitted to the jury upon the conflicting testimony of a number of witnesses in regard to the channel of the creek as affecting the boundary of the respective tracts of land. It is true that some angry words were exchanged between appellant and one Roberts, who lived on appellee's land, after the tearing down of the fence; but this occurred after the fence had been cut down and related to a past transaction.

[4, 5] We therefore conclude that there was no testimony legally sufficient to justify the infliction of punitive damages, and the court should have eliminated this branch of the case from the jury. *Brown v. Allen*, 67 Ark. 386, 55 S. W. 143; *Kelly v. McDonald*, 39 Ark. 387. Where property is wrongfully taken from the owner, the measure of damages is the market value of the property taken, in the absence of testimony showing the circumstances of the taking to be such as to warrant the infliction of punitive damages; and there appears to be no conflict as to the sum which will compensate the actual damage done. This is the only error we find in the record, and the judgment will therefore be reduced to \$45, and as thus modified affirmed.

(138 Ark. 38)

FUNK & SON et al. v. YOUNG. (No. 132.)

(Supreme Court of Arkansas. March 8, 1919.)

**1. BANKS AND BANKING ⇨135—INSOLVENCY OF BANK—SET-OFF BY DEPOSITOR.**

Where a bank becomes insolvent, depositors may set off deposits against notes held by bank, to end that only true balance may be required to be paid to representative of bank.

**2. BANKS AND BANKING ⇨63½, 77(3) — INSOLVENCY—SALE OF ASSETS.**

A receiver of an insolvent bank, or a bank commissioner under Acts 1913, p. 462, § 51, is not an assignee for a valuable consideration of notes held by bank, and by operation of law rights and property of bank passes to him precisely in same condition and subject to same equities as the bank held them.

**3. BANKS AND BANKING ⇨63½, 77(5) — INSOLVENCY—NOTES—RIGHTS OF ASSIGNEE—SET-OFF.**

One to whom notes of an insolvent bank have been assigned by its receiver or the bank

commissioner acquires only rights of the bank in the notes, so that, under Kirby's Dig. § 6008, and sections 6009, and 6101, as amended by Acts 1917, p. 1441, the maker of such a note may set off against it, in such assignee's hands, debts owing him by the bank, such as his deposit therein.

**4. PLEADING ⇨367(5) — MOTION TO MAKE DEFINITE—ANSWER.**

Where the averments of an answer are incomplete, ambiguous, or defective, the remedy is a motion to make them more definite and certain.

**5. PLEADING ⇨84(3)—INTENDMENTS.**

In determining the sufficiency of any pleading, every fair and reasonable intendment must be indulged in its support.

**6. BANKS AND BANKING ⇨135—ACTION ON NOTE—SET-OFF.**

One who had deposit in bank as trustee for another when bank became insolvent, rendering him liable to beneficiary, could, in view of Kirby's Dig. § 6008, and sections 6009, and 6101, as amended by Acts 1917, p. 1441, set off such deposit against his note to the bank.

Appeal from Circuit Court, Benton County; J. S. Maples, Judge.

Suit by Towne Young, trustee, against Funk & Son and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Towne Young, trustee, brought suit against Funk & Son, E. M. Funk and Erwin O. Funk to recover the sum of \$149.40 and the accrued interest alleged to be due him on a promissory note. The note is dated April 27, 1914, at Rogers, Ark., and is signed by Funk & Son, E. M. Funk, and Erwin O. Funk. The face of the note was for \$200, and was due and payable to the order of the Bank of Rogers 60 days after date, with interest at the rate of 10 per cent. per annum from maturity until paid. The note had the following indorsements on the back of it:

"Bank of Rogers, by W. E. Talley, Pres."

"Paid Dec. 18—16, \$100. J. R. D."

"For value received I hereby assign and transfer the within note to Towne Young, trustee."

"John M. Davis, Bank Commissioner."

The defendant filed an answer to the complaint as follows:

"They deny that they are indebted to the plaintiff in the sum of \$149.40, or in any other sum."

"Second. Defendants, further answering, admit that on April 27, 1914, they executed their promissory note to the Bank of Rogers for the sum of \$200, bearing 10 per cent. interest from date, and admit that there was indorsed as paid thereon \$100, December 18, 1916."

"Third. That on the — day of July, 1914, the said Bank of Rogers, being insolvent, clos-

ed its doors, and was with all its assets taken over by John M. Davis, state bank commissioner, and the affairs of said bank are now in process of settlement in the Benton chancery court; that at the time the said bank failed defendant Erwin C. Funk had on deposit in said bank, subject to check, the sum of \$25.06; that the firm of Funk & Son had on deposit in said bank subject to check the sum of \$8.37; that there is due and owing the defendants E. M. Funk and Erwin C. Funk, members of the firm of Funk & Son, \$33.43, and interest which they are entitled to have set off against the said note in suit.

"Fourth. Defendant, E. M. Funk, further answering for himself, says that on the — day of the —, 19—, he, as trustee for S. C. Walters, deposited in said bank, for which he was personally responsible to S. C. Walters, on time deposit, the sum of \$300; that at the time the aforesaid bank failed there was due and owing him as such trustee from said bank the sum of \$300; that about July, 1914, a short time before the said bank closed its doors, he received from said bank a bank draft for \$4.20, being for the interest due on the aforesaid time deposit; that the bank failed before the draft could be presented for payment, and defendant avers that he is entitled to have the same applied towards the payment of said note.

"Fifth. That the said several sums above mentioned as owing from the Bank of Rogers to defendants, Funk & Son, E. M. Funk, and Erwin Funk, have been filed with the bank commissioner, and have been allowed as subsisting claims against the bankrupt estate of the said Bank of Rogers; that 27 per cent. of said claims have been paid, leaving due and owing these defendants jointly 73 per cent. thereof.

"Defendants pray that the amount of the several sums unpaid and found due and owing these defendants as above set forth and mentioned, or so much thereof as may be necessary, be allowed as set-off against the amount that may be found due and owing plaintiff on the note in suit, that the plaintiff take nothing from defendants, for their costs, and for all proper relief."

Subsequently they filed an amendment to the answer, which is as follows:

"Wherein they say that on the 22d day of January, 1916, subsequent to the maturity of the note sued on, plaintiff purchased from John M. Davis, state bank commissioner, all of the assets of the said Bank of Rogers, including the note in controversy, and defendants aver that plaintiff purchased the said note subject to the equities of the defendant."

The answer was duly verified by E. M. Funk. The defendants also filed a motion to transfer the case to equity. The plaintiff filed a demurrer, which was sustained by the court. The judgment recites that the defendants refused to plead further, but elected to stand upon their answer and cross-complaint, and that the court found that the defendants are indebted to the plaintiff in the sum of \$174.50 as principal and interest on the note.

Judgment was rendered against the de-

fendants in favor of the plaintiff for that amount, and the defendants have appealed.

W. N. Ivie, of Rogers, for appellee.

HART, J. (after stating the facts as above). The court erred in sustaining the plaintiff's demurrer to the defendants' answer and cross-complaint and in rendering judgment in favor of the plaintiff against the defendants for the amount sued for.

[1,2] In *Steelman v. Atchley*, 98 Ark. 294, 135 S. W. 902, 32 L. R. A. (N. S.) 1060, the court held that, the relation between a bank and a general depositor being that of debtor and creditor, if a bank becomes insolvent, a depositor who is also indebted to the bank may set off the amount of his deposit in an action by the receiver or assignee of the bank to recover on the indebtedness due the bank. The trend of all modern decisions is toward liberality in the allowance of set-offs in the case of insolvency of the party against whom the set-off is claimed to the end that only the true balance may be required to be paid to the representative of the estate of the insolvent. In such cases a receiver is not an assignee for a valuable consideration in the ordinary sense of that term, and by operation of law the rights and property of the bank passes to him precisely in the same condition and subject to the same equities as the corporation held them. So it is the well-established rule that a receiver takes the claims in favor of the bank subject to all the equities between the bank and its depositors. See case note to Ann. Cas. 1917C at page 1188, and note to Ann. Cas. 1916D at page 599. Under our statutes the bank commissioner takes the place of a receiver of an insolvent bank. Section 51 of Act 113 of the Acts of Arkansas 1913, p. 462.

[3] It is also deducible from the authorities cited above that the assignee of the receiver is entitled to no greater rights than were possessed by the receiver. The reason is that he only purchases the rights of the bank, and a note or demand held by an insolvent bank against a third person is an asset of the bank only so far as there may be a balance due upon the same after deducting whatever the bank may be owing the person against whom the demand is held. Our statute (Kirby's Digest, § 6098) provides that the defendant may set forth in his answer as many grounds of defense, counterclaim, and set-off, whether legal or equitable as he shall have. Sections 6099 and 6101 of Kirby's Digest defining respectively counterclaims and set-offs, have been amended by Act No. 267 of the Acts 1917, p. 1441. As amended, the counterclaim may be a cause of action in favor of the defendants or some of them against the plaintiffs or some of them. A set-off may be pleaded in any action for the recovery of money and may be a cause of action arising either upon contract or tort. So

the court has held that in a suit on a promissory note the parties may settle all matters in dispute between them, whether the respective causes of action grew out of the same or different contracts or whether they arise upon contract or arise out of some tort. *Coats v. Milner*, 203 S. W. 701.

In the application of this statute to the facts of the present case, it is readily apparent that Erwin C. Funk had the right to set off against the claim of the plaintiff the sum of \$25.08, which he had on deposit in the bank at the time of its failure, and that the firm of Funk & Son had a right to set-off the sum of \$7.87, which the firm had on deposit in the bank at the time it became insolvent.

It therefore follows from the principles of law above announced that the court erred in sustaining the demurrer to the answer and cross-complaint of the defendants and in not allowing the set-offs above referred to as claimed by the defendants. For this reason alone the judgment must be reversed, and the cause remanded for a new trial.

In the fourth paragraph of the answer the defendant E. M. Funk, further answering for himself, avers that at the time the bank became insolvent there was due and owing him as trustee from the bank the sum of \$300, that he had deposited this sum in the bank as trustee for S. C. Walters and that he was personally responsible to Walters, for said sum.

[4,5] In *Dickerson v. Hamby*, 96 Ark. 163, 131 S. W. 674, the court held that, where the averments of an answer are incomplete, ambiguous, or defective, the remedy is a motion to make them more definite and certain. The court further held that, in determining the sufficiency of any pleading, every fair and reasonable intendment must be indulged in to support such pleading, and an answer is not demurrable if the facts stated, with every reasonable inference to be drawn therefrom, constitute a good defense. See, also, *Jonesboro, L. C. & E. R. Co. v. Board of Directors of St. Francis Levee Dist.*, 80 Ark. 316, 97 S. W. 281.

[6] Tested by this rule, we think that the demand of the plaintiff and of the defendants were mutual demands, and that, the assignee of the insolvent bank having sued the defendant for the collection of the debt due to the insolvent estate, the defendants may set off the debt due to them or either of them from the insolvent estate and account for the balance only. In other words, we think it fairly inferable that the language of the paragraph of the answer just referred to was merely descriptive of the person of the defendant Funk, and did not alter the right of the depositor to have mutual claims that are due the bank and himself set off against each other. This view is strengthened by the

avermment that the defendant is personally liable for the amount so deposited by him. *Michie on Banks and Banking*, vol. 2, p. 1060, § 135 (1b), and cases cited; *Laubach v. Leibert*, 87 Pa. 55; and *Miller v. Franklin Bank*, 1 Paige (N. Y.) 444.

In the last-mentioned case it was held that the public administrator of the city of New York is entitled to offset against a debt due from him to the bank a demand for deposits in the bank, whether made in his own name or as public administrator. The court said that as between him and the bank he stood in the same situation that an attorney would who had deposited in the bank for safe-keeping the moneys collected for different clients, in one general account in his name as attorney, to be drawn out on his own check when called for. The court further said that in neither case could the bank object to pay the money to the depositor, or to allow it to be offset against a demand in favor of the bank, unless they had notice from the persons having an equitable claim thereon not to pay it. We think this principle was recognized in the *Bank of Hartford v. McDonald*, 107 Ark. 232, 154 S. W. 512, where the court held that a trustee with full control over the trust funds in a bank may draw them out at his will, and the bank incurs no liability in permitting this to be done so long as it does not participate in any breach of trust resulting in any misapplication of the funds.

It follows that the judgment must be reversed, and the cause will be remanded for further proceedings according to law and not inconsistent with this opinion.

(138 Ark. 53)

#### EASLEY v. ROWE (No. 141.)

(Supreme Court of Arkansas. March 10, 1919.)

#### 1. EXECUTORS AND ADMINISTRATORS §435—ACTIONS ON CLAIMS—JURISDICTION OF COURTS OF LAW—CONSTITUTION.

Before adoption of Constitution of 1874, courts of law had jurisdiction to entertain suits for claims against estates of deceased persons; if affidavit of justice and nonpayment of claim, made before commencement of suit, was produced, and jurisdiction was not disturbed by adoption of such Constitution.

#### 2. EXECUTORS AND ADMINISTRATORS §443 (8)—AUTHENTICATION OF CLAIM—STATUTE.

In action against administratrix to recover money collected by her and her deceased husband on plaintiff's notes, affidavit authenticating claim, setting out its amount, that nothing had been paid in satisfaction, and that the amount

of \$200 was justly due, was a substantial compliance with Kirby's Dig. § 114, and was all that was required.

**3. EXECUTORS AND ADMINISTRATORS ⇨437(4)  
—STATUTE OF NONCLAIM—RUNNING OF TIME  
FROM GRANT OF LETTERS.**

Under the statute of nonclaim, suit against an administratrix, with claim produced and properly authenticated, must be brought within one year after the grant of letters.

**4. EXECUTORS AND ADMINISTRATORS ⇨228(3)  
—EXHIBITION OF CLAIM—ACTION AS EX-  
HIBITION—STATUTES.**

Under Kirby's Dig. § 112, bringing of action against administrator within one year after his appointment is legal exhibition of claim or demand against estate, satisfying the statute of nonclaim; but action in justice court against administratrix in her personal capacity cannot be treated as such legal exhibition of claim.

Appeal from Circuit Court, Hot Spring County; W. H. Evans, Judge.

Suit by Ada Rowe and others against Mrs. Ella Easley administratrix. From a judgment for plaintiffs, defendant appeals. Reversed and dismissed.

E. H. Vance, Jr., of Malvern, for appellant.  
Jabez M. Smith, of Malvern, for appellees.

**HUMPHREYS, J.** On October 15, 1917, appellees instituted suit against appellant, as administratrix of the estate of C. H. Easley, deceased, in the Hot Spring circuit court, to recover \$200, with interest at the rate of 8 per cent. per annum from the 7th day of November, 1911, for money which had been collected on notes, belonging to appellees, partly by C. H. Easley, in his lifetime, and partly by appellant, as administratrix of the estate of C. H. Easley, deceased. It was alleged that appellant was appointed administratrix of the estate of C. H. Easley, deceased, on the 23d day of November, 1916. With the complaint, an affidavit of the justice and nonpayment of the claim was produced, of date September 24, 1917.

Appellant denied that the notes upon which the money had been collected by her husband, C. H. Easley, in his lifetime, and by her, as administratrix of his estate, were the property of appellees; also denied that she was appointed administratrix of the estate of C. H. Easley, deceased, on the 23d day of November, 1916; and, as an additional defense, pleaded the statute of nonclaim, alleging that letters of administration of the estate of C. H. Easley, deceased, were issued to her on September 26, 1916, and that the suit was not instituted by appellees until October 15, 1917. Appellees filed a reply to the answer of the administratrix, setting up that, after appellant was appointed adminis-

tratrix, appellees instituted suit against appellant in the court of J. M. Ketchum, a justice of the peace of Henderson township, which was appealed to the circuit court on the 30th day of July, 1917, and nonsuit there taken in said suit without prejudice. Appellant filed an answer to appellees' reply, denying that there had been a suit instituted after her appointment as administratrix before J. M. Ketchum, a justice of the peace, against her as administratrix of the estate of C. H. Easley, deceased.

The cause was submitted to a jury on the pleadings, evidence, and instructions of the court. The jury returned a verdict in favor of plaintiffs for \$75 each, and a judgment was rendered in accordance therewith. Proper steps were had and done, and an appeal has been prosecuted to this court from said judgment.

[1] Appellant first contends that this cause of action was exclusively cognizable in the probate court of Hot Spring county, and that it was error for the circuit court to entertain jurisdiction of the action. Before the adoption of the Constitution of 1874, courts of law had jurisdiction to entertain suits for claims against the estate of deceased persons, if an affidavit of the justice and nonpayment of the claim, made before the commencement of the suit was produced. *Ryan et al., Use, etc., v. Lemon, Adm'r*, 7 Ark. 78; *Beirne & Burnside v. Imboden et al.*; 14 Ark. 237; *Alter v. Kinsworthy, Adm'r*, 30 Ark. 756; *Eddy v. Loyd*, 90 Ark. 340, 119 S. W. 264. The jurisdiction to entertain such suits by courts of law was not disturbed by the adoption of the Constitution of 1874. *Turner v. Rogers*, 49 Ark. 51, 4 S. W. 193; *Meredith v. Scallion*, 51 Ark. 361, 11 S. W. 516, 3 L. R. A. 812.

[2] It is next insisted by appellant that the claim was not properly authenticated. The affidavit of the authentication set out the amount of the claim, that nothing had been paid toward the satisfaction thereof, and that the amount of \$200 was justly due. This was a substantial compliance with the form of affidavit required in section 114 of Kirby's Digest. A substantial compliance in the matter of form of the affidavit is all that is required. *Wilkerson v. Eads*, 97 Ark. 296, 133 S. W. 1089; *Hayden v. Hayden*, 105 Ark. 95, 150 S. W. 415; *Davenport v. Davenport*, 110 Ark. 222, 161 S. W. 189.

[3, 4] Lastly, it is insisted that the claim, or demand, is barred by the statute of nonclaim. The undisputed evidence in the case disclosed that the application, bond, and letters of administration were all dated September 26, 1916; that she made out her inventory and appraisement of the estate on October 16, 1916, and filed them on October 21, 1916; that the letters were recorded, through mistake of the deputy clerk, on November 23,

1916; that this suit was instituted on October 15, 1917, more than one year after the date of the letters of administration. Appellees insist that the statute of nonclaim did not begin to run until the letters of administration were recorded on November 23, 1916, and that the statutory bar did not attach, because the suit was instituted within one year from that time. Appellees are in error in this contention. This court has held (quoting syllabus 1) that—

"All claims against the estates of deceased persons must be exhibited, duly authenticated, to the administrator or executor, within two years after the grant of letters, as decided in Walker, Adm'r, v. Byers, 14 Ark. 246." Bennett et al. v. Dawson, et al., 15 Ark. 412.

The time has been changed in the statute of nonclaim from two years to one year since the decree in Walker, Adm'r, v. Byers, supra, so under the statute as it now stands, a suit with claim produced and properly authenticated must be brought within one year after the grant of letters. However, it is insisted by appellees that they brought suit against appellant before J. M. Ketchum, a justice of the peace, within one year from the date of the letters, which case was appealed to the circuit court, where a nonsuit was taken without prejudice on the 30th day of July, 1917, less than a year before the institution of the present suit. It is insisted that they had one year within which to institute the suit after the nonsuit was taken. Section 112 of Kirby's Digest is as follows:

"All actions commenced against any executor or administrator after the death of the testator or intestate shall be considered demands legally exhibited against such estate, from the time of serving the original process on the executor or administrator, and shall be classed accordingly."

Thus it will be seen that the bringing of an action against an administrator within one year after the appointment is a legal exhibition of the claim or demand against the estate. Had such a suit been brought, and nonsuited without prejudice, appellees could have brought another suit at any time thereafter against appellant in her representative capacity. But, on inspection of the record, we have ascertained that the suit instituted before J. M. Ketchum was a suit against Mrs. Ella Easley in her personal capacity, and, for that reason, the suit cannot be treated as a legal exhibition or presentation of the claim against the estate. It follows that it was necessary to have brought this suit within one year from the appointment of the administrator.

For the error indicated, the cause is reversed and dismissed.

(188 Ark. 1)

# KANSAS CITY SOUTHERN RY. CO. v. FT. SMITH COMPRESS CO. (No. 123.)

(Supreme Court of Arkansas. Feb. 24, 1919.)

## 1. APPEAL AND ERROR ⇐1072—QUESTIONS FOR JURY—CONFLICTING EVIDENCE.

Findings of fact by jury on conflicting evidence are conclusive on appeal.

## 2. CARRIERS ⇐100(1)—DEMURRAGE—RIGHT TO CHARGE.

Under a contract between a railroad and a cotton compress company, wherein latter agreed to pay demurrage on cars remaining unloaded, railroad will not be allowed to recover demurrage, where failure to unload was due to fault of railroad in not furnishing cars for outbound cotton.

## 3. CARRIERS ⇐100(1)—CONTRACTS—DEMURRAGE.

A stipulation, in an agreement between a railroad and a cotton compress company, that latter would not hold railroad for penalties or damages for failure to furnish cars, was not an agreement on part of compress company not to set up as a defense, in a suit by the railroad for demurrage on unloaded cars, that it was prevented from carrying out its contract by refusal of railroad to furnish cars.

## 4. CARRIERS ⇐100(1)—DEMURRAGE—FAILURE TO FURNISH CARS.

Where a railroad and a cotton compress company entered into agreement, whereby latter agreed to pay demurrage on unloaded cars, held, in an action by railroad for demurrage, in view of the evidence, that it was not contemplated that compress company was to depend upon other railroads for empty cars to be loaded with outbound cotton, so as to relieve the contracting railroad of duty to furnish such cars.

## 5. CARRIERS ⇐100(1)—DEMURRAGE—CONGESTION—NOTICE.

Under a contract between a railroad and a cotton compress company, wherein it was agreed that compress company could by giving written notice of a congestion refuse to receive more cotton, railroad could not recover demurrage on unloaded cars due to congestion, where its agents had knowledge of congestion at all times and that situation was being constantly accentuated, although no written notice was given.

Wood and Hart, JJ., dissenting.

Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

Action by the Kansas City Southern Railway Company against the Ft. Smith Compress Company. From a judgment in its favor for part of the relief prayed for, plaintiff appeals. Affirmed.

Jas. B. McDonough, of Ft. Smith, for appellant.

Harry P. Dally, of Ft. Smith, for appellee.

SMITH, J. The parties to this litigation, the Kansas City Southern Railway Company,

hereinafter referred to as the appellant, and the Ft. Smith Compress Company, hereinafter referred to as the appellee, entered into the contract out of which the litigation arises on September 1, 1916, the relevant features of which are as follows:

It is recited:

That appellant, which brought this suit to recover the damage by way of demurrage for an alleged violation of the contract, owns and operates certain side tracks and switches connecting the railroad with the premises and property of the appellee compress company. "That by reason of the nature of cotton and the commercial practices and customs under which it is handled, and by reason of the conditions of buying, selling, storing, and transporting it, and by reason of and for the general convenience of all concerned, the railway company and the compress company agree and covenant to occupy and use jointly the property and premises of the compress company for the several purposes and to the extent hereinafter set forth.

"The intent and purpose of this agreement, among other things, is to confirm the compress company as the limited agent of the railway company for the purpose of receiving cotton from the railway company, delivering cotton to the railway company, loading and unloading cotton from and into the cars of said railway company, making proper delivery of cotton in the custody of said compress company so far as concerns the interest of the railway company, and, as principal, to furnish the premises for the use of the railway company as a cotton depot under and subject to all the terms and conditions of this agreement and the lawfully published tariffs and regulations of the railway company with respect to the transportation and handling of cotton."

There follows an enumeration of four grades, designated, respectively, as, (a), (b), (c), and (d), which the contract provided should be handled by the compress company.

Class (a) was cotton delivered by the owners to the compress company and intended for shipment over the lines of the railway company and its connecting carriers. This grade of cotton is also referred to as "wagon" cotton, it being delivered to the compress company on wagons.

Class (b) was cotton consigned to compress points on local bills of lading and so consigned that, when delivery is made by the railway company to the compress company for the consignees thereof, the contract of carriage made by the railway company is completed.

Class (c) was cotton destined to compress points consigned to "order," or in any other manner, which is to be held by the compress company for account of the railway company until released by the railway company. As to this class, the contract provides:

"The railway company may place the cars containing such cotton alongside the compress platform and when the railway company furnishes to the compress company a written statement of such cotton showing plainly that it is

covered by an 'Order' bill of lading, or is for any other reason to be held for its account, the compress company agrees to receive and unload such cotton and deliver to the agent of the railway company compress warehouse receipts therefor. The compress company further agrees to hold such cotton and be responsible to the railway company for the loss of or damage thereto occasioned in any manner howsoever other than fire until such cotton is released in writing by the railway company and the compress warehouse receipts are surrendered to said compress company."

Class (d) was cotton covered by through bills of lading delivered by the railway company to the compress company for compression, the time allowed for that purpose being only 48 hours unless extended by the railway company.

The contract further provided that, if appellee should be unable to handle the cotton at any time by reason of congestion or accident to its plant, it should have the right to cease, temporarily, to receive cotton falling in either class (b) or (c) after causing written notice of such intention to be served upon the resident station agent of the appellant company 36 hours before it became effective. It was further provided that, in the event of failure of appellee to promptly load or unload cars placed for loading or unloading, it should pay appellant \$1 per car per day for each day, or fraction thereof, after 48 hours (Sundays and legal holidays excepted) from the time each car was placed for loading or unloading, or when tendered and appellee was unable to accept.

The complaint alleged that during the months of October, November, and December, 1916, the appellee had retained cars of the appellant over and above the free time allowed amounting to 2,698 cars for one day, and prayed judgment for the sum of \$2,698. An itemized statement of this demurrage was furnished, and its accuracy appears to be conceded; but appellee seeks to avoid the liability which the contract would otherwise impose by showing that the delay in unloading cars upon which the claim for demurrage was based was wholly due to the fault of appellant in not furnishing cars to forward cotton already received from appellant and compressed by appellee and which had been ordered out by appellant and for which appellant had issued bills of lading, and that, during the whole of the period of time during which the claim for demurrage had accrued, appellant was constantly tendering to appellee cotton to be unloaded and compressed, while refusing and failing to furnish cars into which to load said cotton when compressed, although appellant had ordered said cotton out and had issued bills of lading therefor, and that during all said period it was constantly notifying appellant that it could not properly unload cars of inbound cotton unless cars were furnished

for outbound cotton which had been compressed and for which appellant had actually issued bills of lading, and that appellant company at all times had full knowledge of these facts, and through its officers and agents had waived any right to recover from appellee for failure to unload said cotton.

This litigation involves only class (c) cotton. As previously stated, this was cotton which had been shipped from points along appellant's line of railroad and which was shipped out of the compress on the orders of appellant and upon its bills of lading. As to such cotton, it was admitted by appellant that it not only received the freight from the point of origin on its line to Ft. Smith, but also shared with the carrier which hauled the cotton to its final destination (usually some city of export) the freight earned on this long haul. It was shown that the custom had prevailed for the Iron Mountain Railroad and the Frisco Railroad (other railroads running out of Ft. Smith) to furnish the cars for shipments of cotton routed over their lines, although the bills of lading were issued by the appellant company. Prior to 1916, there had been no difficulty in obtaining cars; but the cotton crop of that year was marketed unusually early, and, on account of the high price prevailing, was marketed with unusual rapidity, so that a sufficient number of cars were not available to supply the demand for cars.

It is undisputed that repeated and insistent requisitions for cars were made by appellee on both the Iron Mountain and Frisco Railroads, but those railroad companies refused to furnish their own cars for the shipment of cotton covered by bills of lading issued by appellant. It is also undisputed that, when appellant ordered out cotton, it designated the railroad over whose line it was to be shipped. Appellee could only tender the cotton to the designated carrier and demand cars into which to load it, and appellant was advised that these cars were not being furnished and that because of this failure the congestion at the compress was daily becoming more acute.

Appellee's managing officer did not contend that all the delay in unloading cars was attributable to the loading and unloading of class (c) cotton, and estimated that 20 per cent. of the demurrage accrued on account of cotton of other classes. Liability for this 20 per cent. is admitted, and reversal of the judgment for that amount against appellee is not asked. The judgment was rendered for only this 20 per cent., and appellant complains of that fact, and insists that judgment should be rendered here for the remaining 80 per cent. of the accrued demurrage.

At appellant's request, the trial court told the jury that, if no part of the demurrage accrued by reason of the failure or refusal of appellant to furnish reasonably adequate

car facilities, appellant would be entitled to the demurrage claimed. But at appellee's request, and over appellant's objection, the court gave the converse of this instruction, and told the jury that, if a part of the demurrage claimed accrued because of the failure of appellant to furnish reasonably adequate car facilities for handling outbound cotton ordered out by the appellant, then as to such demurrage accrued by reason of that fact the appellant would not be entitled to recover.

[1, 2] This instruction is decisive of the case, as the verdict of the jury is conclusive as to the extent to which the demurrage accrued on some other account. We approve this instruction, because it is an application of the elementary principle that a party to a contract cannot render its performance impossible by the other contracting party and then sue for damages for its breach.

[3] It is very earnestly insisted that judgment should be rendered here for the full amount sued for, because appellee admits that there was demurrage to the extent alleged, and it is pointed out that the contract provides that "the railroad company shall not be liable to the Compress Company for any damages or penalties, whether statutory or otherwise, on account of any failure to furnish or to promptly furnish cars," and it is argued that to allow any credit on the admitted demurrage by reason of the failure to furnish cars is to adopt a measure of damages on that account which contravenes the express recital of the contract that no such damages shall be allowed. But it is pointed out in appellee's brief that the agreement that the railway company should not be liable for damages for failure to furnish cars might operate to defeat an independent suit for damages on that account without having the effect of precluding the compress company from setting up this failure to furnish cars to defeat a suit against it for demurrage for failure to unload cars, when this failure to unload the cars was caused by the railroad's antecedent failure to furnish cars to load out cotton which had already been compressed, thereby affording the necessary space for unloading the cars in question. In other words, the agreement of the compress company not to hold the railway company for penalties or damages for failure to furnish cars cannot be construed as an agreement on the part of the compress company, in a suit by the railway company against it, not to set up and prove, as a defense, that it was prevented from carrying out the contract by the refusal of the railway company to perform its duty in furnishing cars.

[4] It is insisted on behalf of appellant that inasmuch as the custom had been, prior to 1916, for both the Iron Mountain and the Frisco Railroads to furnish cars upon demand,

the parties must be held to have contracted with reference to this custom. But on behalf of appellee it is shown that no issue about the duty to furnish cars had ever arisen prior to 1916, and appellee's manager testified that the compress company had never acknowledged the existence of any custom absolving the appellant from the duty to furnish cars for the shipment of cotton covered by appellant's bills of lading. Appellee was not a carrier and had no cars of its own, and it could only call upon the railroads to furnish the cars for the shipment of cotton covered by appellant's bills of lading, and in doing so it was acting as the agent of appellant, and appellee as appellant's agent made repeated demands for these cars, and as frequently advised appellant that these demands were not being supplied, and appellant itself made no offer of its own cars. Under these circumstances, the court was warranted in giving, at appellee's request, the instruction set out above.

[5] It is finally insisted that appellee failed to give appellant the written notice which the contract provided should be given in case of congestion. Such a notice would have accomplished no result, as it is not even claimed by appellant that its policy would have been altered had written notice been given. It is undisputed that appellant's agents, not only were warned of the congestion, but these agents admit having knowledge of this congestion at all times and that the situation was being constantly accentuated by the continued delivery of cotton at the compress, and a written notice could have imparted no additional knowledge to appellant.

Finding no error, the judgment is affirmed.

WOOD and HART, JJ., dissent.

(138 Ark. 162)

**ARKANSAS-LOUISIANA HIGHWAY IMPROVEMENT DIST. v. DOUGLAS-GOULD & STAR CITY ROAD IMPROVEMENT DIST. (No. 136.)**

(Supreme Court of Arkansas. March 10, 1919.)

**1. VENUE §4—TRANSITORY ACTION—INJUNCTION SUIT BY ROAD IMPROVEMENT DISTRICT—"LOCAL ACTION."**

Action by road improvement district against highway improvement district to enjoin commissioners of defendant district from extending the whole of its assessments against lands in county embraced in plaintiff district is in its general nature not local, but transitory, not falling within definitions of local actions found in Kirby's Dig. § 6060, subds. 1-4.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Local Action.]

**2. HIGHWAYS §80—INJUNCTION SUIT BETWEEN ROAD DISTRICTS—STATUTE.**

Under Acts 1917, p. 1366, creating the Arkansas-Louisiana Highway Improvement District, suit against such district by the Douglas-Gould & Star City Road Improvement District, created by Acts 1917, p. 1714, to restrain commissioners of defendant district from extending whole of assessments against lands in county, including lands embraced in plaintiff district, should have been brought in Desha county, domicile of defendant district.

**3. DISMISSAL AND NONSUIT §55—VENUE.**

A suit brought in the wrong county should have been dismissed.

Appeal from Lincoln Chancery Court; John M. Elliott, Chancellor.

Suit by the Douglas-Gould & Star City Road Improvement District against the Arkansas-Louisiana Highway Improvement District. From decree for complainant, defendant appeals. Decree reversed, and cause remanded, with directions to dismiss.

Rose, Hemingway, Cantrell & Loughborough, of Little Rock, for appellant.

A. J. Johnson, of Star City, for appellee.

McCULLOCH, C. J. Appellant is an improvement district created by special act of the Legislature (Acts 1917, p. 1366), embracing lands in Ashley, Chicot, Desha, Drew, and Lincoln counties for the purpose of constructing certain roads described in the statute. An attack was made on the validity of the statute, but it was declared valid in the decision of this court in *Bennett v. Johnson*, 130 Ark. 507, 197 S. W. 1148.

Appellee district was created by a special statute enacted at the session of 1917 (Acts 1917, p. 1714), embracing certain territory in Lincoln county, for the purpose of improving a road in that county.

The two statutes are quite similar in form, and each provides for the appointment of commissioners, with power to levy assessments and to borrow money, and to construct the improvements described in the statutes. The act creating appellee district went into effect seven days later than the act creating the other district, and contains the following provision:

"Sec. 34. Any land the district may acquire may be sold by the commissioners for the price and on the terms they deem best. A portion of the lands in the district created under this act are embraced in the Arkansas-Louisiana Road Improvement District, and it is hereby declared that the lands which are embraced in both districts will be benefited equally by the two roads, and that the assessment of benefits made upon said lands shall be at the same rate as the other lands similarly situated in said Arkansas-Louisiana Road Improvement District and in the district created under this act so that the



tax derived from said lands shall be equally divided between the two districts."

The two organizations were perfected under the respective statutes, and are proceeding with the construction of the improvements. The commissioners in appellant district proceeded to levy assessments on all the lands in the district, including the lands in Lincoln county which are embraced in appellee district, and the present action is one instituted in the chancery court of Lincoln county by the commissioners of appellee district against appellant to enjoin the commissioners of the latter district from extending the whole of the assessments against the lands in Lincoln county. The prayer of the complaint is that appellant district "and its board of commissioners be restrained from extending for assessment and collection more than one-half of the benefits they had assessed against the lands."

Counsel for appellant appeared in the action and filed a motion to quash the service of process and dismiss the action on the ground that the action was improperly instituted in Lincoln county, whereas the venue was properly in Desha county. The court overruled the motion, and appellant filed an answer in the action, but preserved its objection to the institution of the action in the wrong county. Final decree was rendered in favor of appellee in accordance with the prayer of its complaint, and an appeal has been duly prosecuted to this court.

We are of the opinion that under the statutes of this state the venue in this action was in Desha county, and that the court erred in refusing to sustain appellant's motion to quash the service and dismiss the action.

The special statute creating appellant district contains the following provision:

"The said commissioners and their successors in office shall compose a body corporate for the purpose of this act under the name and style of 'Arkansas-Louisiana Highway Improvement District,' and by this name may contract, and sue and be sued. The domicile of the corporation shall be in McGehee, in Desha county, and all suits against it shall be by service on one of the commissioners in that county." Section 4.

[1, 2] The present action is in its general nature, not local, but transitory. It does not fall within the definitions of local actions found in either of the four subdivisions of section 6060 of Kirby's Digest. The action does not relate to the recovery of real estate, or an interest therein, nor for the sale of real estate under a mortgage or other lien, or for an injury to real estate. It is merely a controversy between the two districts with respect to funds to be raised by assessments on certain real property, and

does not constitute the kind of action mentioned in the section of the statute referred to above. The special statute creating the district, however, fixes the venue in the county of the domicile of the defendant.

[3] The suit having been brought in the wrong county, it follows that the same should have been dismissed. The decree is therefore reversed, and the cause remanded, with directions to the chancery court to dismiss the action.

(137 Ark. 410)

#### MOONEY v. STATE. (Nos. 137, 144.)

(Supreme Court of Arkansas. March 10, 1919.)

##### 1. LARCENY $\Rightarrow$ 40(9)—ALLEGATION OF OWNERSHIP—PROOF.

In indictments for larceny, the allegation of ownership is material, and must be proved as alleged.

##### 2. NAMES $\Rightarrow$ 16(2)—IDEM SONANS.

There is sufficient similarity in sound of names "Fincher" and "Fancher," indictment for larceny stating the name of the owner of the stolen property as "Fincher," and there being proof to show that his name was "Fancher," to bring the case within the doctrine of idem sonans.

##### 3. LARCENY $\Rightarrow$ 40(9)—VARIANCE—OWNER OF STOLEN PROPERTY.

Where indictment for grand larceny stated name of owner of stolen property as "Grover Fincher," and testimony of owner on direct examination showed his name was "Fincher," and on cross-examination that his name was "Fancher," there was no material variance between allegations of ownership and proof, owner being called by both names.

Appeal from Circuit Court, Johnson County; J. H. Evans, Special Judge.

Robert Mooney was convicted of grand larceny, and he appeals. Affirmed.

G. O. Patterson, of Clarksville, for appellant.

Jno. D. Arbuckle, Atty. Gen., and T. W. Campbell, Asst. Atty. Gen., for the State.

WOOD, J. The appellant was convicted of the crime of grand larceny on an indictment which charged him in apt words with stealing a calf, "the property of Grover Fincher."

The appellant duly appeals to this court, and the only question presented is whether or not the charge in the indictment is sustained by proof that the animal stolen was the property of Grover Fancher.

On direct examination the prosecuting witness testified, "My name is Grover Fincher," and on cross-examination he said, "My name is Fancher."

[1] In indictments for larceny the allega-

tion of ownership is material, and must be proved as alleged. *McLemore v. State*, 111 Ark. 457, 164 S. W. 119; *Wells v. State*, 102 Ark. 627, 145 S. W. 531; *Fletcher v. State*, 97 Ark. 1, 132 S. W. 918; *Merritt v. State*, 73 Ark. 32, 83 S. W. 330; *Blankenship v. State*, 55 Ark. 244, 18 S. W. 54.

The testimony of the prosecuting witness shows on direct examination that his name is "Fincher," and on cross-examination that his name is "Fancher." He is the same individual, whether called "Fincher" or "Fancher." Although his name under the evidence was "Fancher," yet he was also called "Fincher," and under such circumstances there is no material variance between the allegations of ownership and the proof thereof.

[2] Moreover, the majority of the court are of the opinion that there is sufficient similarity in the sound of the names "Fincher and Fancher" to bring the case within the well-recognized doctrine of *idem sonans*. *Birnes v. State*, 105 Ark. 82, 150 S. W. 416; *Godard v. State*, 100 Ark. 149, 139 S. W. 1131.

In 14 *Ruling Case Law*, p. 207, § 51, it is said:

" \* \* \* Where the name as written in the indictment may be pronounced in the same way as the name given in the evidence, although such may not be the strictly correct pronunciation, the variance will not be regarded as fatal, unless the variant orthography be such as would be likely to mislead the defendant in preparing his defense."

The difference in spelling could not have misled the appellant in the preparation of his defense.

The judgment is therefore correct, and it is affirmed.

**McCULLOCH, C. J. (concurring).** I concur in the judgment for the reason that the testimony is sufficient to warrant the finding that the name of the owner of the stolen property is Fincher, as charged in the indictment, and not Fancher—at least that he was known by that name—and there was no vari-

ance between the allegation and proof. *Bennett v. State*, 84 Ark. 97, 104 S. W. 928; *Woods v. State*, 123 Ark. 111, 184 S. W. 409, Ann. Cas. 1918a, 348, I do not agree, however, to that part of the opinion which holds that the names Fincher and Fancher have the same sound so as to be, in effect, the same in the indictment and in the proof. Where the variance occurs merely in the spelling of the name it is immaterial. Such is the effect of decisions of this court in *Rector v. Taylor*, 12 Ark. 128, where it was held that the names Gardner and Gardnier have the same sound; and the decision in *Semon v. Hill*, 7 Ark. 70, where it was held that Gravier and Gravaier have the same sound; in *Ruddell v. Mozer*, 1 Ark. 503, where Mozer, Mausuer, and Monseuer were held to have the same sound; and in *Power v. Woolley*, 21 Ark. 462, where Woolley and Wolley were treated as having the same sound; in *Beneux v. State*, 20 Ark. 97, where Bennaux and Beneux were held to be the same; in *Bennett v. State*, 62 Ark. 516, 36 S. W. 947, where Watkins and Wadkins held to be the same; in *Taylor v. State*, 72 Ark. 613, 82 S. W. 495, where Foshee and Forshee were held to be the same; in *Godard v. State*, 100 Ark. 149, 139 S. W. 1131, where Vaughn and Vaughan were held to be the same; and in *Birnes v. State*, 105 Ark. 82, 150 S. W. 416, where Nowlin and Nolan were held to have the same sound. On the contrary, the court held in *State v. Williams*, 68 Ark. 241, 57 S. W. 792, 82 Am. St. Rep. 288, that the names Hite and Hyde do not have the same sound; and in *Woods v. State*, supra, that the names Wood and Woods are not of the same sound.

[3] Fincher and Fancher do not sound alike, though there is enough similarity possibly to cause confusion among acquaintances as to correct name of the individual so called. Such was the case in this instance, and Fancher was known by the name of Fincher. That being so, it was not a fatal variance to mention him in indictment under the name of Fincher if the proof showed that he was known by that name, even though it was not his true name.

(141 Tenn. 288)

## CHATTANOOGA WAREHOUSE &amp; COLD STORAGE CO. v. ANDERSON.

(Supreme Court of Tennessee. Feb. 25, 1919.)

## 1. NEGLIGENCE — 32(1)—DUTY TO INVITE.

Owner, who expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, has duty of being reasonably sure that he is not inviting them into danger, and to that end must exercise ordinary care and prudence to render the premises reasonably safe for the visit.

## 2. NEGLIGENCE — 32(3)—DUTY TO INVITE—CONDITION OF PREMISES.

Duty of owner to keep premises in reasonably safe condition for those impliedly invited thereon extends only to those parts of the premises where person invited is expected to go.

## 3. NEGLIGENCE — 32(3)—UNGUARDED ELEVATOR SHAFT—LIABILITY OF OWNER FOR INJURIES.

Storage company, having adjoining building being constructed by contractor, owed concrete inspector, employed in the construction of adjoining building, no duty of keeping its ware-room in reasonably safe condition, though inspector frequently consulted with president of storage company, and occasionally transacted business with him in the office of the storage company, where he had never been invited into, and had no business to transact in, the ware-room.

## 4. NEGLIGENCE — 2—THEORY OF.

The theory of all negligence cases is that the defendant has violated some legal duty he owed plaintiff.

## Certiorari to Court of Civil Appeals.

Action by Hattie A. Anderson, administratrix, against the Chattanooga Warehouse & Cold Storage Company. Judgment for plaintiff reversed, and suit dismissed, by Court of Civil Appeals, and the case brought to the Supreme Court by certiorari. Judgment of Court of Civil Appeals affirmed.

Strang & Fletcher, Williams & Lancaster, and Brown, Spurlock & Brown, all of Chattanooga, for Chattanooga Warehouse & Cold Storage Co.

Tatum, Thach & Lynch and Cogswell & Fletcher, all of Chattanooga, for administratrix.

McKINNEY, J. A. S. Anderson, the husband of the defendant in error, on October 23, 1916, fell through an open elevator shaft, located in the building occupied by the plaintiff in error, in Chattanooga, and received injuries, from which he died in a few hours.

Suit was instituted to recover damages therefor, and a verdict of \$20,000 was rendered by the jury, upon which judgment was entered, after a motion for a new trial had been overruled by the court.

Upon appeal this judgment was reversed by the Court of Civil Appeals, and the suit was dismissed; motions for peremptory instructions having been made in the lower court. The case has been brought to this court by writ of certiorari.

The plaintiff in error operated a warehouse and cold storage plant in Chattanooga in a building owned by the Stone Fort Land Company. Mr. Theodore King was president and general manager of the storage company. This building extended 100 feet from east to west, 80 feet from north to south, and was six stories in height. The south fronted on the street, and had a platform on the level with the first floor. There was a large door on the south side, about the middle of the building, and goods received by wagon or truck, for storage, were unloaded on this platform and conveyed into the building through this large door.

The office was located in the southwest corner of the building, on the first floor, and was partitioned off from the ware-room proper. There was a door leading from the office into the ware-room, a door leading from the platform into the office, and steps leading from the street up to the platform, about opposite the office door.

The business of the storage company had grown to such proportions that the building occupied by it was insufficient to take care of its business, so that, on September 20, 1916, it entered into a contract with the Stone Fort Land Company, by which the latter was to erect a building east of and adjoining the old building, and lease same to the storage company for a term of years. The new building was to be 100 by 180 feet, to be four stories high, and was to be constructed of reinforced concrete. The plans and specifications for the new building were agreed upon and made a part of the contract between the storage company and the land company. The contract for the erection of the new building was let by the land company to T. S. Moudy & Co. Mr. McDavity was the superintendent in charge of the building, W. C. Spiker was the inspector of the concrete work, and said A. S. Anderson was the inspector under Mr. Spiker. W. T. Downing, the architect, had general supervision of the entire work. None of these parties were in the employ of the storage company, and this latter company had nothing to do with the erection of the new building, the supervision of the work, or the workmen, and was not to be consulted about anything connected therewith.

Mr. King, the president and general manager of the storage company, was frequently about the new building discussing it with the workmen, and he says that his purpose in this was to see that a good building was

erected in accordance with the specifications, since he was to occupy the building.

Mr. Andersson was on the work from 10 to 15 days before he was killed. During that time he had frequent conversations with Mr. King, where the new building was being erected, several times in the office of the old building, and he and Mr. King were seen in the office several times engaged in conversation with blueprints before them.

Mr. King testifies that, according to his recollection, they never discussed the plans or the construction of the new building in the office, but that on several occasions some one did call Mr. Anderson over his telephone, and that he would send for Mr. Anderson, who would come to the office and talk over the telephone.

So far as the record shows, Mr. Anderson, prior to the day of the injury, had never been in any part of the storage company's building, except the office.

Mr. King testifies, without contradiction, that all business with the storage company was transacted in the office; that no one, except the employes, was permitted to enter the wareroom, with the further exception that customers having goods stored there were permitted to inspect same, when accompanied by some employe of the company; that he had never invited Mr. Anderson into the wareroom, and that he had never seen him in any part of the building other than the office.

About 4:30 or 5 o'clock on the afternoon of the accident Mr. Anderson and Mr. King were engaged in a conversation about the middle of the new building. Mr. King returned to the old plant. There is a dispute as to whether he was in the office or in the wareroom, when Mr. Anderson came to the old building some 20 or 30 minutes later. Mr. Anderson spoke to one Lowe, an employe of the Hamilton Produce Company, who was unloading some barrels of cabbage at the large door on the south side, and asked if he knew where Mr. King was, to which Lowe replied that he thought Mr. King was in the back end of the wareroom. There is nothing in the record to show the purpose for which Mr. Anderson wanted to see Mr. King. However, it has been assumed by counsel that he wanted to see him about the construction of the new building. The elevator shaft was about 25 feet from this large door, and some 10 or 12 feet from the door leading from the office into the wareroom. Lowe did not notice whether Mr. Anderson entered through the large door directly into the wareroom, or entered the wareroom through the office. In a few moments a cry for help was heard, and it was discovered that Mr. Anderson had fallen through the elevator shaft to the basement. The elevator shaft was unguarded and the wareroom was dark.

Under this state of facts, is the storage company liable for the injury suffered by Mr. Anderson resulting in his death?

[1] The general rule is succinctly, but accurately, stated by Mr. Cooley in his work on Torts (pages 604, 607), and approved by the Supreme Court of the United States in *Bennett v. L. & N. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 236, as follows:

"When one expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit."

It is not insisted that Mr. Anderson was on the premises by express invitation; it therefore becomes necessary to determine whether he was there by implied invitation.

Implied invitation is thus defined by *Shearman & Redfield on Negligence* (6th Ed.) § 706:

"Invitation by the owner or occupant is implied by law, where the person going on the premises does so in the interest or for the benefit, real or supposed, of such owner or occupant, or in the matter of mutual interest, or in the usual course of business, or where the person injured is present in the performance of duty, official or otherwise."

[2] The great weight of authority, however, qualifies this definition of implied invitation by providing that where one goes upon the premises of another, for any of the purposes stated above, he must confine himself to such parts of the premises as are included in the invitation. Such implied invitation does not involve in its scope such parts of the establishment to which the public is not invited. It is only those parts of the premises where the person invited is expected to be that the owner is required to keep in a reasonably safe condition.

As stated by one writer, operators of factories and mills do not impliedly invite customers into parts of their plants where the machinery is being operated, hotel keepers do not invite guests to their engine rooms, and carriers do not invite passengers to the many places not fitted up for their use. The foregoing conclusion is supported by the following authorities: *Bedell v. Berkey*, 76 Mich. 439, 43 N. W. 308, 15 Am. St. Rep. 370; *Murray v. McLean*, 57 Ill. 378; *Bennett v. Butterfield*, 112 Mich. 96, 70 N. W. 410; *Lehman v. Coffee*, 146 Wis. 218, 131 N. W. 362; *Mentee v. Fruit Co.*, 240 Mo. 177, 144 S. W. 833; *Schmidt v. Bauer*, 80 Cal. 568, 22 Pac. 256, 5 L. R. A. 580; *Parker v. Publishing Co.*, 69 Me. 179, 31 Am. Rep. 262; *Pierce v. Whitcomb*, 48 Vt. 129, 21 Am. Rep. 120; *McCarvell v. Sawyer*, 173 Mass. 540, 54 N. E. 259, 73

Am. St. Rep. 318; Cowen v. Kirby, 180 Mass. 505, 62 N. E. 968; Phillips v. Library Co., 55 N. J. Law, 307, 27 Atl. 478; Ryerson v. Bathgate, 67 N. J. Law, 337, 51 Atl. 708, 57 L. R. A. 307; Shaw v. Goldman, 116 Mo. App. 332, 92 S. W. 165; Ferguson & Palmer Co. v. Ferguson (Ky.) 114 S. W. 297; Zoebish v. Tarbell, 10 Allen (Mass.) 385, 87 Am. Dec. 660; Stamford Oil Mill Co. v. Barnes, 103 Tex. 409, 128 S. W. 375, 31 L. R. A. (N. S.) 1218, Ann. Cas. 1913A, 114; New York Lubricating Oil Co. v. Pusey, 211 Fed. 625, 129 C. C. A. 88; Thompson on Negligence, §§ 988, 990.

The defendant in error relies on the following cases as holding to the contrary, to wit: Indameur v. Dames, 19 Eng. Rul. Cas. 64; Pauckner v. Wakem, 231 Ill. 277, 88 N. E. 102, 14 L. R. A. (N. S.) 1118; Glaser v. Rothschild, 221 Mo. 186, 120 S. W. 1, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576; Pelton v. Schmidt, 104 Mich. 345, 62 N. W. 552, 53 Am. St. Rep. 462.

These latter cases can be distinguished from those cited above; but, even if they are in conflict, we think the former carry the decided weight and announce the more reasonable and just rule.

Conceding that Mr. Anderson was seeking Mr. King on business, and that he had transacted business with him before in the office of the storage company, there is nothing in the record to even suggest that he was ever invited into the wareroom, or that it was even suspected by the company that he would come into that private room, a place not open to the public, dark, unlighted, a part of the establishment he had never entered before.

[3, 4] We are unable to see upon what theory it could be held that the storage company was obligated or owned any duty to Mr. Anderson to keep its wareroom in a safe condition.

The theory of negligence was well stated by this court in Williams v. Nashville, 106 Tenn. 538, 63 S. W. 233, the court saying:

"For the theory of all negligence cases is that the defendant has violated some legal duty he owed plaintiff. So where such duty does not exist, however unfortunate the injury may be, and free from negligence, yet he must alone bear the consequences; he cannot impose them upon one under no obligation in law towards him, save not to inflict, directly or indirectly, wanton injury upon him."

We think that the Court of Civil Appeals was correct in holding that Mr. Anderson entered the wareroom of the storage company without invitation, either express or implied, and that the storage company owed him no duty to keep said place safe.

It results that the judgment of the Court of Civil Appeals is in all things affirmed.

(141 Tenn. 297)

## HUTCHINS et al. v. WILSON et al.

(Supreme Court of Tennessee. Feb. 3, 1919.)

1. COURTS  $\Leftrightarrow$  246—APPELLATE JURISDICTION—TENNESSEE.

Where the principal purpose of a bill is a recovery of a money judgment in excess of \$1,000, an appeal will lie direct to the Supreme Court; but, if it have some other principal purpose, an appeal will lie only to the Court of Appeals, notwithstanding an incidental prayer for recovery of a money judgment in excess of \$1,000.

2. COURTS  $\Leftrightarrow$  246—APPELLATE JURISDICTION—TENNESSEE—APPEAL FROM DECREE UPON CREDITORS' BILL.

The main purpose of a creditors' suit is not to obtain a money judgment, but to impound property, enjoin the proceedings in which property has been attached, and adjudicate the interests of all claimants as to their priority rights, and appoint a receiver for preservation of property, and the appellate jurisdiction thereof lies in the Court of Civil Appeals.

3. COURTS  $\Leftrightarrow$  246—JURISDICTION—TENNESSEE—STATUTES.

Acts 1907, c. 82, creating the Court of Civil Appeals, confers upon it appellate jurisdiction in all civil cases from the law and equity courts, with certain named exceptions, and the Supreme Court cannot assert jurisdiction unless a particular case falls clearly within one of the exceptions enumerated.

Appeal from Chancery Court, Polk County; Foss H. Mercer, Chancellor.

General creditors' bill by J. S. Hutchins and others against R. B. Wilson and others, in which various parties excepted to the report of the master, and from the chancellor's decree certain creditors whose claims were disallowed have appealed, and the defendant R. B. Wilson has appealed as to the claims allowed. Case transferred to the Court of Civil Appeals.

J. Harry Swan, of Benton, for J. S. Hutchins.

J. C. Ramsey, of Cleveland, and B. B. C. Witt, of Benton, for R. B. Wilson and others.

McKINNEY, J. This is a general creditors' suit. The bill was filed on behalf of the complainants and all other creditors of the defendant R. B. Wilson.

The total indebtedness claimed by the complainants against the defendant Wilson amounted to about \$500. The bill charged that said defendant was largely indebted to other parties, stating names and amounts, and that several of said creditors had instituted attachment and injunction suits.

It appears that, subsequent to the creation of these debts, the defendant had filed a voluntary petition in bankruptcy and had been discharged; that after such discharge

the father of the defendant, R. B. Wilson, died, and by his will devised a valuable farm to the defendant R. B. Wilson, subject to the life estate in the mother of said defendant, who is a very old woman.

The defendant and his mother sold this farm for \$11,000; \$3,500 was for cash, and deferred notes were executed for the balance. After the delivery of the deed, but before the money and all of the notes were turned over to the vendors, these various creditors, claiming that the defendant, R. B. Wilson had repeatedly promised to pay their debts after he was discharged in bankruptcy, began filing injunction and attachment suits for the purpose of impounding said property and having it applied to their respective debts. Under this general creditors' bill an order was made, enjoining the further prosecution of these independent suits, and all creditors were required to prosecute their claims in this suit, which they did.

Only two of the creditors had claims amounting to as much as \$1,000.

This bill prayed for an attachment, injunction, the appointment of a receiver (which was granted), an accounting with the trustee, through whose hands the money and notes were to pass, a reference to ascertain the amount of the assets of the defendant, the names of the preferred creditors and amounts due them, the priority of liens, the names of the general creditors and the amounts due them, the costs and expenses of the suit, including compensation for the receiver and that of the solicitors, the interest of the mother of the defendant R. B. Wilson in the proceeds derived from the land, etc.

The master made a very full and elaborate report, to which exceptions were filed by the various parties, and these matters were all passed upon by the chancellor, and from his decree certain creditors, whose claims were disallowed, have appealed, and the defendant R. B. Wilson has appealed as to the claims allowed. Said appeals were prayed and allowed to this court.

We are of the opinion that this court is without jurisdiction, and that the appeals should have been taken to the Court of Civil Appeals.

But for the fact that two of the claims exceeded \$1,000 the case of *Singer v. Singer*, 122 Tenn. 671, 126 S. W. 1085, would be conclusive. In that case it was held:

"Where each of several claimants sue individually in an administration suit in chancery for separate sums less than one thousand dollars, but the aggregate of which exceeds that amount, the Court of Civil Appeals, and not the Supreme Court, has appellate jurisdiction, although their separate petitions, for convenience and to save expense, were consolidated and heard together in the chancery court."

Most of the authorities cited in the *Singer* Case were decisions involving the jurisdiction of the Supreme Court of the United States,

and it was held in those cases that it did not have jurisdiction as to claims under \$5,000, even though some of the claims involved in the case exceeded \$5,000. It is not very clear that jurisdiction was exercised in those cases where some of the claims exceeded the jurisdictional amount, but, assuming that they did, if such holding were applied to a case like the one here involved, the result would be that as to two of these claims the appeal would lie to this court, while as to most of the claims the appeal would go to the Court of Civil Appeals, although it is apparent that it is almost necessary that all of these matters be heard together; and, for reasons hereinafter stated, if any doubt exists as to which court has jurisdiction, the doubt should be resolved in favor of the Court of Civil Appeals.

But we have a different question involved here from that with which the Supreme Court of the United States was dealing in the cases cited in *Singer v. Singer*, supra.

[1] In *Railroad v. Byrne*, 119 Tenn. 278, 104 S. W. 460, the court held:

Primary jurisdiction of the Court of Civil Appeals is defined to embrace all cases brought up from courts of equity and chancery courts, except cases seeking money recoveries for more than \$1,000, and except cases involving the constitutionality of statutes, election contests, and state revenue and ejectment suits, and to embrace all cases brought up from the circuit and common-law courts, except cases involving the constitutionality of statutes, election contests, state revenue and ejectment suits.

If, therefore, the principal end, or purpose, of the bill was a recovery of a money judgment, then the appeal would lie direct to this court.

In *Morris v. Railroad*, 124 Tenn. 524, 137 S. W. 759, and other cases, it was held that an incidental prayer for the recovery of a money judgment, in excess of \$1,000, will not confer appellate jurisdiction upon this court, when the main purpose of the suit is to obtain some relief other than a money judgment.

[2] It becomes important, therefore, to determine the purpose and object of a creditors' bill.

A creditors' bill is thus defined in 12 Cyc. 5.

"A creditors' bill has been defined to be a bill by which a creditor seeks to satisfy his debt out of some equitable estate of the debtor which is not liable to levy and sale under execution at law, or out of some property which has been put beyond the reach of the ordinary process."

And in notes to the above text we find the following definitions, which are supported by authority:

"A bill for the discovery of assets, debts owing by third persons and the like."

"A bill filed for an account of decedent's assets and a settlement of the estate or a bill filed against a fraudulent conveyance."

"A proceeding to enforce the security of a judgment creditor against the property and interest of his debtor."

"In their most comprehensive sense they are bills in equity by creditors to enforce payment of debts out of the property of debtors, under circumstances which impede or render impossible the collection of the debts by the ordinary process of execution."

"The jurisdiction over a creditors' bill is only exercised when the remedy afforded at law is ineffectual to reach the debtor's property, or when the enforcement of the legal remedy is obstructed by some incumbrance or by a transfer which has been made to defeat the creditors' rights."

From the foregoing authorities, as well as upon reason, it seems that the main purpose of this suit is not to obtain a money judgment, but to impound property, enjoin the proceedings in which the property has been attached, adjudicate the interest of all claimants in the property as to their rights of priority, and appoint a receiver for its preservation. The fixing of the amount due creditors is but one of the incidents of the suit, and cannot be said to be the principal one. It often happens that the claims of debtors have already been reduced to judgments, in which event the filing of such a bill as this could not be said to be primarily for the purpose of procuring a money judgment, but the principal purpose in such case would be to reach the property before it was dissipated, or made way with, or absorbed by other creditors.

This case is somewhat analogous to a bill filed by a judgment creditor on a nulla bona return. In such a case the creditor asks for a money decree, and that the property impounded be applied in satisfaction of such decree, but it is obvious that the prayer for the money judgment is not the primary purpose of the bill, for the creditor already has a money judgment; the main purpose of the bill is to reach trust property. As previously stated, where there is doubt as to the primary object of the bill, the jurisdiction should be held to be in the Court of Civil Appeals.

[3] In *Burns v. City of Nashville*, 132 Tenn. 434, 178 S. W. 1054, the court said:

"As stated before, it is difficult to determine what is the paramount object of the litigation. All the matters are of great importance, and it is hard to say that any one could be treated as incidental.

"Chapter 82 of the Acts of 1907, creating the Court of Civil Appeals, confers upon that court appellate jurisdiction of all civil cases coming up from the law and equity courts of this state, with certain exceptions named; that is to say, the act gives the Court of Civil Appeals immediate supervision of all civil litigation in the lower courts, unless such litigation is of the particular character excepted by the act.

"Where a general rule has been established by statute, with exceptions, the court will not

curtail the former nor add to the latter by implication. Exceptions strengthen the force of a general law, and enumerations weaken it as to things not expressed." *Sutherland on Statutory Construction*, § 328.

"Applying this rule of construction, inasmuch as general jurisdiction of civil appeals lies in the Court of Civil Appeals, and the jurisdiction of this court exists only in exceptional cases, it follows that this court cannot assert jurisdiction, unless a particular case falls clearly within one of the exceptions enumerated; that is to say, unless we plainly see that we have jurisdiction of a particular case, we must conclude that the matter is one for the supervision of the Court of Civil Appeals."

It results, therefore, that this case will be transferred to the Court of Civil Appeals.

(141 Tenn. 305)

#### MOFFAT et al. v. SCHENCK et al.

(Supreme Court of Tennessee. Feb. 4, 1919.)

##### 1. ADVERSE POSSESSION § 79(4)—COLOR OF TITLE—VOID TAX DEED.

A tax deed under which defendants claimed the land in suit, even if void, constituted color of title in them.

##### 2. LIMITATION OF ACTIONS § 73(2)—REMOVAL OF DISABILITIES OF MARRIED WOMEN—EFFECT ON SAVING CLAUSE OF DISABILITY STATUTE.

Acts 1913, c. 26, removing disabilities of married women, did not repeal saving clause of Shannon's Code, § 4448, in favor of married women, as to commencement of actions after removal of their disability, and complainant married woman had the right to sue the adverse possessors of land under the saving clause of section 4448, within three years after chapter 26 took effect, January 1, 1914, and, not having done so, the suit, not filed until May 24, 1917, is barred.

##### 3. HUSBAND AND WIFE § 69½—REMOVAL OF DISABILITIES OF MARRIED WOMEN—APPLICATION OF STATUTE.

Acts 1913, c. 26, removing the disabilities of married women and giving them the right to bind themselves personally, to sue and to be sued, etc., does not apply only to property, real and personal, in the possession of such women.

Appeal from Chancery Court, Cumberland County; F. T. Fancher, Special Chancellor.

Bill by Mary A. Moffat and others against Charles R. Schenck and others. From a decree dismissing the bill, complainants appeal. Affirmed.

J. A. Monroe, of Harriman, for Moffat and others.

Ward R. Case, of Jamestown, for Schenck and others.

HALL, J. The bill in this cause was filed by complainants in the chancery court of Cumberland county on May 24, 1917, seeking to recover of the defendants the title and possession of a certain tract of land known as Fentress County Entry 456, on which grant No. 5243 was issued to John B. McCormack on May 25, 1837.

Complainants claim title to said land through the original grantee, John B. McCormack, they being the heirs at law and next of kin of Mary H. Blake, to whom the said McCormack conveyed said land by deed bearing date of February 17, 1838, and which was recorded in the register's office of Fentress county on April 3, 1838. Mary H. Blake died August 11, 1835.

The defendants claim title to said land through Charles C. Schenck, father of the defendant Charles R. Schenck, who purchased said land at a tax sale had under a judgment rendered in the circuit court of Fentress county on August 24, 1832. By this judgment title was divested out of Mary H. Blake and vested in Charles C. Schenck, who was put in actual possession of the land on September 13, 1832, by the sheriff of Fentress county under a writ of possession issued upon said judgment.

Defendants insist that said judgment gave them at least color of title. They also assert title under a tax deed based upon said sale executed on August 8, 1834.

It is contended by complainants that this tax sale and deed are void, and did not constitute color of title in the defendants. It is claimed by defendants that they have been in open, notorious, continuous adverse possession of said land from the date they were put in possession under said tax sale judgment to the date of the filing of the bill in this cause, and they rely upon such adverse possession to perfect their title to said land.

It is insisted by complainants that this alleged continuous adverse possession on the part of the defendants under said tax title has been broken by the following interruptions, and was not therefore continuous and exclusive, and cannot be counted for the time said interruptions existed.

First. That in December 1835, J. S. Watson, who claimed to be the owner of grant No. 11741, which is a younger grant than that issued to John B. McCormack for the land in controversy, and which interlaps with and covers the western portion of the land embraced in grant No. 5243, brought an ejectment suit in the circuit court of Fentress county against S. S. Perkins and Anderson Ashburn, defendants' tenants, to recover that portion covered by the interlap of the Watson grant. It appears that Watson was successful in this suit, final decree having been entered December 7, 1834, and a writ of possession issued in favor of Watson and against Perkins and Ashburn under said decree, but its execution was enjoined by

Schenck and his associates by a bill filed in the chancery court at Jamestown on February 27, 1835. Schenck and his associates, who were the landlords of Perkins and Ashburn, were not made parties to the suit of Watson v. Perkins and Ashburn.

It appears that the suit of Schenck and others against Watson to enjoin the execution of the writ of possession issued in favor of Watson and against Perkins and Ashburn resulted in a decree for the complainants, and Watson was never put in possession of said land.

It is insisted by the complainants that the decree rendered in the cause of Watson v. Perkins and Ashburn had the effect of breaking the continuity of defendants' possession, notwithstanding Watson never was in possession, but only obtained a decree against the tenants of Schenck and his associates adjudging that he was entitled to possession.

Second. It is insisted that the defendants' possession was again broken on January 1, 1830, when Charles C. Schenck leased the land to one W. H. Neely, who, it appears, without the knowledge of Schenck, and while the land was occupied by Schenck's tenant, had previously, on November 13, 1829, taken a lease from J. S. Watson for the land covered by the Watson grant No. 11741. It appears that Watson had no actual possession of said land, and that Neely did not go into possession of it himself, but subleased it to one Jerre Hall, telling Hall that he was acting for Watson. About the time Hall went into actual possession he went to Schenck and procured a lease for him, and thereafter held possession under the Schenck lease instead of the Watson lease. Watson, learning that Hall was holding under Schenck, procured Neely to bring an action of forcible entry and detainer against Hall. This suit was first tried before a justice of the peace on January 8, 1831, and resulted in a judgment in favor of Neely, from which Hall appealed. Neely gave bond for rents, and, under the statute, a writ of possession issued, and Hall was dispossessed, and one Bill Padgett was placed in possession of the land by Neely and Watson. In the circuit court there was a judgment in favor of Hall, and Neely appealed to the Supreme Court, where, on March 12, 1832, the judgment in favor of Hall was affirmed, and he was restored to possession as Schenck's tenant soon thereafter.

Third. That in 1831, while the suit of Neely v. Hall was pending, and while Schenck was in fact out of possession of said land, one William Mitchell appeared and claimed to be the only heir at law of Mary H. Blake. Schenck and his associates, believing that Mitchell was the only heir at law of Mary H. Blake, compromised his claim with him by conveying to him one-fourth of the land in controversy and retaining three-fourths. Thereafter, on June 26, 1831, said Mitchell gave Charles C. Schenck a power



of attorney, in which Schenck was authorized to take possession of said land for him and in his name, and to bring suits to recover the same, if necessary, to establish and make good his title to said land, and thereafter dispose of the same in accordance with the terms of a joint agreement entered into contemporaneously with the execution of said power of attorney between the said Mitchell and Schenck. Thereafter, on April 5, 1893, said Mitchell conveyed his interest in said land to the defendant Charles R. Schenck. This deed contains the following recital:

"Transfer and convey unto Charles R. Schenck \* \* \* all my right, title and interest \* \* \* grant No. 5243 \* \* \* sold by said John B. McCormack to Mary H. Blake, who was afterwards Mary Mitchell, and of whom I am the sole surviving heir."

It is insisted by complainants that the taking of this power of attorney by Schenck from Mitchell had the effect of surrendering and abandoning all previous possession of said land by Schenck in favor of Mitchell, and that, therefore, the period of adverse possession by Schenck prior to the date of the power of attorney cannot be counted in defendants' favor.

Fourth. That in 1895 or 1896 the Union Land Coal & Coke Company and the Tennessee Union Land Development Company held four separate and distinct one-acre possessions and inclosures on said land, which were cleared about the year 1895 or 1896, and were kept up and cultivated continuously each year until August 1, 1899, on which date said companies executed a deed to the defendants Charles R. Schenck and A. B. Brauford, conveying to them the land in controversy. It is insisted by complainants that these possessions held by the Union Land Coal & Coke Company and the Tennessee Union Land Development Company had the effect of impounding and neutralizing the defendants' possession of said land.

On the trial of the cause the complainants, who are married women, were allowed to amend their bill and plead and rely on their disabilities of coverture, but their husbands were not made parties complainants, and the cause proceeded to trial as to said married women in their own right.

It is insisted by the complainants that, by reason of the interruptions hereinbefore mentioned, the defendants had no valid adverse possession of said land until after the disabilities of said married women occurred, and that the defendants' plea of the statute of limitations cannot avail them; that the said Mary H. Blake, complainants' ancestor, died on August 11, 1885, on which date said land descended to her heirs at law, and those being under disability of coverture are as follows:

Complainant Anna H. B. Howe, owner of

an undivided one-third interest, and the wife of William Read Howe, has been under continuous disability of coverture since the death of her father, John L. Blake, on October 10, 1899; that the complainant Elizabeth M. Mason was married in 1865; Julia C. Averill was married in 1886, and Mary A. Moffat was married in 1891, since which time they have all been under the disability of coverture, and jointly owning an undivided one-sixth interest in said land; that Mary L. Block, daughter of Louise R. Tyler, and granddaughter of the said Mary H. Blake, was married to John W. Block in the year 1879, and has been under disability of coverture since that date, and is entitled to an undivided one-twelfth interest in said land.

The cause was heard before special chancellor, F. T. Fancher, on June 20, 1918, who held that the defendants had had more than seven years' continuous, peaceable, adverse, open, and exclusive possession of said land next preceding the filing of the bill, and that complainants' right of action was barred for the reason that they did not bring their suit within 3 years from January 1, 1914, on which date chapter 26 of the Acts of 1913 went into effect, and their bill was therefore dismissed. From the decree of the chancellor dismissing their bill complainants have appealed to this court, and have assigned errors.

[1] Owing to our view of the cause, which is the same as that taken by the chancellor, it will not be necessary to determine whether the interruptions occurring in the defendants' possession prior to 1899 had the effect of breaking the continuity of such possession. The tax deed under which the defendants claim, even if void, would constitute color of title in them. *Iron Co. v. Schwoon*, 124 Tenn. 176, 135 S. W. 785.

The undisputed evidence shows that, since the execution of the deed by the Union Land Coal & Coke Company and the Tennessee Union Land Development Company, to defendants, on August 1, 1899, they have had continuous, open, exclusive, and uninterrupted possession of said land down to the present time. The possessions that were on said land at the date of the execution of said deed by the Union Land Coal & Coke Company and the Tennessee Union Land Development Company have been extended by the defendants and new possessions and new inclosures have been erected on said land by them. There have been two new fields cleared on the land by the complainants since the execution of said deed by said companies. These clearings consist of about 40 acres of land, upon which buildings have been erected, and said possessions have been occupied and cultivated continuously by the tenants of the defendants on down to the date of the filing of the bill in this cause.

J. M. Hall testified that he took possession of said land as the tenant of the defendants in the year 1890; that there was then a possession on said land consisting of about 25 acres, and that since that time there has been about 40 additional acres cleared by the tenants of defendants, and that these latter possessions have been kept up continuously and cultivated each year.

Hugh Hall testified that he moved on the land in 1904, as the tenant of the defendants, and has been there 17 years; that there are now three distinct possessions upon said land, the old place and two new ones; that the two new ones have been made since he went on the land, and have been kept up continuously until the present time and cultivated each year.

J. W. Hall testified that he moved on the land in controversy in 1897, and that the old possession, as well as the new ones, have been kept up continuously since that time, and that the tenants of the defendants have cleared and fenced something near 40 acres since he moved on said land. The evidence shows that said new improvements or possessions have been made on the land by defendants' tenants since the year 1890, and these possessions have been occupied and the lands cultivated continuously without interruption on the part of any adverse claimants.

[2] By chapter 26 of the Acts of 1913 it is provided:

"That married women be, and are, hereby fully emancipated from all disability on account of coverture, and the common law as to the disabilities of married women and its effect on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of, all property, real and personal, in possession, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued with all the rights and incidents thereof, as if she were not married."

By section 4448 of Shannon's Code it is provided:

"If the person entitled to commence an action is, at the time the cause of action accrued, either (1) within the age of twenty-one years, or (2) of unsound mind, or (3) a married woman, or (4) beyond the limits of the United States and the territories thereof, such person, or the (their) representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceed three years, and in that case within three years from the removal of such disability."

Chapter 26 of the Acts of 1913, by which the disabilities of married women were clearly removed, went into effect on January 1, 1914. The bill in the suit at bar was not filed until May 24, 1917. It is therefore clear that more than 3 years had elapsed between the date of its filing and the date when chapter 26 of the Acts of 1913 took effect. The complainants, however, take the position that the act of 1913 removed, not only the disability of coverture from married women, but likewise cut off and removed the saving clause provided by section 4448 of Shannon's Code above quoted, giving them 3 years within which to sue after the removal of such disability. It is therefore insisted by the complainants that said saving clause having been suddenly cut off, the complainants had 7 years after their disabilities were removed within which to bring suit. The case of *Jones et al. v. Coal Creek Mining & Manufacturing Co.*, reported in 133 Tenn. 160, 180 S. W. 179, is cited in support of this contention.

We do not think the holding in that case is controlling in the case at bar. The opinion in that case dealt with chapter 15 of the Acts of 1901, abolishing all exceptions to statutes limiting commencement of suits and actions in favor of persons beyond the limits of the United States and territories thereof. It was held that said statute removed the saving clause provided by section 4448 of Shannon's Code for the benefit of such persons, and that a right to sue could not be suddenly cut off, but a reasonable time must be given. The court held in that case that a reasonable time was not given short of the period of limitation, and in order to give the parties their day in court it was held that they had their full period of 7 years within which to sue.

Chapter 26 of the Acts of 1913 does not undertake to repeal the saving clause given by section 4448 of Shannon's Code in favor of married women. It only removes the disabilities of married women, leaving the saving clause of the statute still in effect. That the complainants had the right to sue under the saving clause provided by section 4448 of Shannon's Code cannot be questioned, and, not having done so within the 3 years provided by the saving clause, it must be held that they are barred.

[3] We cannot assent to the additional contention made by complainants that the act of 1913, removing the disabilities of married women, only applies to property, real and personal in the possession of such women. The act expressly gives the right to a married woman to bind herself personally, "and to sue and be sued with all the rights and incidents thereof, as if she were not married."

It was expressly held in *McIrvin v. Lincoln Memorial University*, 138 Tenn. 260, 197 S.

W. 862, L. R. A. 1913C, 191, that chapter 26 of the Acts of 1913, removed the exemption which otherwise would have excluded married women from the operation of the statute of limitations. That was a suit to recover for personal injuries commenced more than one year from the accrual of the cause of action. The injuries were sustained after the date upon which chapter 26 of the Acts of 1913 went into effect. It was contended by the complainant that the 3 years' saving clause provided by section 4448 of Shannon's Code applied, and by the defendant that it did not. It was held that the right of action was barred after 1 year. The only difference between that case and the case at bar is that the cause of action in that case accrued after January 1, 1914, and in the suit at bar it accrued a number of years before.

It results that the decree of the chancellor will be affirmed, with costs.

(141 Tenn. 318)

STATE ex rel. THOMPSON v. CUMMINS,  
County Judge.

(Supreme Court of Tennessee. Feb. 17, 1919.)

STATUTES §98(10) — SPECIAL LAWS — DISCRIMINATION — COUNTIES.

Pub. Acts 1915, c. 74, creating a constabulary for the state, and providing that expenses and compensation of members shall be paid by county or counties wherein services are rendered, but that counties having a population of 190,000 and over, according to the federal census of 1910, are exempt from the act, is unconstitutional, since no county but Shelby comes, or ever will come, within exception.

Appeal from Chancery Court, Hamilton County; W. B. Garvin, Chancellor.

Proceedings by the State, on the relation of Frank M. Thompson against William Cummins, County Judge. From the decree rendered, complainant appeals. Affirmed.

William H. Swiggart, Jr., Asst. Atty. Gen., for relator.

Will F. Chamlee, of Chattanooga, for county judge.

MCKINNEY, J. The only question involved in this cause is the constitutionality of chapter 74 of the Public Acts of 1915, which is as follows:

"An act to create a constabulary for the state of Tennessee, to be designated and known as the state rangers, and to provide for their appointment and to define their powers and duties.

"Provided: That this act shall not apply to counties having a population of 190,000 and over according to the federal census of 1910.

"Whereas, the Governor of Tennessee and

the civil authorities of the several counties of the state are charged by law with the duty of protecting persons and property and of enforcing the laws and preserving the peace of the state:

"And whereas, conditions sometimes arise where the Governor and civil authorities are called upon and expected to preserve order and protect persons and property from the violence of organized forces:

"And, whereas, the state of Tennessee has not heretofore provided either the means or the authority to enable the performance of these duties:

"Section 1. Therefore, be it enacted by the General Assembly of the state of Tennessee, that there be hereby created a state constabulary, to be designated and known as the state rangers, to consist of ten members who shall be appointed by the Governor and who shall hold office for the term of ten years, subject to removal by him for sufficient cause.

"Said ten members, when so appointed, shall constitute the regular force and shall be vested with and possess all the powers conferred upon the sheriff by section 4933 of the Code of 1858.

"Sec. 2. Be it further enacted, that when acts of violence occur in any county of the state whereby the rights of persons or property are violated or jeopardized by organized forces, or by any considerable number of persons acting in conjunction or singly, and which may be brought to the attention of the Governor, he shall, in his discretion, direct the state rangers to police such county, or any part thereof, so disturbed, to suppress such acts of violence and to arrest all persons engaged or aiding and abetting therein.

"Sec. 3. Be it further enacted, that the state rangers be attached to the adjutant general's office and by him organized and equipped for duty under the direction of the Governor, but they shall at all times be at the command of the Governor and under his general supervision and control.

"Sec. 4. Be it further enacted, that each regular member of the state rangers shall receive as compensation for his services three dollars per diem and necessary expenses while actually engaged in the discharge of any official duty, the same to be paid upon voucher from the adjutant general's office out of any moneys in the state treasury not otherwise appropriated.

"Sec. 5. Be it further enacted, that each of the regular members of the state rangers appointed by the Governor under section 1 of this act shall have authority to summon and swear in the posse comitatus when necessary to meet any emergency and when for any reason, the Governor may not be able to appoint and supply the special members or force hereinafter provided for. The posse may be summoned from any county or counties in the state, in the discretion of the ranger, and the members thereof shall receive as compensation for their services two dollars per diem and necessary expenses while actually engaged in the service, the same to be paid as hereinafter provided.

"Sec. 6. Be it further enacted, that the Governor shall appoint such special members of the state rangers as may be necessary to aid the

regular force to effectually perform the duties herein imposed upon them, the period of their service, however, to extend no longer than the exigencies may demand.

"Such special members shall receive for their services the same compensation allowed the members of the posse comitatus in section five of this act the same to be paid as hereinafter provided.

"Sec. 7. Be it further enacted, that the per diem and necessary expenses, which shall include all transportation of the members and equipment, of the posse comitatus and of the special members as provided for in sections five and six of this act shall be paid by the county or counties wherein the service may be rendered, upon an itemized statement certified from the adjutant general's office showing the service rendered on behalf of such county or counties and upon the proper rendition of such account the county court of such county or counties shall provide for the payment of same, which shall be by warrant drawn by the county judge or chairman and in favor of the state.

"Sec. 8. Be it further enacted, that this act shall not apply to counties having a population of 190,000 and over according to the federal census of 1910.

"Sec. 9. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it."

The chancellor held the act to be unconstitutional because in violation of article 11, section 8, of the state Constitution, which provides that the Legislature shall have no power to suspend any law for the benefit of any particular individual, nor to pass any law for the benefit of any individuals inconsistent with the general law of the land, nor to pass any law granting to any individual rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law.

It is apparent that this act is a general law from which Shelby county was excepted. No other county comes within the exception, or can ever come within the exception by any subsequent federal census.

The case, therefore, falls within the rule announced in the Redistricting Cases, 111 Tenn. 283, 80 S. W. 761, which rule is supported by *State v. Burnett*, 6 Heisk. 188; *Sutton v. State*, 96 Tenn. 696, 36 S. W. 697, 83 L. R. A. 589; *Woodard v. Brien*, 14 Lea, 520; *Burkholtz v. State*, 16 Lea, 71; *Mayor v. Dearmon*, 2 Sneed, 119 and *Weaver v.*

*Davidson County*, 104 Tenn. 815, 59 S. W. 1105, to wit:

"No benefit shall be conferred or no burden imposed upon the citizens of any given county, which by the same act is not conferred upon or imposed upon all of the citizens of all of the other counties in the state who may be able to bring themselves, or may be brought, within the terms of the act conferring the benefit or imposing the burden."

The court then says:

"It is apparent, therefore, that these cases do not oppose the hypothesis that the Legislature may pass special laws for the regulation of individual counties, by name, as arms of the state government, or subordinate political entities, as distinguished from the personal relations of their several citizens.

"It is equally obvious that while *Moore v. State* [5 Sneed, 510], *State v. Leonard* [86 Tenn. 487, 7 S. W. 453], *State v. Maloney* [92 Tenn. 68, 20 S. W. 419], *State v. Nine Justices* [90 Tenn. 728, 18 S. W. 893], *Lauderdale County v. Fargason* [7 Lea, 153], and *Burnett v. Maloney* [97 Tenn. 697, 702, 703, 37 S. W. 689, 34 L. R. A. 541] (as to its first point) do not necessarily establish the hypothesis, inasmuch as they rest upon special clauses of the Constitution which were held to confer or permit the power of special legislation in respect of matters falling thereunder, yet they furnish very useful analogies that point to the conclusion indicated by the hypothesis just referred to."

It will thus be seen that the cause under consideration is not a special law for individual counties, as arms of the state government; neither does it fall within the line of cases recited above, which rest upon special clauses of the Constitution, but falls within the line of cases holding unconstitutional all acts which confer benefits or impose burdens upon citizens of some counties and not upon others.

It is not insisted by the state that if the exception to the act is unconstitutional that the remainder of the act is valid, and our decisions are to the contrary. *Burkholtz v. State*, 16 Lea, 73; *Bouldin v. Lockhart*, 3 Baxt. 279; *Weaver v. Davidson County*, 104 Tenn. 815, 59 S. W. 1105; *Lindsay v. Allen*, 112 Tenn. 637, 82 S. W. 171; *State ex rel. v. Trehwitt*, 118 Tenn. 571, 82 S. W. 480; *Morrison v. State*, 116 Tenn. 534, 95 S. W. 494.

The learned chancellor was correct in holding the act in question unconstitutional and in dismissing the complainant's bill, and his decree is in all things affirmed.

(183 Ky. 647)

## FRANZ v. JACOBS.

(Court of Appeals of Kentucky. March 21, 1919.)

1. WATERS AND WATER COURSES ¶51, 119(1)  
—RIGHTS OF CONTIGUOUS OWNERS—STREAMS  
—SURFACE WATERS.

An upper proprietor has an easement in the land of the lower proprietor for the escape from his land of both surface water and that running in natural streams, which right the lower proprietor may not interfere with.

2. WATERS AND WATER COURSES ¶119(3)—  
RIGHTS OF CONTIGUOUS OWNERS—SURFACE  
WATERS.

An upper proprietor cannot collect surface water into a volume and empty it upon the lower proprietor, nor can he by such means augment the flow of a natural stream, so as to damage his neighbor below.

3. APPEAL AND ERROR ¶1009(2)—DETERMI-  
NATION OF TRIAL COURT—REVIEW.

The essential fact entitling plaintiff to the relief he sought having been put in issue and determined by the chancellor against him upon sufficient evidence, court on appeal must affirm the judgment.

4. APPEAL AND ERROR ¶1009(3)—FINDING  
OF CHANCELLOR—WEIGHT.

Where the evidence is conflicting, and the mind is left in doubt as to the truth, some weight will be given by the court on appeal to the finding of the chancellor.

Appeal from Circuit Court, Greenup County.

Suit by Edward Franz against James W. Jacobs. Petition dismissed, and plaintiff appeals. Affirmed.

S. S. Willis and R. D. Davis, both of Ashland, for appellant.

Allen D. Cole, of Maysville, and W. T. Cole, of Greenup, for appellee.

THOMAS, J. Appellant, plaintiff below, and appellee, defendant below, own adjoining farms in Greenup county, both of which border on the Ohio river, which at that point runs east and west. Defendant's farm lies above that of plaintiff, and some distance from the river bank on defendant's farm is a natural sag, slough, or depression, running entirely across the farm and extending upon the next adjoining one on the east. The lower end or foot of the sag extends to or perhaps upon a small portion of plaintiff's farm. Between the bank of the river and the slough or sag is a slight elevation, called by the witnesses a ridge. There is a narrow place in the ridge a short distance from the line between the farms of plaintiff and defendant, and through this narrow place there was an old ditch, leading from the sag onto the low ground immediately next to the river, and, when open,

would permit the water which collected in the sag to run out and find its way into the river, which could be done only when the river was not high enough to prevent it. According to the testimony the ditch was an artificial one, but when it was dug, or by whom, no one seems to be able to tell. In times of high water it would fill with drift and debris, and would constantly have to be cleaned out. In the fall of 1913 defendant put an eight-inch sewer pipe from the bank of the river through the ditch and up the sag to the lowest point in it, and constructed a dam across the ditch. The purpose of this work was to have the sewer drain off the surface water which would collect in the sag, and also the overflow water which would be left in it in times of floods, and the dam constructed across the ditch was to prevent the water from the river running into the sag at ordinary stages of the water. Plaintiff, upon the theory that the stopping of the ditch caused the water in the sag to flow over his land below and wash away and damage it, brought this suit, in which he sought a mandatory injunction against defendant, commanding him to remove the dam, and seeking to recover the sum of \$500 for damages which he alleged had accrued since the dam was constructed.

The answer denied the allegations of the petition, and claimed that defendant had the right to stop the ditch by constructing the dam, upon the ground that it was not a natural stream but an artificial one, in the continued opening of which plaintiff had no rights. Appropriate pleadings made the issues, and upon hearing, after proof taken, the court dismissed the petition, and to reverse that judgment plaintiff prosecutes this appeal.

[1, 2] The civil law governing the rights of contiguous owners of land relative to the flowing of surface water, as well as that in natural streams, has been adopted in this state, and it is that an upper proprietor has an easement in the land of the lower proprietor for the escape from his land of both surface water and that running in natural streams, which right the lower proprietor may not interfere with or obstruct by any act which would prevent the flowing of either surface water or that carried by natural stream. A corresponding duty is imposed upon the upper proprietor not to collect surface water into a volume and empty it upon the lower proprietor, nor can he by such means augment the flow of a natural stream, so as to damage his neighbor below. These rules, with their application to the various facts presented, are adopted in the cases of *Moody v. Fremd*, 177 Ky. 5, 197 S. W. 433; *Pickerill v. City of Louisville*, 125 Ky. 213, 100 S. W. 873, *Kemper v. City of Louisville*, 14 Bush, 87, *Hahn v. Thornberry*, 7 Bush,

408, *Grinstead v. Sanders*, 56 S. W. 665, 22 Ky. Law Rep. 51, *Robertson v. Daviess Gravel Road Co.*, 116 Ky. 913, 77 S. W. 189, 26 Ky. Law Rep. 1114, and other cases which might be cited.

Plaintiff claims that under the law as announced in the cases referred to he has the right to maintain this action, since he contends that by the damming of the ditch defendant permitted the surface water to collect in the sag without an outlet and forced it to run over plaintiff's land, and that in doing so he stopped up what plaintiff insists is a natural stream, thereby causing the water to flow upon his land in increased quantities, or in such a way as to produce the damages complained of. If the facts assumed in plaintiff's petition were established, there could be no doubt about his right to relief. As we read the record, there is no proof to show that any of the water producing the damage was collected surface water. On the contrary, it is conclusively shown that the sewer mentioned is amply sufficient to and does drain from the slough or sag all surface water, at least enough to keep it from getting out of the banks of the sag and flowing over plaintiff's land. The proof is that plaintiff's land at the place of which he complains is more than one foot higher than the point where the dam is constructed, and the flood water would not run over that place when it was to the top of the dam. So that it is a difficult matter to see how the dam could cause the water to flow over a place which was higher than the dam. Moreover, a number of witnesses—greater, numerically, than those testifying for plaintiff—who have long been familiar with that territory and surrounding conditions testified that the construction of the dam did not cause an increased amount of water to flow over plaintiff's land. On the other hand, they testified—which testimony seems to accord with natural principles—that the construction of the dam prevents the water in ordinary stages (and except in times of high floods) from getting into the sag, and thereby serves to protect at least that part of plaintiff's land covered by the depression. To this extent it benefits him. When the waters of the river are at sufficient flood stage to go over the dam, and thereby fill the sag, it is also at that time over a large portion of plaintiff's farm, and then no water could run through the ditch, so as to lower the water

in the sag to any extent, because the river into which it would have to empty would be full. When the water in the river would recede, so as to get below the dam and permit the ditch, if open, to drain the sag, that portion of plaintiff's farm about which he complains, being higher, would be free from water. We therefore conclude that defendant's witnesses had scientific grounds upon which they could base their testimony, as well as upon their actual observations.

[3, 4] It is true that plaintiff shows that a small portion of his land in floods occurring in 1913 and since then has to some extent washed; but there is plenty of testimony to show that this is a usual and ordinary occurrence with land contiguous to a stream like the Ohio river. It also appears from the testimony that some floods will wash the overflowed land, while others will deposit sediment thereon, dependent upon the duration of the rise in the river. So we conclude that, the essential fact entitling plaintiff to the relief he sought—i. e., damage as a proximate result of the acts complained of—having been put in issue and determined by the trial court against him upon sufficient evidence, there is no course left to us but to affirm the judgment. In cases like this the rule is that, where the evidence is conflicting and the mind is left in doubt as to the truth of the matter, some weight will be given to the finding of the chancellor. *Campbell v. Trospen*, 108 Ky. 602, 57 S. W. 245, 22 Ky. Law Rep. 277, and *Moody v. Fremd*, supra.

Another question presented and discussed by defendant's counsel is that the rules of law governing the rights of adjoining proprietors with reference to the flowing of both surface water and that in natural streams has no application to the damming or destruction of an artificial ditch. This contention is attempted to be met by plaintiff's counsel with the argument that, where the artificial ditch has existed for such a length of time as to give the complaining party a prescriptive right in its continued maintenance, the same law would apply as though the ditch were a natural stream.

However interesting it might be to take up and discuss these questions, we are not disposed to do so in view of the fact that the judgment will have to be affirmed upon the chancellor's finding of fact.

Wherefore the judgment is affirmed.

(183 Ky. 597)

## SCHRIVER et al. v. FROMMEL et al.

(Court of Appeals of Kentucky. March 14, 1919.)

## 1. TRUSTS ⇐211—EMPLOYMENT OF ASSISTANT—COMPENSATION.

Assistants employed by a trustee must look to the trustee for compensation, and they cannot be granted an allowance out of the trust estate.

## 2. TRUSTS ⇐315(1) — TRUSTEES — COMPENSATION.

Contrary to the common-law rule, compensation may be granted a trustee for services rendered in connection with the trust estate, though the trustee was interested in the corpus of the estate, unless there was an implied agreement that the trustee should receive no compensation.

## 3. TRUSTS ⇐315(2) — TRUSTEES — COMPENSATION.

Trustee held entitled to \$1,500 as compensation, in view of the fact that the creator of the trust first imposed such duties upon his executors and testamentary trustees, and provided that they should receive as compensation the sum mentioned.

Appeal from Circuit Court, Campbell County.

Action between Mary Frommel and another and Oliver P. Schriver, trustee, and others. From a judgment denying the trustee compensation, he appeals. Reversed, with directions.

Wm. U. Warren, of Newport, for appellant.  
Oscar P. Grischy and Elmer W. Grischy, both of Cincinnati, Ohio, and John T. Hodge, of Newport, for appellees.

CLARKE, J. The only question involved upon this the second appeal in this case is whether or not the trustee is entitled to compensation for his services in administering the trust created in the manner fully set out in the opinion on the former appeal, which is reported in 179 Ky. 228, 200 S. W. 327.

Upon the return of the case to the lower court, an order was entered, directing the trustee to settle his accounts with the master commissioner, and upon that settlement he asked and was allowed by the master the sum of \$1,500 for his services and to pay his brothers, George and Robert, for the assistance they had rendered him in the management of the trust property. To this allowance by the master appellee filed an exception, which was sustained by the chancellor, and judgment was entered, denying to the trustee any compensation for himself or his assistants for their services in administering the trust.

[1] It will not be necessary to consider the

question of allowance to the assistants employed by the trustee, since that is a matter between them and the trustee, which is not here, as they are not asking any allowance, nor could they have done so, since they are not trustees under the trust deed, and the will of the father by which they were made trustees of his estate was superseded by the trust deed, although we think the will is so closely connected with the deed as to form a part of the whole transaction and require a consideration of its provisions upon the question of compensation for the trustee under the deed.

[2] Prior to the American Revolution it was the common-law rule that a trustee was not entitled to compensation for his services in respect of his trusteeship, in the absence of any provision in the order of the court appointing him, or of a contract or stipulation with the parties, and this rule was enforced in this country and in this state at an early period as a rule of the common law. 39 Cyc. 480. But from the very first, the soundness of this rule was questioned in this country, and the accepted rule at the present time is that, unless otherwise regulated by statute or contract, courts of equity will exercise a just discretion and make or withhold allowance as they consider the particular circumstances require. 39 Cyc. 481.

In this state by statute, administrators, executors, and guardians are allowed commissions for their services whether or not they are interested in the trust estate, but there has been no legislative action with reference to compensation to trustees. This court has, however, in numerous decisions expressed its disapproval of the old common-law rule, and in *Phillips' Adm'r v. Bustard*, 1 B. Mon. 348 (1841), exposed the fallacy of the grounds upon which it was supposed to rest, and concluded the discussion of the question thus:

"Is there now, therefore, any sufficient reason here, for applying a rule so harsh and unreasonable to the solitary class of cases denominated express technical trusts? We think not.

"For similar reasons, the courts of Pennsylvania and of our parent state, Virginia, have decided that trustees may be entitled to compensation without any express direction or contract therefor. See [*Wilson v. Wilson*] 3 Bin. [Pa.] 557; [*Granberry's Ex'r v. Granberry*] 1 Wash. [Va.] 246 [1 Am. Dec. 455]; [*Miller v. Beverleys*] 4 Hen. & M. [Va.] 415. And this appearing to be intrinsically just, not forbidden by policy, and not only not inconsistent with any analogy in our local jurisprudence, but perfectly consistent with its complete harmony, we do not feel authorized to repudiate it and blindly adhere to the old English rule, the reasons for which, if ever good, are now altogether inapplicable in this age and country, whenever it may be presumed that compensation was expected and seems to be reasonable and just."

In no case in this court since that opinion was rendered has its reasons or conclusions been attacked or questioned, but compensation has been allowed to trustees in all cases for their services, unless there was an express or implied agreement to the contrary.

Counsel for appellee concedes that the old common-law rule has been abrogated in this state, in so far as strangers to the trust are concerned, but insists that where the trustee has an interest in the trust estate, he has no right to compensation in the absence of a stipulation therefor. This contention is based upon *Miles v. Bacon*, 4 J. J. Marsh. 457, decided in 1830, wherein the court enforced the old common-law rule where the trustee had an interest in the estate, but this opinion was based upon the old common-law rule, which had theretofore been enforced in *McMillen v. Scott*, 1 T. B. Mon. 150 (1824), both of which, however, antedated by a number of years the repudiation of the rule in *Phillips' Adm'r v. Bustard*, supra.

Not only has there been no recognition or even discussion in any case in this jurisdiction since *Phillips' Adm'r v. Bustard*, supra, was decided of the old common-law rule, but, upon the other hand, in numerous cases the right of trustees to compensation has been accepted as a matter of course, and the only controversy since that time about compensation appearing in any of the decisions is as to the amount. See *Phillips v. Burton*, 107 Ky. 88, 52 S. W. 1064, 21 Ky. Law Rep. 720; *Central Trust Co. v. Johnson*, 74 S. W. 663, 25 Ky. Law Rep. 55; *Mercer County v. Pearson*, 71 S. W. 639, 24 Ky. Law Rep. 1368; *Kentucky Natl. Bank v. Stone*, 11 Ky. Law Rep. 948; *Pearcy, etc., v. Greenwell, etc.*, 80 Ky. 616; *Patrick v. Patrick*, 135 Ky. 307, 122 S. W. 159. It is true that in none of these later cases did it happen that the trusteeship was coupled with an interest, but the repudiation of the old common-law rule in this jurisdiction was based upon the conception that the "laborer is worthy of his hire," and the fact that compensation having been provided by statute for administrators, executors, and guardians, compensation to trustees was justified and demanded by analogy. On the very same grounds and by parity of reason as well as analogy, the trustee should be paid reasonable compensation for his services even though interested in the estate, unless by express or implied contract he is to receive no compensation therefor, because his services are none the less valuable to other interested parties, and no such distinction is made in the cases of administrators, executors, and guardians.

It is also insisted by counsel for appellee

that this trust was nothing more in effect than a provision for expediency in the management of a partnership business of parties having equal joint interests in the trust estate, and properly comes within the rule that a partner is not entitled to compensation for his services in the management of affairs of the partnership, but this contention is wholly without merit, because while the parties owned the property jointly, there was no partnership whatever in its management, but that by express agreement was delegated solely to the trustee.

[3] The only questions remaining are whether the trusteeship was accepted under circumstances which imply a contract for compensation, or, as stated in *Phillips v. Bustard*, from which "it may be presumed compensation was expected and seems to be reasonable and just," and, if so, the amount at which same should be fixed. It is upon these two questions that we think the will of the father has a bearing, although abrogated almost entirely by the trust deed. It was provided in the will of the father that the executors and trustees therein named should receive as compensation for the same services as the trustee under the deed was required to perform the sum of \$1,500, and it seems to us, under the circumstances and in the absence of any provision in the trust deed disturbing this provision of the will, most reasonable that the acceptance of the trusteeship requiring the performance of the same services was in anticipation of such compensation. In fact since the will was probated, it seems nearly impossible to avoid the conclusion that such of its provisions as were not abrogated by the trust deed executed between the parties upon the same day it was probated are still in full force, and we are unable to escape the conclusion that under the circumstances here the trustee is entitled as compensation, out of which of course he must pay any assistant employed by him the sum of \$1,500 for his services, which except for the provisions of the will fixing that sum as compensation would be entirely inadequate, since the trustee during the ten years he had charge of and managed the trust property collected rents in small sums from a large number of tenants, amounting to \$57,806.47, out of which he paid for repairs, taxes and insurance, \$30,739.78, and distributed the balance among the trustors, together with about \$49,000 for portions of the property sold by the joint efforts of all parties.

Wherefore the judgment is reversed, with directions to allow the trustee \$1,500 as compensation for his services.



(188 Ky. 675)

**CRADY v. GREER.**

(Court of Appeals of Kentucky. March 25, 1919.)

**MASTER AND SERVANT §302(6)—LIABILITY FOR TORT—CHAUFFEUR—ABANDONMENT OF SERVICE.**

A chauffeur directed to make a certain trip and return, having, when nearly home, gone in the opposite direction, on his own account, and when returning, but while still farther from home than when he abandoned his master's service, collided with another, was still using the machine solely for purposes of his own, and was not acting for the master, so that the master was not liable.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Wood Crady against Frank T. Greer. Judgment for defendant, and plaintiff appeals. Affirmed.

Walter S. Lapp, of Louisville, for appellant.

Elmer C. Underwood, of Louisville, for appellee.

CLAY, C. Plaintiff, Wood Crady, brought this suit against defendant, Frank T. Greer, to recover damages for injuries to his automobile, caused by a collision with an automobile owned by defendant and operated by defendant's chauffeur. A demurrer was sustained to the petition as amended, and the petition dismissed. Plaintiff appeals.

It appears from the petition as amended that defendant lives at 1133 South Third street in the city of Louisville. On March 4, 1917, defendant's wife directed defendant's chauffeur to take defendant's automobile and convey defendant's children to the Warren Memorial Church, situated at Fourth and Broadway, and then to return to defendant's home. Pursuant to these directions, the chauffeur did take the automobile and convey the children to the church. Thereupon the chauffeur drove the machine to Third and Kentucky streets, a point near defendant's home, for the purpose of procuring gasoline for the operation of the car. After getting the necessary gasoline, he then drove the machine in the opposite direction to First and Broadway, for the purpose of securing an attendant for his wife, who was then sick. After accomplishing his purpose at First and Broadway, he then proceeded south on First street for the purpose of returning to defendant's home. When he reached the intersection of First and Breckenridge streets, his machine collided with plaintiff's machine, which was then being driven west on Breckenridge street, and it is alleged that the accident was due to the negligent operation of defendant's machine.

The liability of the defendant depends on whether the chauffeur was acting for himself or for the defendant. When the chauffeur reached the gasoline station at Third and Kentucky streets, he was then only a block and a half from the home of the defendant, where he had been instructed to go, and his journey was practically completed. Instead of going to defendant's home, he turned the machine around and drove it in the opposite direction to First and Broadway, several blocks distant, solely for the purpose of attending to his own business. When the accident occurred, he was still  $3\frac{1}{2}$  blocks from defendant's residence. It is apparent that this is not a case of a mere deviation from the direct route, but a case where the chauffeur had practically completed the service which he owed to his master and went on an independent journey of his own, having no connection whatever with his master's work. The chauffeur had not resumed the service merely because he had accomplished his purpose at First and Broadway and was returning to the defendant's home when the accident occurred. He was then almost three times as far from the defendant's home as he was at Third and Kentucky streets, when he abandoned the service of his master and started on the trip to First and Broadway. We therefore conclude that he was still using the machine solely for purposes of his own, and was not acting for the defendant when the accident occurred. *Eakin's Adm'r v. Anderson*, 169 Ky. 1, 183 S. W. 217, Ann. Cas. 1917D, 1003; *Tyler v. Stephan's Adm'r*, 163 Ky. 770, 174 S. W. 790; *Healey v. Cockrill* (Ark.) 202 S. W. 229, L. R. A. 1918D, 115.

It follows that the demurrer was properly sustained.

Judgment affirmed.

(188 Ky. 406)

**McMURRY v. MIMMS et al.**

(Court of Appeals of Kentucky. Feb. 25, 1919.)

**APPEAL AND ERROR §154(4), 793—PARTIES ENTITLED TO ALLEGE ERROR.**

Committee of person of unsound mind, having agreed to judgment, cannot be heard upon appeal from judgment; but, since committee does not seem to occupy a disinterested position, appeal will be dismissed without prejudice to the ward, no guardian ad litem having been appointed to represent her.

Appeal from Circuit Court, Todd County.

Action by Claude Mimms and others against H. J. McMurry, committee, and his ward. From the judgment rendered, McMurry appeals. Appeal dismissed.

W. B. Reeves, Jr., of Elkton, for appellant.  
Jas. R. Mallory, of Elkton, for appellees.

**HURT, J.** This is an appeal from a judgment rendered against a person of unsound mind and her committee. The committee appeared and filed answer for himself and his ward in the circuit court, and appears for the ward upon this appeal.

No issue was made in the circuit court. The allegations of the petition were not denied by the answer, but the averments of the petition were affirmatively alleged to be true by the answer, and the relief sought in the petition was agreed to by the answer. No relief was sought in the answer of any kind, but it was expressly averred that the defendants, appellants here, had no cause of complaint. The committee, having agreed to the judgment appealed from, cannot now be heard upon an appeal from the judgment. An action, in which no issues are made, and all the parties agree, and the judgment rendered is in accordance with the agreed acts, does not present anything for the determination of a court of review. The committee does not seem, however, to occupy a disinterested position between his own interests and those of his ward, and a guardian ad litem was not appointed to represent her.

The appeal is therefore dismissed, but without prejudice to any right of the ward, if any she has.

(183 Ky. 669)

#### TAYLOR v. SHIELDS et al.

(Court of Appeals of Kentucky. Feb. 25, 1919.)

##### 1. MUNICIPAL CORPORATIONS §189(1)—POLICE OFFICER—LIABILITY OF SURETIES.

Where a duty is imposed by law on a police officer to make an arrest, as when he has a warrant, or a public offense is committed in his presence, if the duty is neglected, or performed in an improper manner, his surety is liable; but if no duty is imposed and he voluntarily does so, he thereby commits a trespass, and the surety is not liable.

##### 2. MUNICIPAL CORPORATIONS §189(1)—POLICE OFFICER—LIABILITY OF SURETIES—UNLAWFUL ARREST.

Where police officers arrested plaintiff without a warrant, and without a public offense of any kind being committed in their presence, and assaulted him while confined, their surety was not liable for the trespass; they having no authority to make the arrest under Cr. Code Prac. §§ 35, 36, and consequently their acts not being official acts.

##### 3. PLEADING §8(3)—CONCLUSION—ACTING AS OFFICER—LIABILITY OF SURETY.

In an action against a surety of police officers for malfeasance in office, in arresting plaintiff without warrant or without cause, the allegation that the officers were "acting as police

officers" was a mere description of the person or conclusion of the pleader, insufficient to show that they were acting by virtue of their office.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Eugene Taylor against Albert Shields and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Charles Carroll and J. Frank Withers, all of Louisville, for appellant.

Furlong, Woodbury & Furlong, of Louisville, for appellees.

**SAMPSON, J.** Shields and Shore were members of the police force of Louisville in 1916, and the Chicago Bonding & Surety Company was the surety on the official bond of each of said policemen. In October, 1916, this action was filed in the Jefferson circuit court by Taylor against Shields and Shore as policemen, and their surety, the Chicago Bonding & Surety Company, to recover \$5,000 for the malfeasance in office of Shields and Shore.

The petition alleges that—

On the "night of August 29, 1916, plaintiff was arrested by the defendants Shields and Shore, and was by them detained and confined in the Highland police station, in Louisville, Kentucky, and that while so detained and confined he was assaulted by said defendant officers, and was struck and beaten upon and about his head, body, and limbs, and his head, body, and limbs were thereby bruised, cut, and lacerated, and he was caused, by reason of said injuries, great pain and suffering, both physical and mental. Plaintiff says that said assaulting, beating, and striking, as aforesaid, was done wantonly and maliciously by the said defendants Shields and Shore."

On December 9th following, an amended petition was filed, the material allegations of which are as follows:

"The plaintiff says that each of defendants, Albert Shields and John J. Shore, executed before the 29th day of August, 1916, to the commonwealth of Kentucky, a bond upon which the defendant Chicago Bonding & Surety Company was surety, that he would well and faithfully discharge the duties of his office as policeman according to law. Said bond was accepted and approved by the board of public safety of Louisville, and was in full force and effect on the 29th and 30th of August, 1916. Certified copies of each of said bonds will be filed herewith, if required.

"Plaintiff says that on the night of August 29, 1916, he was arrested by the defendants Albert Shields and John J. Shore, acting as police officers of the city of Louisville; that said arrest was wrongful and without warrant or judicial order, or other authority of law, and at said time plaintiff was acting in a quiet, peaceable and law-abiding manner, and he had not committed any breach of the peace, or committed any offense, either a misdemeanor or

felony, in or out of the presence of defendants, or either; and that neither of said defendants had reasonable grounds to believe plaintiff had committed a misdemeanor or felony.

"Plaintiff says said defendants wrongfully and unlawfully, under the circumstances before set out, under their authority as police officers of the city of Louisville, took plaintiff and detained and confined him in the Highland police station, in Louisville, Ky., and while he was detained and confined he was assaulted by said defendant officers and each, and was struck and beaten on and about his head, body, and limbs, with great force and violence by said defendants and each, and his head, body, and limbs were thereby bruised, cut and lacerated, and he was caused by reason of said injuries great pain and suffering, both physical and mental, and that said beating and striking by said defendants and each was done wrongfully and unlawfully and wantonly and maliciously and at said time he was not resisting arrest by said defendants or either, or by any other officer or any other person, and had not attacked or attempted to attack said defendants or either, or any other officer, and he says at the time or prior thereto he had not committed a felony and had not been arrested for the commission of a felony, and was not attempting to escape arrest, and by reason of said acts defendants and each violated the covenant of the bonds aforesaid executed by each."

To this petition, as amended, the three defendants interposed a general demurrer which was overruled as to the policemen Shields and Shore, and sustained as to the Chicago Bonding & Surety Company, and the plaintiff declining to plead further, the petition was dismissed as to the Surety Company, and of this Taylor complains and prosecutes this appeal, seeking a reversal of the judgment, asserting that a surety upon the official bond of a policeman of the city of Louisville is liable for the act of the policemen in committing assault and battery upon a prisoner while confined in a station house by said policeman, after having been arrested by him, there being no effort on the part of the prisoner to escape or to assault the officer.

"An arrest may be made by a peace officer, or by a private person." Cr. Code, § 85.

"A peace officer may make an arrest (1) in obedience to a warrant of arrest delivered to him; (2) without a warrant, when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested has committed a felony." Cr. Code, § 36.

"A peace officer in this state, under the provisions of section 36 of the Criminal Code, may lawfully arrest one only in obedience to a warrant delivered to him, or without a warrant if a public offense is committed in his presence, or if he has reasonable grounds to believe that the arrested person has committed a felony." *Morton v. Sanders*, 178 Ky. 839, 200 S. W. 25.

"A policeman of the city of Louisville, like any other peace officer, can make an arrest without a warrant only where a public offense is committed in his presence, or he has reasonable

grounds for believing that the person arrested has been guilty of a felony." *Madden v. Meehan*, 151 Ky. 220, 151 S. W. 681.

"A peace officer can make an arrest without a warrant only where a public offense is committed in his presence, or where he has reasonable grounds for believing that the person arrested has committed a felony." *Jamison v. Gaernett*, 10 Bush, 222.

According to the allegations of the petition as amended, the arrest of Taylor—

"was wrongful and without warrant or judicial order, or other authority of law, and at said time plaintiff (Taylor) was acting in a quiet, peaceable and law-abiding manner, and he had not committed any breach of the peace, or committed any offense, either a misdemeanor or felony, in or out of the presence of defendants, or either, and that neither of said defendants had reasonable grounds to believe plaintiff (Taylor) had committed a misdemeanor or a felony."

If these allegations be true, and upon demurrer they are so considered, then the acts of the policemen were their individual acts and not their official acts, or acts done by virtue of their office. The policemen had no right to arrest Taylor without a warrant, or other order of a court, unless he had committed a public offense in the presence of the officers, or the officers had reasonable grounds for believing that Taylor had committed an offense. The allegations of the petition show that the arrest of Taylor was made without process of any kind and that Taylor had committed no public offense either in or out of the presence of the officers. The officers had no writ for Taylor; he had committed no public offense, either in or out of their presence, and they had no reasonable grounds to believe that Taylor had committed a felony. There was, therefore, no ground for the exercise of their authority as policemen.

[1] Where there is a duty imposed by law on a police officer, as when he has in his hands a warrant, or a public offense is committed in his presence; if the duty is neglected, or performed in an improper manner, the surety is liable, but if there is no duty imposed upon the officers, as aforesaid, to make an arrest and the officer voluntarily undertakes to do so, and thereby commits a trespass, the surety is not liable. Whatever the policemen did to Taylor, if anything, was their individual acts and not their official act.

[2] In order for the surety to become liable on the bonds of Shields and Shore, their acts must have been done by virtue of their office as policemen, and in order for their acts to have been so done, the acts must have been done in attempting to serve or execute a writ or process, or as a means to that end, or in acting under a statute giving them the right to arrest without a writ or process. If they acted otherwise, and without a writ, or

other process, and without Taylor having committed a public offense in their presence, then they acted as individuals and not as officers. If they acted on their individual responsibility they are liable for the trespass as individuals, but the surety on their official bond is not liable, because the act was not an official act, or done by virtue of their offices.

"When an officer assumes to act under color of his office, having no writ or process whatsoever, or having process which on its face is utterly void, it seems to be the prevailing doctrine that whatever he may do under such circumstances imposes no liability on his sureties. To constitute color of office such as will render an officer's sureties liable for his wrongful acts, something else must be shown besides the fact that in doing the act complained of the officer claimed to be acting in an official capacity. If he is armed with no writ, or if the writ under which he acts is utterly void, and if there is at the time no statute which authorizes the act to be done without process, then there is no such color of office as will enable him to impose a liability upon the sureties in his official bond." *Chandler v. Rutherford et al.*, 101 Fed. 774, 43 C. C. A. 218; *Jones v. Van Bever*, 164 Ky. 80, 174 S. W. 795, L. R. A. 1915E, 172; *Kouns v. Townsend*, 165 Ky. 163, 176 S. W. 989; *Jewell v. Mills*, 3 Bush, 64; *Murrell v. Smith*, 3 Dana, 463; *Calvert v. Stone*, 10 B. Mon. 152; *Commonwealth v. Hurt*, 64 S. W. 911, 65 S. W. 610, 23 Ky. Law Rep. 1171; *Carson's Adm'r v. Dezarne*, 90 S. W. 281, 28 Ky. Law Rep. 761.

"An official bond is not regarded as imposing liability for the purely personal acts of officers not done as a part of or in connection with their official duty, as for example, the receipt of money which it was not the officer's duty to receive, or the arrest of an individual, or the seizure of property without a warrant." 29 Cyc. 1455; 2 R. C. L. 486.

In the case at bar, no writ had been issued for Taylor, and the officers had no process whatever for his arrest, and he had committed no public offense, either in or out of their presence, and therefore there was no excuse whatever for his arrest by Shields and Shore. They were not, therefore, acting in their official capacity or by virtue of their office, because they were not armed with a writ for his arrest, and there was no statute or city ordinance authorizing the arrest of a person who had committed no public offense without a warrant.

It therefore appears Shore and Shields were acting in their individual capacity, and that their surety, Chicago Bonding & Surety Company, is not liable for their willful and wanton trespass, as alleged in the petition as amended, and the general demurrer was properly sustained to the petition as amended; and, the plaintiff failing to plead further as to the Bonding Company, the petition was properly dismissed.

[3] The allegation of the petition that the

policemen Shields and Shore were "acting as police officers of the city of Louisville" is a mere description of the person, or a conclusion of the pleader, and does not sufficiently show that Shields and Shore were acting by virtue of their offices at the time of the alleged assaulting and beating of Taylor.

Judgment affirmed.

(183 Ky. 666)

# CUMMINS et al. v. MULLINS.

(Court of Appeals of Kentucky. March 21, 1919.)

## 1. APPEAL AND ERROR ⇨715(2)—AFFIDAVITS.

On appeal from default judgment, court will not consider affidavits filed in appellate court attacking the sufficiency of service of process, for such affidavits should have been filed before appeal was taken.

## 2. APPEAL AND ERROR ⇨655(1)—MOTION TO STRIKE JUDGMENT FROM RECORD.

A motion on appeal to strike from the record a judgment rendered by the same court upon the same rights of the same parties growing out of the same contract as the judgment upon which the appeal has been taken will be overruled, such motion being for the lower court.

## 3. JUDGMENT ⇨582—CONCLUSIVENESS.

The litigated questions as raised by the pleadings are merged in the judgment.

## 4. JUDGMENT ⇨203—CONFLICTING JUDGMENTS.

Where there are two conflicting judgments rendered by the same court upon the same rights of the same parties growing out of the same contract, that which is later in time will prevail.

## 5. JUDGMENT ⇨203—SUPPLEMENTAL JUDGMENT—EFFECT.

Where, after the rendition of judgment, plaintiff tendered amended petition, alleging that by mistake the full amount due him was not claimed in original petition, pursuant to agreement between the parties to the action, that the execution on the judgment should be returned, and no further steps taken to collect the judgment until the amount due plaintiff was finally determined and a second or supplemental judgment was thereafter rendered, the first judgment is not binding, and the rights of the parties will be determined by the second judgment.

Appeal from Circuit Court, Rockcastle County.

Action by Cam Mullins against Detroit Cummins and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

J. C. Chenault, of Richmond, and O. C. Williams, of Mt. Vernon, for appellants.

Bethurum & Lewis, of Mt. Vernon, for appellee.

QUIN, J. Appellee was elected sheriff of Rockcastle county, and appointed appellant Detroit Cummins as a deputy. Said deputy, on the day of his appointment, executed a bond, with J. H. Cummins, T. J. Nicely, Fritz Kreuger, and Jonas McKenzie as sureties, under the terms of which the parties bound themselves that said deputy would faithfully account to and pay over to the proper persons all public moneys or other things coming into his hands by virtue of said office. The sureties further obligated themselves to make good any defalcation on the part of said Detroit Cummins. Said deputy was later removed from office by the appellee and failing and refusing, when called upon, to make a settlement of his accounts, appellee instituted this suit against said deputy and his sureties, alleging that under the terms of his appointment the said deputy was to receive one-third of the commission for collecting the revenue due the county and state for the year 1914, and was to defray one-third of the expenses of the office; he was also to collect the taxes in the three precincts assigned to him, and be responsible for the collection of all taxes listed on the books in said precincts. Giving him full credit for all returns made and commissions due, and charging him with uncollected taxes, and his proportion of the expenses of the office, together with \$38 collected on an execution, all of which is set out in the petition, appellee alleged there was due him the sum of \$583.14, for which he asked judgment.

Detroit Cummins was the only one of the several defendants to file any pleadings in the case, and, because of their failure to plead, a judgment was entered January 31, 1916, against the four sureties. On March 30th, following, appellee tendered an amended petition, notice of which was served on the said deputy, and in which amendment it was alleged that through mistake the original petition stated that the said deputy was entitled to one-third of the commissions of the office, while, as a matter of fact, he was only entitled to one-fourth, and likewise chargeable with one-fourth of the expenses, and therefore he was indebted to the appellee in the sum of \$778.04, instead of \$583.14, as alleged in the original petition. Said deputy filed a general demurrer to the amended petition, exceptions to the report of the commissioner, to whom a reference had been made to ascertain the amount due, and also filed a motion to strike the amended petition from the files. The demurrer and the motion to strike from the files were overruled, and the cause again referred to the commissioner, and in the order of reference it is stated that by agreement the affirmative matter of the amended petition could be controverted of record, or a written pleading could be filed not later than the June term of court. No further pleadings were filed, and in this state

of the record the lower court on September 4th entered a judgment in favor of appellee for \$778.04, against Detroit Cummins and the four sureties, all of whom, except Nicely, who was a defendant below, have appealed.

A motion was later made by the defendants to set aside this judgment on the ground that same was void. No affidavits were filed in support of the motion; however, in opposition to said motion the appellee filed certain affidavits, in effect stating that summons had been issued on the amended petition and same had been served on the several defendants, and, though the summons was duly served, it had become misplaced. The defendants' motion to set aside the judgment having been overruled, the defendants prayed and were granted an appeal to this court.

[1] Since the record has been filed in this court a number of motions have been made by both parties. Appellants contend there was no service of process on the amended petition, and therefore it has no binding effect upon them. This claim is made in the case for the first time through some affidavits filed in this court with the brief of the appellants on appellee's motion to strike from the files the judgment for \$583.14. This comes too late. It appears from affidavits filed before the appeal was taken that summons on the amended petition was issued and served, and no contradictory affidavits were filed. The affidavits now tendered in this court should have been filed before the appeal was taken. We cannot try a case on affidavits. *Carson's Adm'r v. Dezarne*, 90 S. W. 281, 28 Ky. Law Rep. 761; *Campbell v. Chitwood*, 164 Ky. 638, 176 S. W. 36.

[2] Appellee has filed a motion in this court to strike from the record the judgment for \$583.13, rendered on January 31, 1916, but this motion will have to be overruled; it, too, should have been made in the court below.

[3] We are referred to the case of *Brown v. Van Cleave*, 86 Ky. 381, 6 S. W. 25, 9 Ky. Law Rep. 593, in which it is stated that by the rendition of a final judgment the power of the court is spent, except for the purpose of setting aside the judgment, or modifying it at the same term, as may be provided by the rules of pleading, and the rights of the parties thus settled by the judgment are at an end. The litigated questions as raised by the pleadings are merged in the judgment. To the same effect are *Meadows v. Goff*, 90 Ky. 541, 14 S. W. 535, 12 Ky. Law Rep. 495; *Harding v. Harding*, 145 Ky. 315, 140 S. W. 533. We do not question the correctness of this rule.

But after this first judgment was entered, and before the filing of the amended petition, the said deputy and his four sureties entered into an agreement with the appellee, in which reference is made to the default judgment, and in which it is agreed that—

"The execution on said judgment shall be returned by the order of plaintiff, and no further steps shall be taken to collect said judgment until it is finally determined the amount, if any, that is due the said Cam Mullins [appellee] from the defendant Detroit Cummins; and it is agreed that whatever amount the final judgment in said action shall be against the defendant Detroit Cummins, that the said amount shall be the amount the defendants in said action shall owe and shall pay to the plaintiff, Cam Mullins. \* \* \*

This statement is not controverted by anything in the record, and it is evident the parties thereafter practiced the case, relying upon this contract. Such is indicated by the later proceedings up to the entry of the second or supplemental judgment for the sum of \$778.04.

[4, 5] Where there are two conflicting judgments rendered by the same court upon the same rights of the same parties, growing out of the same contract, that which is later in time will prevail. 23 Cyc. 1105. Hence this court will treat the first judgment to all intents and purposes as of no binding effect. The appellee is entitled to but one recovery, and his rights and the rights of the appellants shall be fixed and determined solely by the provisions of the judgment entered September 4th. This is the only judgment from which an appeal is prosecuted.

The judgment of the lower court is therefore affirmed.

(183 Ky. 591)

**WALKER et al. v. AMERICAN SNUFF CO.**

(Court of Appeals of Kentucky. March 11, 1919.)

**APPEAL AND ERROR §770(1)—MATTERS REVIEWABLE—BRIEF.**

In absence of brief specifying errors for which reversal is asked, it will be presumed that no errors exist, and that judgment below is correct.

Appeal from Circuit Court, Christian County.

Suit by the American Snuff Company against W. M. Walker and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Linton & Clark, of Hopkinsville, for appellants.

James Breathitt, of Hopkinsville, for appellee.

**CLAY, C.** This suit was brought by the American Snuff Company against W. M. Walker and J. L. Humphrey, to enjoin Walker from selling a certain crop of tobacco to Humphrey, and to compel him to deliver the tobacco to plaintiff, pursuant to the terms of

the contract by which he sold and agreed to deliver the tobacco to plaintiff. The suit was based on the claim that a portion of the tobacco was necessary to meet the demands of plaintiff's business, and that the other portion was necessary to enable plaintiff to comply with a contract by which it had sold that portion to others; that other tobacco of like character could not be purchased in the market; that plaintiff had no adequate remedy at law, because damages would not compensate it for the loss incurred; that Walker was insolvent, and that plaintiff would suffer irreparable injury if the injunction were not granted. On final hearing, the relief prayed for was granted, and the defendants appeal.

The case is here without brief for appellants. In the absence of a brief, specifying the errors for which a reversal is asked, it will be presumed that no errors exist, and that the judgment is correct. *Commonwealth v. Lexington & E. Ry. Co.*, 187 Ky. 442, 180 S. W. 532; *Continental Insurance Co. v. Ramsey*, 160 Ky. 441, 169 S. W. 855; *Crawford v. Weidemann*, 158 Ky. 883, 164 S. W. 981; *Brown v. Daniels*, 154 Ky. 267, 157 S. W. 8.

Judgment affirmed.

(183 Ky. 602)

**WILLIAMS v. LOUISVILLE & N. R. CO.**

(Court of Appeals of Kentucky. March 14, 1919.)

**1. CARRIERS §818(1)—CARRIERS OF PASSENGERS—INJURY.**

In an action by a passenger who claimed to have been injured by a heavy suit case thrown on her foot as she was entering a train, held that a verdict for the carrier was not flagrantly against the evidence.

**2. APPEAL AND ERROR §1003—REVIEW—SCOPE.**

The appellate court will not reverse a verdict merely because it is against the weight of evidence, but it must appear to be flagrantly against the weight of the evidence before the determination of the jury will be disturbed.

**3. TRIAL §189(1)—JURY QUESTION—WEIGHT OF EVIDENCE.**

The weight of the evidence is for the jury.

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

Action by Sarah Williams against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

B. F. Graziana, of Covington, for appellant.

S. D. Rouse, of Covington, and B. D. Warfield, of Louisville, for appellee.

QUIN, J. There is but one question to be decided on this appeal, viz.: Is the verdict flagrantly against the evidence?

The appellant became a passenger on a train of the appellee company, at Latonia, Ky., June 24, 1916, having purchased a ticket to Glencoe, Ky. She got on the rear end of the first coach, and, having reached the platform of the car, some one directed her to turn toward the right, which would be in the direction of the ladies' coach. This she did, and as she started to enter the door of the latter coach she claims that an employé of the company either threw or pitched a heavy suit case upon the platform, which fell upon her right foot, thereby producing the injury for which she sought damages.

[1] The testimony of the appellant is corroborated by her daughter, who was with her at the time. These are the only two witnesses testifying on this point. The flagman, in behalf of the appellee, in stating what happened on the occasion complained of by the appellant thus testifies:

"Q. Explain to the jury just what your duty as flagman was on that train. A. At this station to receive passengers and assist them with their baggage. This lady was boarding it, on the steps coming up on the lower side. I was helping some other passengers up, I put up a suit case like that. As I set it down she set her foot under it, she was behind on the platform, like this; she put her foot under it, pulled it out, and walked away, never said a word to me."

At another point he said that he first observed appellant "as she pulled her foot out from under this suit case and stepped in the car." This is all the evidence in the case showing how the injury complained of occurred.

The case was submitted to the jury under proper instructions, and there is no complaint as to these; the sole point raised by appellant, as above stated, being that the verdict is contrary to the evidence.

[2] Counsel relies upon six cases, and we think these cases support the conclusion we have reached, viz. that the judgment should be affirmed, because, it is well settled in this state, and we have written it in a number of cases, that the court will not reverse a verdict of the jury merely because it might

be against the weight of the evidence, it must be more; it must be clearly and palpably against the evidence, or, as otherwise expressed, "flagrantly against the evidence." This is the rule laid down in the first case relied upon by appellant, viz. *Adams Express Co. v. Tucker*, 161 Ky. 741, 171 S. W. 428. The court in that case reversed the lower court on the ground that the verdict was clearly and palpably against the weight of the evidence, because, as against the practically unsupported testimony of Tucker that the package he shipped contained diamonds, Mr. Elwood Hamilton testified that in a conversation with Tucker at about the time he was supposed to have shipped the diamonds Tucker stated he had pawned them, and could get them if sufficient money was forthcoming. And three prominent attorneys of the Frankfort bar testified that Tucker's character for truthfulness was bad. Furthermore, the consignee testified that when the package was opened the diamonds were not in it, and the agent of the company testified that the package was sealed in Tucker's presence, so it is manifest that the court was clearly right in reversing this judgment.

In the other cases cited, viz. *Thomson v. Thomson*, 93 Ky. 435, 20 S. W. 373, 14 Ky. Law Rep. 513, *Urso v. Unverzagt*, 2 Ky. Law Rep. 228, *McClain v. Esham*, 17 B. Mon. 146, and *L. & N. R. Co. v. Graves*, 78 Ky. 74, the same rule is stated, and in each of these reversal was denied because there was evidence to support the verdict. *Bell v. Keach*, 80 Ky. 42, is not in point.

Applying this principle of law to the case before us, we are of the opinion that the evidence here is sufficient to support the verdict. The flagman denied that he either threw or pitched the suit case on the car platform; he explained exactly what he did, and how the case was placed there. The jury heard the evidence; they did not believe the theory advanced by the appellant and her witnesses. It is not for this court to say that in so doing they erred.

[3] The jury having concluded from defendant's evidence that it was not negligent, we are powerless to set aside a judgment entered pursuant to their verdict. It is the province of the jury, not the court, to weigh the evidence.

The judgment is affirmed.

(183 Ky. 522)

**HAYES v. WEST VIRGINIA OIL GAS & BY-PRODUCTS CO.**

(Court of Appeals of Kentucky. March 18, 1919.)

**1. APPEAL AND ERROR — §845(2) — STATEMENT OF FACTS—SUFFICIENCY.**

Where the stipulation of facts does not disclose in what state contracts were made and executed by which a corporation acquired leases on oil lands, the validity of the leases, depending upon their being made where plaintiff corporation was authorized to do business, will not be decided.

**2. CORPORATIONS — §861(5)—FOREIGN CORPORATIONS — FAILURE TO COMPLY WITH STATUTE—EFFECT.**

A foreign corporation, failing to comply with Ky. St. § 571, enacted under Const. § 104, by designating an agent within the state upon whom process might be served, could not lawfully transact business, nor enforce any right claimed under contract made within the state, nor would it acquire such right by compliance with the statute during pendency of action.

Appeal from Circuit Court, Lawrence County.

Suit by the West Virginia Oil Gas & By-Products Company against Wilson Hayes. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to set aside the judgment granting the injunction.

Clyde L. Miller, of Louisa, for appellant.  
W. D. O'Neal, of Louisa, for appellee.

**HURT, J.** The appellant, Wilson Hayes, is the owner of a tract of land in Lawrence county. On August 3, 1915, he executed and delivered to A. J. Dalton, trustee, a lease upon his lands, by which he conveyed, to the grantee, the oil and gas under the surface of the lands and the right to enter thereon, and bore for, and remove same, etc. Thereafter A. J. Dalton, trustee, sold and assigned the benefits and rights, under the lease, to the appellee, West Virginia Oil Gas & By-Products Company. Under this lease, the appellee entered upon the lands and bored for oil successfully, but in the meantime a controversy had arisen between appellant, Hayes, and the heirs of Rice, Hatcher, and Rice, as to the ownership of the oil, etc., in the lands, and this controversy resulted in a suit, at law, between Hayes and the Rice-Hatcher-Rice heirs, and in a judgment of the court, by which it was decided that the latter were the owners of the oil and minerals in the lands with the exception of coal. Thereupon the heirs of Rice, Hatcher, and Rice executed a lease to A. J. Dalton, trustee, by which they conveyed to him all their rights to the oil

and minerals in the lands, and he assigned the benefits of his conveyance to the appellee. Thereafter the appellant and appellee engaged in a controversy, as to their respective rights in the premises, which resulted in appellant interfering with the appellee in its use of the land and the exercise of certain privileges thereon, which it claimed under its leases. The appellee brought an equitable action to restrain appellant from interfering with and obstructing it in its operations, and obtained a temporary restraining order, and, as final judgment in the action, an order permanently enjoining the appellant from the acts complained of, and from this judgment he has appealed.

[1] One of the defenses offered by appellant was that the appellee was a corporation and had never complied with the requirements of section 571, Ky. St., by filing, "in the office of the secretary of state a statement, signed by its president or secretary, giving the location of its office or offices in this state, and the name or names of its agent or agents thereat upon whom process can be served." For the purpose of a trial of the action, the parties then made and subscribed an agreement as to the facts touching their controversy, and therein it was agreed that the appellee was the assignee of Dalton, trustee, of the lease executed by appellant to him, and also of the lease executed by the heirs of Rice, Hatcher, and Rice, and that these leases authorized the appellee to enter upon the lands, and to bore for oil, etc., and that prior to the institution of the action the appellant interfered with appellee in its operations, and forbade it to enter upon the lands for the purposes of the operations. It was also agreed that at the time appellee acquired the leases, and at the time the appellant committed the acts complained of, the appellee "was engaged in leasing, buying, owning, and operating oil and gas properties in Lawrence county, Ky., and had failed to designate a process agent, it being a West Virginia corporation, but, after the filing of the amended answer herein, setting up such default, the appellee did, on March 30, 1917, designate a process agent as required by section 571, Ky. St." The appellee by its brief insists that the contract, by which it acquired the leases, was made and executed wholly in the state of West Virginia, wherein the corporation is domiciled, and that it acquired the leases by assignment from A. J. Dalton, trustee, who, as an individual, had acquired the leases in Kentucky, and for that reason the leases are not invalid, but the stipulation as to the facts does not contain a statement to the above effect, and neither does it contain any statement as to where the contract was made and executed by which the corporation



acquired the leases, and for that reason we do not decide nor make any intimation as to the validity or invalidity of the leases, and neither is such question before us upon the record, as the appellant only contests the right of the corporation to enforce rights which it claims to have growing up out of the lease, or to complain in court of any infraction of any rights which it might have under the leases, if it had complied with the statutory requirements. All the acts of appellant which it complains of were committed before it had complied with the statute, and at the time of the institution of its suit it had not then complied with it. The statute, *supra*, very broadly declares that "it shall not be lawful for any corporation to carry on any business in this state," until it shall have complied with the requirements of that statute, and it imposes a penalty upon a corporation which "shall transact, carry on or conduct any business in this state," without a previous compliance with the requirements of the statute, thereby making such conduct upon its part illegal. Hence it is immaterial whether the leases are valid or invalid, as the corporation could not lawfully do any business with reference to them, nor enforce any right claimed by it under them, nor appeal to the courts of this state to enforce an asserted right upon its part to conduct a business, which the law forbids it to do. The reasons and purposes of the statute (section 571, *supra*) have been frequently declared, and a compliance with its provisions is neither onerous nor complex. Most of the states have a similar statute. The duty of enacting such a statute was imposed upon the legislative department by section 194 of the Constitution. The effect of the statute upon those corporations which decline or neglect to comply with its provisions has been heretofore declared by the decisions of this court until it has become the settled law of the commonwealth. *Oliver Co. v. Louisville Realty Co.*, 156 Ky. 628, 161 S. W. 570, 51 L. R. A. (N. S.) 293, Ann. Cas. 1915C, 565; *Fruin-Colnon Contracting Co. v. Chatterton*, 146 Ky. 504, 143 S. W. 6, 40 L. R. A. (N. S.) 857; *Bondurant v. Dahnke-Walker Milling Co.*, 175 Ky. 774, 195 S. W. 139.

[2] Nor would the fact that before the judgment in the trial court, the appellee did comply with the requirements of the statute in any way affect its right to maintain a suit, because of claimed interferences with its business prior to that time, and to invoke the aid of the courts in the carrying on a business which it was expressly forbidden by statute to do. In *Fruin-Colnon Contracting Co. v. Chatterton*, *supra*, it was held that a corporation, which had made a contract, prior to complying with section 571, *supra*, could not make that contract enforceable by a compli-

ance with the statute thereafter. To hold that a corporation could decline or neglect to comply with the statute until it desired to invoke the aid of the courts about something, and that its compliance then would have the effect of making its acts previous to that time valid, and its claims enforceable, which it was theretofore exercising unlawfully, would destroy the purpose of the statute, and any beneficial effect which it was intended to have. In the instant case all of the things complained of were such as transpired previous to the bringing of the action, and to the compliance with the statute by the appellee. One cannot be heard to invoke the aid of the courts in assisting it to carry on a business which the law makes illegal and forbids one to do.

The judgment is therefore reversed and cause remanded, with directions to set aside the judgment, granting the injunction, and for proceedings not inconsistent with this opinion.

(183 Ky. 604)

SCOTT et al. v. SCOTT et al.

(Court of Appeals of Kentucky. March 14, 1919.)

1. COVENANTS §180(4) — DAMAGES FOR BREACH—COSTS AND COUNSEL FEES.

Relative to the right of a grantee to recover of his grantor for breach of covenant of warranty, costs of resisting correction of the record of a deed, such correction being a necessary step that a third person's remainder interest in the land might be quieted, is an expense incurred in defense of the title.

2. ARBITRATION AND AWARD §10—EFFECT OF AGREEMENT AS ESTOPPEL.

An arbitration agreement, not having been carried out, but having been abandoned, furnishes no ground for estoppel to insist on warranty.

3. TRUSTS §95 — CONSTRUCTIVE TRUSTS — FRAUD.

Persons having only a life estate, not only executing a deed with covenant of general warranty, purporting to convey the entire title, but fraudulently representing that they owned such title, obtained by actual fraud the portion of the purchase money for which there was no consideration, and to that extent became trustees of the grantees; the trust attaching to the land bought by the grantors with the money, entitling the grantees to a lien thereon.

4. LIFE ESTATES §17 — IMPROVEMENTS — CHARGE ON REMAINDERMEN.

A life tenant, and so a purchaser from him, notwithstanding an honest belief of ownership of the fee, is not entitled to a lien as against the remaindermen for enhancement of the property by improvements.

### Appeal from Circuit Court, Pike County.

Suit by Daisy Scott and others against John W. Scott and others. From part of the judgment, defendants John W. Scott and wife appeal, and from another part thereof, defendants Crit Scott and wife prosecute a cross-appeal. Affirmed on cross-appeal, and reversed, with directions, on original appeal.

Childers & Childers, of Pikeville, for appellants.

Roscoe Vanover and Willis Staton, both of Pikeville, for appellees.

CLAY, C. This is the second appeal of this case. The opinion on the former appeal may be found under the title of Scott v. Scott, 172 Ky. 658, 180 S. W. 143.

On November 30, 1891, Crit Scott conveyed a tract of land in Pike county to his wife, Pricy Scott, and her bodily heirs by Crit Scott. On January 20, 1902, Pricy Scott and Crit Scott conveyed the same land to John W. Scott and wife by deed containing a covenant of general warranty, and purporting to convey the fee-simple title. Thereafter Daisy Scott and others, children of Pricy Scott and Crit Scott, brought suit against John W. Scott and wife to correct the record of the deed of November 30, 1891, from Crit Scott to his wife, and to quiet their title to their remainder interest in the land. On the hearing below, the petition was dismissed, but on appeal it was held that the plaintiffs were entitled to have the record of the deed corrected, and their title to the remainder interest quieted. At the same time the court declined to pass on the liability of Pricy Scott and Crit Scott under their covenant of warranty, or on the question of waste and improvements, but remanded the case, with directions to the chancellor to consider and pass on these questions after the parties had been given an opportunity to take further proof, if they desired. On the return of the case, further evidence was heard as to the amount of timber cut and removed by John W. Scott and wife. On final hearing, plaintiffs were given judgment against the defendants John W. Scott and wife, for the sum of \$200 for timber cut and converted to their own use. John W. Scott and wife were given judgment against Crit Scott for the sum of \$175 for costs and attorney's fees incurred in defending the title conveyed to them by Crit Scott and Pricy Scott. It was further adjudged that Pricy Scott's life interest in the \$1,000, paid as consideration for the land in controversy, was worth \$702.50, and for the balance of \$297.50, with 6 per cent. interest thereon from January 20, 1902, until paid, John W. Scott and wife were given judgment against Crit Scott and were awarded a lien therefor on the land purchased by Crit Scott with the purchase money and conveyed to Pricy Scott. The claim of

John W. Scott and wife for improvements was disallowed. From that part of the judgment, denying their claim for improvements and adjudging plaintiffs a recovery of \$200 for timber cut, and awarding them only the sums of \$297.50 and \$175 for breach of warranty, John W. Scott and wife appeal. From that portion of the judgment awarding John W. Scott and wife the sum of \$297.50 and a lien on the land of Pricy Scott, Crit Scott and Pricy Scott prosecute a cross-appeal.

The only evidence as to the amount of timber cut and removed by John W. Scott and wife is that prior to the suit he cut 42 trees, of the value of \$1 per tree, and that after the suit was brought he cut 47,565 feet of lumber, worth \$2 per thousand in the tree, or the sum of \$95.13. Under this proof, plaintiffs were entitled to recover \$42 plus \$95.13, or the sum of \$137.13, and no more, and it was error to render judgment in their favor for \$200.

[1] John W. Scott testified that the costs and counsel fees, incurred in defending the title, amounted to \$209, and there is no evidence to the contrary. The chancellor seems to have proceeded on the theory that, as a portion of this cost was incurred in resisting the correction of the deed, Crit Scott should not be held liable on his warranty for that, and therefore gave judgment for only \$175. As a matter of fact, however, the correction of the record of the deed was a necessary step, in order that plaintiffs' title to the remainder interest in the land might be quieted. That being true, the whole expense was incurred in defense of the title, and John W. Scott and wife are entitled to recover on the warranty of Crit Scott and wife the amount so expended, or the sum of \$209.

[2] But it is suggested that there should be no recovery on the warranty, since John W. Scott and wife are estopped to insist on the warranty, because they and their grantors agreed to rescind the trade and submit the matter to arbitration. It does not appear, however, that the arbitration agreement was ever carried out. On the contrary, it was abandoned. That being true, there is no ground for estoppel.

[3] It is further insisted on the cross-appeal, that John W. Scott and wife should not have been adjudged a lien on the tract of land purchased and conveyed to Pricy Scott for the \$297.50 and interest, or that portion of the purchase price of the tract in controversy for which they received no consideration. In Pomeroy's Eq. Jur. § 155, the author says, citing many cases:

"If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property

in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

And again, in section 1053:

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influences, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interests, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer."

And, citing the foregoing principles, the United States Supreme Court, in the case of *Angle v. Chicago, St. Paul, M. & O. R. Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55, laid down the rule that, whenever the legal title to property has been obtained through actual fraud, equity impresses a constructive trust upon the property thus acquired, in favor of one who is truly and equitably entitled thereto. Here the grantors, Crit Scott and Pricy Scott, not only conveyed the land purchased by John W. Scott and wife by deed containing a covenant of general warranty, and purporting to convey the entire title, but they fraudulently represented that they were the owners of the entire title. Furthermore, the evidence leaves no doubt that the purchase money which they received was invested in the tract of land conveyed to Pricy Scott. That being true, they obtained by actual fraud that portion of the purchase money for which there was no consideration. To that extent, they became trustees of John W. Scott and wife, and the trust attached to the land purchased with the money, thus entitling John W. Scott and wife to an equitable lien thereon.

[4] There is no basis for awarding John W. Scott and wife a lien on the land in controversy for the improvements to the extent that they enhanced the vendible value of the land. It is the well-established rule in this state that a life tenant, even though he may believe in good faith that he is the owner of the fee, is not entitled to a lien as against the remaindermen, for the enhancement of the property by reason of his improvements,

and a purchaser from the life tenant, though honestly believing that he acquired the fee, is entitled to no greater rights than the life tenant himself. *Wilson v. Hamilton et al.*, 140 Ky. 327, 131 S. W. 32; *Gray v. Soden*, 120 Ky. 277, 86 S. W. 515, 27 Ky. Law Rep. 673; *Frederick v. Frederick's Adm'r*, 102 S. W. 858, 31 Ky. Law Rep. 583, 13 L. R. A. (N. S.) 514.

On the cross-appeal the judgment is affirmed. On the original appeal the judgment is reversed, with directions to enter judgment in conformity with this opinion.

(133 Ky. 651)

# BRYANT v. MEADORS et al.

(Court of Appeals of Kentucky. March 21, 1919.)

## 1. INJUNCTION $\Leftrightarrow$ 35(1)—TRESPASS—TITLE TO SUPPORT ACTION.

Plaintiff, suing to enjoin defendant from trespassing and cutting trees upon her land, must recover upon the strength of her own title, and not upon any weakness of that of defendant, where only plaintiff's title is put in issue.

## 2. PUBLIC LANDS $\Leftrightarrow$ 151(6)—PATENTS—EXCLUSIONS—"LAND PREVIOUSLY SURVEYED."

Patent excluding "all land previously surveyed" held to refer only to subsisting legal entries and surveys.

## 3. PUBLIC LANDS $\Leftrightarrow$ 151(7)—PATENTS—EXCLUSIONS—ENTERED—SURVEYED—PATENTED.

Entries, surveys, or patents are invalid as to "lands previously entered, surveyed, or patented," under Ky. St. § 4704, only where previous entry and survey are subsisting legal entries and surveys.

## 4. PUBLIC LANDS $\Leftrightarrow$ 151(8)—PATENTS—CONFLICTING CLAIMS—CURATIVE ACTS.

Where warrant was issued February 25, 1851, in consideration of a bond, and not for cash, as required by Laws 1834-35, c. 875, and 1836-37, c. 370, and irregularity was not cured under special acts of March 5, 1850 (Laws 1849-50, c. 870), and March 8, 1851 (Laws 1850-51, c. 838), by payment in money or labor on or before March 1, 1852, the survey made pursuant to warrant was not a legal subsisting survey when land was subsequently surveyed and patented, and land was not excluded from subsequent survey, under Ky. St. § 4704, or by provision of patent excluding "land previously surveyed."

## 5. PUBLIC LANDS $\Leftrightarrow$ 151(6)—PATENTS—COLLATERAL ATTACK.

In action to enjoin trespass, where defendant's title to land is not in issue, the validity of patent under which defendant claims may be attacked, where validity of plaintiff's patent, in so far as it embraced the land involved, depended upon whether defendant's survey was a valid subsisting survey when plaintiff's patent was issued.

6. PUBLIC LANDS ⇨151(6)—PATENTS—COLLATERAL ATTACK.

Where patent purports on its face to have been issued under certain warrant and certain survey, the warrant and survey may be read with patent to show its invalidity upon a collateral attack.

7. JUDGMENT ⇨533—OPERATION—INVALIDITY OF PATENT—RIGHTS OF PURCHASERS.

Court's decision declaring survey illegal will not disturb vested interests of owners of land covered by survey, where such owners derived title through grantor, claiming under subsequent valid patent and who made no claim to such vested interests.

8. JUDGMENT ⇨712—CONCLUSIVENESS—PARTIES CONCLUDED—VALIDITY OF PATENT.

In action to enjoin trespass, plaintiff is not estopped from denying validity of patent under which defendant claimed by reason of former action in which an attack upon its validity failed, and of which plaintiff or her agent must have known, where plaintiff was not a party to such former action.

Appeal from Circuit Court, Whitley County.

Action by Roberta S. Bryant against John R. Meadors and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with instructions.

Stephens & Steely, of Williamsburg, for appellant.

Tye & Siler and Rose & Rope, all of Williamsburg, for appellees.

CLARKE, J. [1] The appellant, who was plaintiff below, sought by this action to enjoin appellees from trespassing and cutting trees upon about 65 acres of land adjoining the town of Pine Knot, now in McCreary, but formerly in Whitley county; and although she must of course recover upon the strength of her own title, and not upon any weakness of that of the defendant, since only her title is put in issue, strangely enough, the question involved is whether or not a survey made December 21, 1853, upon which on December 10, 1872, a patent for 200 acres was issued to Jacob E. Harmon, through whom the defendants claim title, was a valid survey. This is true because the patent under which plaintiff claims was issued October 18, 1855, on a survey made August 30, 1854, to Wait and Hudson, for 9,600 acres, nearly 20 years before the Harmon survey was carried into grant, and the land in controversy is shown to be within its exterior lines and outside its exclusions, unless the prior Harmon survey is an exclusion or pro tanto invalidates the Wait and Hudson patent which has been upheld as a valid patent by this court many times. See *West v. Chamberlain*, 109 Ky. 194, 58 S. W. 584, 22 Ky. Law Rep. 687; *Bry-*

*ant v. Stephens*, 82 S. W. 423, 26 Ky. Law Rep. 718; *Bryant v. Strunk*, 89 S. W. 549, 28 Ky. Law Rep. 556; *Steele v. Bryant*, 132 Ky. 569, 116 S. W. 755; *Bryant v. Prewitt*, 132 Ky. 799, 117 S. W. 343; *Slaven v. Dority*, 142 Ky. 640, 184 S. W. 1166; *Watts v. Bryant*, 144 Ky. 14, 137 S. W. 790; *Bryant v. Kentucky Lumber Co.*, 144 Ky. 755, 139 S. W. 1069; *Bryant v. Strunk*, 151 Ky. 97, 151 S. W. 381; *Ford v. Bryant*, 158 Ky. 97, 164 S. W. 308; *Bryant v. Arnold*, 161 Ky. 736, 171 S. W. 403; *Boyatt v. Stearns Coal Co.*, 178 Ky. 674, 199 S. W. 773.

[2, 3] Both patents cover the land in controversy, and the Wait and Hudson patent by its terms excludes "all land previously surveyed." But whether this were true or not, it would have been void under section 4704 of the Kentucky Statutes, as to all land included which had been previously surveyed, and it is insisted by counsel for appellees that as the survey for their patent was made December 21, 1853, and appellants' survey was not made until August 30, 1854, nor his patent issued until October 18, 1855, their land was excluded from his patent both by its terms and by the statute. This, however, is not necessarily true, because it is only subsisting legal entries and surveys that are excluded by such a reference in a patent, and for which the statute invalidates subsequent entries, surveys, or patents. *Stansberry's Heirs v. Pope*, 6 J. J. Marsh. 192; *Bryant v. Kentucky Lumber Co.*, 144 Ky. 755, 139 S. W. 1089; *Ford v. Bryant*, 158 Ky. 97, 164 S. W. 308; *Mason v. Fuson*, 171 Ky. 111, 186 S. W. 891; *Stephens v. Terry*, 178 Ky. 129, 198 S. W. 768.

It therefore becomes necessary to determine whether or not defendant's survey made by Harmon December 21, 1853, was a valid survey, in order to determine the validity of plaintiff's title under a subsequent survey and patent. The Harmon patent recites:

"That by virtue and in consideration of an order from the Whitley county court, there is granted by the said commonwealth unto Jacob E. Harmon, assignee of Cox, Williams and McLancy, a certain tract or parcel of land containing 200 acres, by survey bearing date of 21st day of December, 1853, lying and being," etc.

The order from the Whitley county court, referred to above as authority for the issuance of the patent as shown by the records of the Kentucky land office, is Whitley county land warrant No. 464, and shows upon its face that it was issued on February 25, 1851, in consideration of a bond for \$1,000, and not for cash as required by the acts of the Legislature of 1835 (Acts 1834-35, c. 875) and 1837 (Acts 1836-37, c. 370), which authorized the issuance of such warrants by the county courts as the first necessary step in acquiring title by patent from the common-

wealth to vacant lands. It having been brought to the attention of the Legislature that a great many such warrants had been issued by the Whitley county court for bonds instead of cash, the Legislature by special acts approved March 5, 1850 (Acts 1849-50, c. 370), and March 8, 1851 (Acts 1850-51, c. 388), legalized all such warrants irregularly issued by the Whitley county court, upon condition that they actually be paid for in money or labor, and be filed together with any plat or certificate or survey made thereon, with the register of the land office, on or before March 1, 1852.

In considering these acts and in determining the validity of the precise warrant No. 464 issued by the Whitley county court, this court, in the case of Bryant v. Kentucky Lumber Co., *supra*, said:

"The plain purpose of this act [the one approved March 8, 1851] was to require all these matters to be closed up by March 1, 1852; this is, the parties who had made these surveys were given a year to pay the price and take out their grants. The necessary meaning of the statute is that they were required to pay the price and register their surveys within the time specified and that they could not do so thereafter."

[4] This court again in the case of Stephens v. Terry, *supra*, held Whitley county land warrant No. 464 invalid. It is therefore apparent that the survey made December 21, 1853, upon which the Harmon patent rests, was not a valid subsisting survey when the Wait and Hudson survey was made and the patent issued thereon, and therefore neither excluded nor invalidated any part of the land included in the Wait and Hudson survey and patent; and of like impotency was the payment to the Whitley county court September 1, 1872, that portion of the money due for the Harmon survey upon the bond upon which warrant No. 464 was illegally issued, as this was done long after the expiration of the time given by the Legislature for making payments to legalize such warrants.

But counsel for appellees insist that since this is a collateral attack upon their patent, which is regular upon its face, its validity cannot be questioned in this action. They overlook the fact, however, that it is not the validity of their patent that is in question here, but the validity of plaintiff's patent, so far as the land in question is concerned, depends upon whether their survey was a valid subsisting survey so as to constitute an exclusion by the terms of plain-

tiff's patent and pro tanto render same void under section 4704 of the Statutes.

[5, 6] Hence there is no place here for the application of the rule that a patent valid upon its face cannot be collaterally attacked; even if it were otherwise, this case falls within one of the recognized exceptions to that rule, since defendant's patent upon its face purports to have been based, and is shown by the records to have been issued upon Whitley county land warrant No. 464, and the survey of December 21, 1853, and, as stated in Bryant v. Kentucky Lumber Co., *supra*, these papers may be read with the patent to show its invalidity upon a collateral attack.

[7] We are also urged by counsel for appellees not to declare their survey illegal upon the ground that to do so will disturb numerous and valuable vested interests of many citizens of the town of Pine Knot, which is largely built upon the northern half of the Harmon patent; but even if this were true, that fact could not under any principle of law with which we are familiar control our decision of this case to which none of the owners of these vested interests is a party; however, as a matter of fact from the evidence in this case counsel's fears do not seem to be warranted, because plaintiff's son and her only witness testifies that his mother and those under whom she claims many years ago sold and conveyed the surface of the land upon which Pine Knot is largely built, and that the parties who now own and have improved this land claim and hold same by title derived through her and her vendors, and that she now claims no interest in any part of the surface of the Harmon patent, except that involved here.

[8] Another contention advanced by appellees is that because in an old suit to which plaintiff was neither a party nor privy, an attack upon the validity of the Harmon patent failed, she is estopped to deny its validity because she or her agents in charge of her property in the vicinity must have known of this contest and its outcome; but these facts are clearly insufficient to constitute an estoppel, even if one had been pleaded, which was not done.

These conclusions render it unnecessary for us to consider the plea of adverse possession by which plaintiff also attempts to establish title to a part of the land in controversy.

For the reasons indicated, the judgment is reversed, and the cause remanded, with instructions to grant plaintiff the relief asked.

(128 Ky. 696)

**KENTUCKY RIVER TIMBER & COAL CO.  
v. MOSELY.**

(Court of Appeals of Kentucky. March 28, 1919.)

**1. EVIDENCE ¶519 — EXPERT EVIDENCE  
—“FLOATING TIDE.”**

As to whether a tide which occurred was a “floating tide,” within a log-driving contract, the opinions of persons, who qualified as experts and stated the facts on which their opinions were based, were admissible; the subject not being one of such common knowledge that the jury, on hearing the facts, could form a reasonable opinion for themselves.

**2. LOGS AND LOGGING ¶15(1)—LOG-DRIVING CONTRACT—“FLOATING TIDE.”**

Plaintiff, by a log-driving contract given one more “floating tide” for doing the work, clearly contemplating one sufficient to enable him, by exercise of reasonable diligence, to float the logs to destination, was not estopped, by employing men and attempting, with partial success only to float the logs, on the occurrence of tide, to deny that it was a “floating tide”; whether it was being a question of fact, depending on the condition of the streams, and not on his judgment or conduct in the matter, and his action in no wise prejudicing defendant's rights.

Appeal from Circuit Court, Leslie County.

Action by E. L. Mosely against the Kentucky River Timber & Coal Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Cleon K. Calvert, of Hyden, for appellant.

Lewis & Lewis, of Hyden, Jas. H. Jeffries, of Pineville, and B. B. Golden, of Barboursville, for appellee.

CLAY, C. Plaintiff, E. L. Mosely, brought this suit against the Kentucky River Timber & Coal Company to recover the sum of \$950, alleged to be due for services rendered in floating and delivering to defendant certain sawlogs. From a verdict and judgment in his favor for \$919.40, the defendant appeals.

In the month of August, 1916, defendant had 12,132 logs in Beech fork and in that part of Middle fork of the Kentucky river, lying between the mouth of Beech fork and the mouth of Greasy fork. These logs plaintiff agreed to deliver to defendant at the mouth of Greasy fork. By the terms of the contract, he was to receive 12 cents for each log delivered, but was to pay defendant as liquidated damages 50 cents for each log not delivered by the 1st day of July, 1917. Under this contract, plaintiff delivered 8,761 logs and there remained undelivered on July, 1917, 5,371 logs. Because of the nondelivery of the latter logs, plaintiff became indebted to the defendant in the sum of \$2,685.50. Thereupon plaintiff and defendant

adjusted their differences by executing another contract, by the terms of which plaintiff was to have one “floating tide” by which to deliver the undelivered logs. If he delivered a sufficient number of the undelivered logs, when added to those already delivered, to exceed, at 12 cents per log, the amount of his indebtedness, then defendant was to pay him such excess. On the other hand, if the number so delivered, when added to those already delivered, did not exceed his indebtedness, then defendant was to cancel the indebtedness. On December 27, 1916, following, the streams rose and plaintiff succeeded in floating and delivering 2,138 of the logs in question. Another tide occurred on January 4, 1917, when plaintiff floated and delivered practically all of the remainder of the logs.

It is conceded that the liability of the defendant turns on whether the tide of December 27, 1916, was the first “floating tide” that occurred after the execution of the contract, and this was the only issue submitted to the jury.

According to the evidence for plaintiff, the waters of Beech fork and Middle fork, where the logs were situated, rose on the morning of December 27th, but soon subsided. Plaintiff, with the aid of a large number of employes, floated and delivered more than 200 of the logs in question. The tide at that time did not exceed  $2\frac{1}{2}$  feet in height, whereas it was necessary to have a rise of at least 4 feet.

The logs delivered by plaintiff were only small logs, and he was able to deliver them only after great effort on the part of his men in rolling and pushing them over the rock bars and through the shoals and shallow places of the stream. Plaintiff and several other witnesses, who were present and observed the streams, and who were practical log men, gave it as their opinion that the tide in question was not a “floating tide.”

[1] It is first contended that the court erred in permitting the witnesses to give their opinions as to the character of the tide; it being argued that their statements, that the tide was not a “floating tide,” were mere conclusions, and therefore inadmissible. It appears not only that the witnesses were experienced log men, having a special knowledge of the subject, but were present and observed the streams on the day in question, and that some of them actually assisted plaintiff in the work of floating the logs. The facts on which their conclusions were based were within their personal knowledge, and were stated to the jury. In our opinion, the subject was not one of such common knowledge that the jury, upon hearing the facts, could have formed a reasonable opinion for themselves. Hence we conclude that it falls within the broad field of opinion evi-

dence, and since the witnesses qualified as experts and stated the facts on which their opinions were based, their opinions were properly received in evidence.

[2] It is further insisted that as plaintiff employed hands and attempted to float the logs on December 27th, and did succeed in floating a large number of them, and thereby construed and treated the tide of that day as a "floating tide," he was bound by his conduct, and could not thereafter be heard to say that it was not a "floating tide." This reasoning we are unable to approve. The contract provided that plaintiff should have one more "floating tide," and the parties clearly contemplate that a "floating tide" was one sufficient to enable plaintiff, by the exercise of reasonable diligence, to float the logs to their destination.

The determination of the question was not left to plaintiff. Whether the particular tide was a "floating tide" was a question of fact depending on the condition of the streams and not on plaintiff's judgment or conduct in the matter. Plaintiff's failure to float the logs was not due to any lack of diligent effort, but was due to the insufficiency of the tide. His action in no wise prejudiced the rights of the defendant. When the tide proved insufficient, he was not required to go on with the work, and his mere mistake of judgment in supposing that the tide was sufficient, and in making a bona fide attempt to float the logs, did not preclude him from asserting that the tide was not sufficient.

Judgment affirmed.

(123 Ky. 571)

# LOUISVILLE & N. R. CO. v. McINTOSH.

(Court of Appeals of Kentucky. March 11, 1919.)

## 1. MASTER AND SERVANT §258(9)—INJURY TO SERVANT — NEGLIGENCE — PROXIMATE CAUSE.

Petition in action for injuries sustained by plaintiff section hand, while hurrying to signal an oncoming train at night in obedience to command of foreman, was insufficient, where it failed to allege that injuries were due to obstruction upon track or to negligent command of foreman.

## 2. MASTER AND SERVANT §101, 102(2)—INJURY TO SERVANT—INABILITY OF MASTER.

An employer is not an insurer of the safety of his employé, and is liable only for such injuries as are attributable to negligence in performance of duties owed to the employé.

## 3. MASTER AND SERVANT §263—CONTRIBUTORY NEGLIGENCE—FAILURE TO DENY—DIRECTION OF VERDICT.

In action for injuries sustained by plaintiff section hand, while hurrying to signal an oncoming train at night in obedience to command

of foreman, the defense of contributory negligence was affirmative, and where plaintiff did not deny it, by reply or otherwise, verdict should have been directed for defendant.

## 4. MASTER AND SERVANT §206—RISKS ASSUMED.

An employé assumes all the ordinary risks which are incident to the employment.

## 5. EVIDENCE §8—COMMON KNOWLEDGE—DECAY OF WOOD.

Cross-ties of a railroad are usually made of wood, and all men know that after a time the wood becomes decayed on the sides, without rendering the ties less serviceable for their purpose.

## 6. EVIDENCE §20(2) — COMMON KNOWLEDGE —SMOOTHNESS OF RAILROAD TRACK.

It is well known that the ties of a railroad track usually project above the surface of the track.

## 7. MASTER AND SERVANT §217(4)—INJURY TO SERVANT—KNOWN DANGERS.

An experienced section hand knows that in passing along the track he must encounter ties which are decayed upon the sides and ties which project above the surface of the track, as well as other slight obstacles.

## 8. MASTER AND SERVANT §210(4)—INJURY TO SERVANT—ORDINARY RISKS.

Where plaintiff, an experienced section hand, who was acquainted with the track and who had been supplied with customary lights to guide his steps, fell and was injured while proceeding hurriedly to flag a train at night, in obedience to command of his foreman, his injuries were due to one of the ordinary risks incident to his employment.

Appeal from Circuit Court, Breathitt County.

Action by George McIntosh against the Louisville & Nashville Railroad Company. Judgment for plaintiff, motion for new trial overruled, and defendant appeals. Reversed and remanded.

O. H. Pollard, of Jackson, and Benj. D. Warfield, of Louisville, for appellant.  
Cope & Cope, of Jackson, for appellee.

HURT, J. This action was instituted by the appellee, George McIntosh, against the appellant, Louisville & Nashville Railroad Company, to recover damages of it, suffered by the appellee while a servant of the appellant, and caused from a fall received by him, upon the track of the railroad.

The petition, in substance, stated that appellee, while a section laborer upon appellant's line of railroad, and after it had become dark upon a certain evening, was directed, by the foreman of his section gang, to go very hurriedly, in a run, around a certain curve, and to signal an oncoming train to stop, so as to prevent any accident

to it by its running upon an unsafe place in its tracks, and while attempting to reach the place to which he was directed to go to signal the train, and without any fault or negligence upon his part, he fell and severely injured his face and other designated portions of his body, to his damage in the sum of \$1,500. The appellant demurred generally to the petition, and without waiving the demurrer answered, traversing the averments of the petition, and in addition pleaded that appellee's negligence contributed to his injury, to the extent that, but for his own negligence, he would not have suffered any injury. The appellee did not deny the contributory negligence, by a reply nor otherwise.

Upon a trial before a jury the appellee stated that he had been engaged in working as a laborer upon a certain section of the road, under the directions of a foreman, for about 18 months, and upon a night, about 7 o'clock, and after it had become dark, he and several others of the section men were called out by their foreman for the purpose of repairing a low place in the track. They were proceeding along the track upon a hand car, when an engine was heard to blow, and it was thought to be a train approaching from the direction in which the hand car was going. There was a curve in the track just in front of the hand car, and the foreman directed him to take the lanterns, a white one and a red one, and to run around the curve to a point from which he could signal the oncoming train, and prevent it from coming forward and colliding with the hand car, and that the foreman cursed him when giving this direction. He was running forward, with the lanterns in one hand, and when he had gone forward, along the track, for about 300 yards he came to a place where the cross-ties had been raised so as to rest upon the top of the ballast. From his testimony the cause of his falling is not clear, but, the best that can be made of it, he stepped upon a cross-tie, a portion upon one side of which was decayed, and the decayed portion broke off and slipped away, and caused him to lose his balance and to fall. He fell upon his face, which received a cut, and his side, as well as one leg, were hurt by the fall. The lantern, which made a white light, and which he was carrying, was the usual lantern used by the servants of the railroad to enable them to see at night, and the red one was for the purpose of signaling. It was a part of his duties to flag trains, and to give signals to protect the hand car when going around curves, and he had frequently done so theretofore. He was acquainted with the fact that the cross-ties, at the point where he was injured, were lying upon the ballast, as he had assisted in placing them in that position. Other witnesses for appellee made

statements similar to those of appellee, except the other witnesses said that the direction of the foreman, to run ahead and signal the train, was addressed to all of them, and the appellee seized the lanterns and went off in a trot, and they fail to corroborate the statement of appellee that the foreman cursed him, when giving the direction.

At the close of the testimony for appellee, the appellant moved the court to direct a verdict for it, but the motion was overruled. The appellee then offered an instruction to the jury, to which the appellant objected, but his objection was overruled, and the instruction was given, and appellant saved an exception. The instruction, in substance, directed the jury that it was the duty of the section foreman to warn the appellee and other men working under him of danger, and if it believed, from the evidence, that appellee, while in the employment of the appellant and under the direction of its foreman, and without negligence upon his part, and while attempting to flag down one of appellant's trains, was injured, it should find for him.

The jury returned a verdict for damages for appellee, and the court rendered a judgment against appellant in accordance with the verdict, and overruled the motion for a new trial, and the railroad company has appealed.

[1,2] It will be observed that the petition did not state a cause of action. Negligence of the appellant is not alleged nor charged, as being the cause of the injuries suffered by appellee, either directly or remotely, nor is appellant charged with any negligence. The profane language alleged to have been used by the foreman in directing the appellee could not have been the cause of his falling upon the ground, from which he avers his injuries arose, nor is his fall attributed to that cause. The petition fails to charge that the appellee's falling upon the ground was caused by any obstruction upon the track. The sending of appellee, in the nighttime, in a hurry to signal a train, is not alleged to have been negligently done, nor is it claimed that so doing constituted negligence, nor is it charged that attempting to perform the service, at the time or in the manner directed caused the fall. To permit a recovery under the averments of the petition, it would be necessary to hold that an employer is an insurer of the employé against any personal injury which he may suffer while engaged in the service of the employer. That an employer is not an insurer of the safety of the employé is one of the firmly established doctrines of the law with relation to the rights of employers and employés. The master is liable in damages to an employé for only such injuries as are attributable to the negligence of the former, in the



performance of duties which he owes to the servant. 26 Cyc. 1077, 18 R. C. L. 544.

[3] The plea of contributory negligence not having been controverted, it was admitted upon the trial by the appellee that his injuries were caused by his own negligence, and that, except for his own negligence, the injuries would not have been sustained. The defense of contributory negligence is an affirmative one, and when the truth of it is admitted by a failure of the plaintiff to controvert it, he has no case to submit to the jury. *L. & N. R. Co. v. Paynter's Adm'r*, 82 S. W. 412, 26 Ky. Law Rep. 761; *Brooks v. L. & N. R. Co.*, 71 S. W. 507, 24 Ky. Law Rep. 1318; *Mast v. Lehman*, 100 Ky. 464, 38 S. W. 1056, 18 Ky. Law Rep. 949; *Louisville Ry. Co. v. Hibbitt*, 139 Ky. 43, 129 S. W. 319, 139 Am. St. Rep. 464. Hence, the motion for a directed verdict in favor of the railroad company should have been sustained.

[4] The evidence offered by appellee failed to prove, or conduce to prove, a cause of action in his behalf. It is a principle applied generally to the rights, duties, and liabilities of employers and employes that the employe, when engaging in an employment, assumes all the ordinary risks which are incident to the employment. In other words, the assumption of such risks grows up out of the contract of employment. *Burton Construction v. Metcalfe*, 162 Ky. 366, 172 S. W. 698; *Wasloto & B. M. A. Co. v. Hall*, 167 Ky. 819, 181 S. W. 629; *L. H. & St. L. N. R. Co. v. Henry*, 167 Ky. 151, 180 S. W. 74; *Phillips v. Corbin & Fannin*, 166 Ky. 638, 179 S. W. 586; *Gordon v. C. & O. Ry. Co.*, 166 Ky. 339, 179 S. W. 210; *Isaacs v. L. & N. R. Co.*, 167 Ky. 256, 180 S. W. 345; *Ohio Valley Co. v. McKinly*, 16 Ky. Law Rep. 445; *Ft. Hill Stone Co. v. Owen*, 84 Ky. 183; *De Lozier v. Ky. Lumber Co.*, 18 S. W. 451, 13 Ky. Law Rep. 818. Furthermore, it is the duty of section hands to observe and keep the track of a railroad free from obstruction.

The evidence shows that it was a customary duty of the men upon the section with appellee to signal trains, and to go ahead around curves to give signals to protect trains from colliding with hand cars, and to protect the hand cars from such collisions, and to give signals, wherever they were directed, at tunnels, bridges, and other places, where such duties were necessary, and appellee had been frequently assigned to, and performed such duties. The nature of the work of keeping a track in repair, so as to not hamper and impede commerce and public travel, and prevent their exposure to dangers, reasonably makes necessary the movements of section hands with hand cars, oftentimes at night, as well as by day, and thus the necessity of signal duties arises at night, as well as by day. In so doing, as well as performing various other duties,

it is necessary for the section hands to walk along the tracks of the road, and in cases of supposed emergency, as in the instant case, to move very hurriedly. It is not practical for a railroad company to maintain tracks of such smoothness and dryness as to remove all probability of a section hand stumbling his toe and falling, or of his foot from slipping, and thereby causing him to fall or his being caused to fall from any other ordinary condition of the track.

[5-7] The cross-ties are usually made of wood, and all men know that after a time the wood becomes decayed upon the sides, without rendering them less serviceable for their purpose; and it is as well known that the ties usually project, slightly, in some instances, and more in others, above the surface of the track, and an experienced section hand knows that, in passing along the track, he must encounter such obstacles as mentioned, as well as other slight obstacles, which may happen to get upon the track from one cause or another. The appellee does not claim that the cross-ties having been laid upon the ballast at the place of his mishap was the cause of his injury, as he knew all about the condition of the track at that point, having assisted in the work; but one of the cross-ties, whether one laid upon the surface of the ballast or not does not appear, was decayed, so that when he stepped upon it a portion broke off, or, having theretofore broken off, slipped from under his foot, thereby causing him to be precipitated upon the ground. It would be highly unreasonable to require a railroad company to maintain its cross-ties of such a degree of soundness that a portion of a tie would not give way, when a section hand stepped upon it, or to hold that the company owed a section hand the duty of maintaining the cross-ties in such a sound condition that portions would not from decay break off when one should step upon it, or slip under his foot when he should step upon it. The appellee was an experienced man in the work he was undertaking to perform, it was a necessary part of his duties, he was provided with the customary lights to guide his footsteps, and all that was reasonably necessary to enable him to see and avoid any ordinary risks of danger.

[8] To direct an experienced section hand, who is acquainted with the track, to proceed hurriedly in an emergency to flag a train at night, when supplied with the customary light to guide his steps, does not seem to be requiring of him any extraordinary risk. Hence it is concluded that the cause of appellee's injuries was one of the ordinary risks incident to his employment, and was not caused by the neglect of any duty which his employer owed to him, and, having thus proven no cause of action, the peremptory instruction to the jury should have fol-

lowed the motion for a directed verdict for appellant, upon that ground, as well as the admission by the pleadings that his own negligence caused his injuries. The instruction given was erroneous, as it was not based upon any issue made in the pleadings, and was otherwise faulty; but, inasmuch as the peremptory ought to have been given, for the two reasons above stated, the merits of the instruction will not be further discussed.

The appeal is therefore granted, the judgment reversed, and cause remanded for proceedings not inconsistent herewith.

(183 Ky. 634)

**LOUISVILLE & N. R. CO. v. WRIGHT.**

**SAME v. BARR.**

(Court of Appeals of Kentucky. March 21, 1919.)

**1. NEW TRIAL ¶108(4)—NEWLY DISCOVERED EVIDENCE.**

In action for injuries from creosote poisoning, wherein physicians gave contradictory testimony as to whether injured person had tuberculosis, fact that three months after trial injured party died of tuberculosis was not conclusive or convincing proof that he had such disease at time of trial.

**2. NEGLIGENCE ¶59—ANTICIPATION OF INJURY.**

When actionable negligence has once been established, tort-feasor is liable for all consequences that proximately result, without regard to what injuries he ought to have anticipated.

**3. NEGLIGENCE ¶136(25)—PROXIMATE CAUSE—QUESTION FOR JURY.**

Jury, rather than court, actionable negligence having been shown, must decide from evidence what consequences are proximate results.

**4. MASTER AND SERVANT ¶285(12) — CREOSOTE POISONING—PROXIMATE DAMAGES.**

Whether a servant's internal and permanent, as well as his external and temporary, injuries resulting from creosote poisoning from handling ties, followed in unbroken sequence and solely from failure to warn servant of any danger, held for jury.

**5. DAMAGES ¶83—INJURIES TO SERVANT—PECULIAR SUSCEPTIBILITY OF SERVANT TO INJURY.**

If a master was negligent in not warning a servant of the danger of handling creosote, servant was entitled to recover full damage suffered, although he was peculiarly susceptible to such poisoning.

**6. MASTER AND SERVANT ¶288(4)—INJURIES TO SERVANT—ASSUMPTION OF RISK—KNOWLEDGE OF DANGER—QUESTION FOR JURY.**

In action by servant for damages for personal injuries occasioned by creosote poisoning from handling ties, whether servant knew of danger in handling such ties held for jury.

**7. MASTER AND SERVANT ¶293(21) — INJURIES TO SERVANT—FAILURE TO WARN—IGNORANCE OF DANGER—INSTRUCTIONS.**

In action by servant for personal injuries alleged to be caused by failure to warn, it was error, in an instruction defining plaintiff's right to recover, to omit to make his alleged ignorance of danger an element of that right, where such fact was at issue.

**8. APPEAL AND ERROR ¶216(8) — MATTERS REVIEWABLE—OBJECTIONS TO INSTRUCTIONS—NECESSITY FOR REQUEST.**

Where instruction presenting plaintiff's theory omits a necessary element of his cause of action and right to recover, all that defendant needs to do to save question of any defect is to object and except; he being under no duty to supply omissions or correct mistakes by offering another instruction.

Appeal from Circuit Court, Franklin County.

Action by Winford Wright against the Louisville & Nashville Railroad Company, followed by a suit by the Louisville & Nashville Railroad Company against J. Barr, administrator of Winford Wright, for a new trial. Judgment for plaintiff in the first action, and for the defendant in the second action, and the Railroad Company appeals. Judgment in first action reversed, and cause remanded; and judgment in second action affirmed.

Guy H. Briggs, of Frankfort, and Benjamin D. Warfield, of Louisville, for appellant.

James H. Polsgrove, Leslie W. Morris, and Scott & Hamilton, all of Frankfort, for appellees.

CLARKE, J. On July 6 and 7, 1916, Winford Wright, employed as a section hand for the Louisville & Nashville Railroad Company, at the direction of the section boss, helped unload at Jett Station ties that had been treated with creosote oil. In the following March he filed the first of these actions to recover for injuries alleged to have been sustained as a result of defendant's negligence in failing to warn him of the danger in handling such ties, which work he alleged was dangerous to his health and person, of which defendant knew or ought to have known, but of which he did not know.

Defendant's answer traversed the allegations of the petition, and in separate paragraphs pleaded assumed risk, contributory negligence, and that, if plaintiff was injured, which was denied, it "was not a probable consequence that would usually or ordinarily result from handling ties that had been treated with creosote oil," but "was due from some idiosyncrasy or peculiar susceptibility possessed by him, and which does not exist in the ordinary run of men," and

which was not known, and could not have been known by the exercise of ordinary care, by defendant. A reply traversed the allegations of the answer.

A trial on September 18, 1917, resulted in a judgment for \$5,000 in favor of the plaintiff, from which judgment the first appeal is prosecuted.

On December 20, 1917, the plaintiff died, and the defendant brought suit against his administrator for a new trial, in which, after setting out the facts with reference to the former trial, it is alleged:

"Plaintiff says that one of the issues, and the principal issue, on the trial of the said action of Winford Wright against the Louisville & Nashville Railroad Company at said term of this court, was the nature of plaintiff's disease, and the question of whether or not that disease was the result of the handling of the creosote ties.

"The plaintiff states that it was admitted by both plaintiff and defendant in that action that tuberculosis was not and could not be the result of the handling of the creosote ties, and the defendant contended that the plaintiff then had, and had had prior to the institution of this action, tuberculosis of the lungs, and the plaintiff denied this, and said he was suffering from creosote poisoning, which affected his liver, muscles, nerves, and eyes.

"Plaintiff states that on the issues thus formed a great deal of medical testimony was taken. All of the plaintiff's medical witnesses testified positively that he had no form of tuberculosis, and could not have contracted same as the result of handling creosoted ties. The defendant's medical witnesses all testified that he had tuberculosis, but that he could not have contracted it from the handling of creosoted ties.

"Plaintiff states that after the term of court in which this plaintiff's motion and ground for new trial was overruled on December 20, 1917, the said Winford Wright died, and died, as this plaintiff can and will prove, of tuberculosis of the lungs.

"Plaintiff states, that he is able to prove this fact by Dr. Warren Monfort, who on the 22d day of December, 1917, certified that fact to the registrar of vital statistics of the state board of health of the commonwealth of Kentucky, a copy of which certificate is filed herewith.

"Plaintiff says that in the natural course of events it did not know these facts, and could not have known these facts, until after the term of this court had come to an end and the court had finally adjourned for said term, and that it is now willing, able, and ready to prove the facts above set forth.

"Wherefore the plaintiff prays that this court set aside the judgment entered heretofore in this case, and grant this plaintiff a new trial in that case."

A certified copy of the report of the attending physician, Dr. Warren Monfort, to the registrar of vital statistics, is filed as an exhibit, in which it is stated:

"The cause of death was as follows: Tuberculosis of lungs. Duration: — years —

mos. ——— ds. Don't know. Contributory: Don't know."

A demurrer was sustained to this petition for a new trial, and the petition dismissed, from which judgment the railroad company is also appealing; the two appeals by agreement being heard together, and we shall first dispose of the latter.

[1] It is insisted by counsel for the company that, since the demurrer admits all facts pleaded, death from tuberculosis is established upon newly discovered evidence, and that fact is so conclusive of the issue tried and decided adversely to it as to furnish ground for a new trial; but is the fact that decedent died of tuberculosis three months after the trial, if admitted, conclusive or convincing proof that he had that disease at the time of the trial as testified by medical witnesses for defendant, but denied by about the same number of physicians who testified for the plaintiff, who stated he was then suffering from systemic poisoning resultant from absorption of creosote? It is not alleged in the petition that this is true or could be proved, and we would hardly risk the statement that such a fact is a matter of common knowledge; but further than this the petition states the newly discovered evidence to be the report of the attending physician, which surely cannot be accepted for more than his opinion that decedent died of tuberculosis, especially since he states he does not know the duration or any contributory cause of the disease, and there is no allegation or statement indicating any conclusive test or post mortem examination, or by what means this opinion or conclusion was reached. Hence we think the fact admitted upon demurrer to the petition is that Wright died of tuberculosis three months after the trial, as could be shown by the evidence of Dr. Monfort, who knows nothing of the duration or contributing causes of the disease.

This new evidence certainly does not bring the case within the rule announced in *Anshutz v. Louisville Ry. Co.*, 152 Ky. 741, 154 S. W. 13, 45 L. R. A. (N. S.) 87, chiefly relied upon by appellant, where a female, after recovering damages for negligence which was held upon conflicting proof to have rendered her barren, gave birth to a child; nor is the newly discovered evidence of the decisive character held to be necessary to warrant a new trial in the other cases cited—*Mason, Evans & Keys v. Meloan*, 165 Ky. 582, 177 S. W. 435, *Smith v. Chapman*, 153 Ky. 70, 154 S. W. 915, and *National Concrete Cons. Co. v. Duvall*, etc., 153 Ky. 394, 155 S. W. 757. Hence the court did not err in sustaining the demurrer to the petition for a new trial, and the judgment in that case is affirmed.

2. For reversal of the original judgment, it is urged first and principally that, under the

allegations of the petition and the proof, damages for only temporary or external, and not permanent or internal, injuries should have been allowed. We do not deem it necessary to discuss separately the allegations of the petition which we consider sufficient to support the verdict, because the whole question is presented by a consideration of the evidence. The only negligence alleged or supported by proof is the failure of defendant to warn plaintiff of any danger incident to handling creosoted ties, of which fact the evidence is quite contradictory, as it is upon the questions of whether or not there was any such danger, and whether the defendant had knowledge of any such danger. So these questions of fact were properly submitted to the jury. The real controversy is about the extent of the danger and the consequences of the neglect to warn, if the jury believed from the conflicting evidence there was danger of which the defendant knew and failed to warn plaintiff; and as the jury found for plaintiff we shall assume for the purposes of this discussion there was danger of injury, at least externally, to persons handling creosoted ties, and the defendant knew of the danger of external injuries, and failed to warn plaintiff thereof. There is, however, no proof that defendant or its agents had actual knowledge that there was any danger of internal injuries from handling creosoted ties, and its evidence is uncontradicted that this is the first instance of internal injuries from such work, if such it is, that has come to the knowledge of its agents and several disinterested witnesses, although experienced for many years in handling ties and other timber treated with creosote oil produced from coal tar as a preservative, just as in this case. We shall therefore also assume, but do not decide, that defendant could not by the exercise of ordinary care have known there was danger of internal injuries from such work, although it was shown by the evidence that technical works upon *materia medica* record the possibility of systemic poisoning by absorption through the pores of the skin from contact with coal tar creosote, or from inhalation of the fumes therefrom, and counsel for defendant have cited two cases from courts of last resort, one from Illinois, decided in 1910, and the other from Texas, decided in 1915, in both of which such results were established to the satisfaction of the juries, from which it might well be argued defendant could have known and ought to have foreseen possibility of internal as well as external injury. We shall further assume for the moment that plaintiff did not know of any danger from such work, because omitted from the instruction defining his right of recovery, although a controverted necessary element of such right, and about which the evidence was conflicting.

Thus stripped, our inquiry is reduced to

whether or not the defendant, with knowledge that the work required of plaintiff was liable to cause him some injury, of which he did not know, and having failed to warn him of any danger, is liable for whatever injury he sustained, as is contended by counsel for plaintiff, or is liable only for such injuries as the defendant in the exercise of ordinary care ought to have known might result, as is contended by counsel for the defendant. The two cases cited by defendant—*Pinkley v. C. & E. I. R. Co.*, 246 Ill. 370, 92 N. E. 896, 35 L. R. A. (N. S.) 879, and *Pecos & N. T. Ry. Co. v. Collins* (Tex. Civ. App.) 173 S. W. 250—are exactly in point and sustain its contention, although from the former opinion three members of the court dissented. Both of these cases, the latter basing its decision upon the former, held that for constitutional disorders or systemic poisoning—that is, the internal effects, which constitute the chief ground of complaint and basis of recovery in both cases—no recovery can be had, for the reason that such consequences were not in law the proximate results of the negligence of the railroad company in requiring their employes to handle creosoted ties without warning them of the danger, because the danger of such internal effect was not shown to have been known, or that it could have been known by the exercise of ordinary care, to have been liable to result, and was not, therefore, a natural or probable consequence of the negligence that ought to have been foreseen in the light of the attending circumstances. Both cases are based upon the general rule that the damages which are recoverable for negligence must be such as are the natural and reasonable result of defendant's act, and the consequences must be such as in the ordinary course of things would flow from the acts, and can be reasonably anticipated as a result thereof.

This court, in the case of *Gosney v. L. & N. Ry. Co.*, 169 Ky. 323, 183 S. W. 538, L. R. A. 1916E, 458, after a careful examination of the authorities from many jurisdictions, stated the rule thus:

"It is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was a natural and probable consequence of the negligence, or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

While this language is broad enough to give support to the defendant's contention, it must be remembered that it is a statement of a general rule, and as such is possibly as accurate as could have been employed; at least, it is the accepted statement of the general rule. An examination of the case, however, will show that the rule was applied, as is usually the case, simply to show that the defendant incurred no liability.

where no danger of any kind to the plaintiff ought to have been foreseen in the light of the attending circumstances as the natural and probable consequence of the alleged negligence or wrongful act, and this is, we apprehend, the full extent of its meaning and correct application, since otherwise it will not fit in harmoniously with many decisions of this court as well as others, holding that where injury ought to have been foreseen and anticipated from a negligent act, the defendant is liable not only for such consequences as it knew, or in the exercise of ordinary care ought to have known, might result from its negligence, but for all consequences that, free from intervening causes, proximately result, regardless of whether or not the particular consequence that did result ought to have been anticipated.

In the Gosney Case, as in *Gould v. Slater Woolen Co.*, 147 Mass. 315, 17 N. E. 531, cited in the Pinkley Case as sustaining its conclusions, the act complained of was not actionable negligence, because no injurious consequences to the plaintiff ought to have been anticipated as the natural and probable result thereof, and the general rule as stated was applicable, while in the case at bar, as in the Pinkley and Collins Cases, the act complained of was actionable negligence, because some danger ought to have been anticipated as the natural and probable consequence to plaintiff from the failure to warn, and in our judgment the general rule is not applicable.

The question gets down in the final analysis to whether or not, after actionable negligence by defendant to the plaintiff has been established, the court or the jury is the proper tribunal to decide what parts of the consequences proven to have followed directly and without intervening causes from the act complained of are the proximate result of the established negligence. Of course, if there is no proof that any injurious consequence has followed directly and without intervening causes from the negligence complained of, the question is for the court; but, as we shall attempt to show, if there is any evidence that an established condition was produced directly and solely by the negligence, the question is for the jury upon all the evidence and under proper instructions to decide whether it is a proximate result.

Manifestly attempting to apply the first part, and overlooking or not agreeing to the latter part, of this proposition, it was held in both the Pinkley and Collins Cases that as a matter of law internal injuries from handling creosote timber were not proximate results of a neglect to warn, simply because there was no proof that such injuries might have been foreseen as an ordinary or natural consequence of a failure to warn. We find ourselves unable to agree with this conclusion, although within the letter of the gen-

eral rule, and although we have been unable to find any case exactly in point upon all of its facts as are these two cases; however, there are many analogous cases from this and other courts which are not only not in harmony with, but are directly opposed to, the conclusions reached in the Pinkley and Collins Cases.

In *L. & N. R. Co. v. Daugherty*, 108 S. W. 336, 32 Ky. Law Rep. 1392, 15 L. R. A. (N. S.) 740, the defendant insisted that it was only liable for the specific discomforts, which it ought to have foreseen, and which were imposed upon the plaintiff by the violation of the duty it owed her not to obstruct a public crossing for an unreasonable length of time, and that it was not liable for any aggravation of an existing disability, because such a consequence could not have been reasonably foreseen or anticipated by the defendant, and therefore was not the proximate result of the negligence complained of. In denying this contention, the court said:

"It is sufficient to say that, when an act of negligence has been committed, or a wrongful act done, resulting in injury or damage, the party committing it will be responsible for all the consequences that naturally and reasonably flow from the negligent or wrongful act, although the result may not be immediately connected with the cause."

In the case of *Seckinger v. Philibert & Johanning Mfg. Co.*, 129 Mo. 603, 31 S. W. 960, the Missouri Supreme Court in disposing of the defendant's contention that it was not liable for tuberculosis proven to have resulted to the plaintiff from being struck in the chest by a piece of wood, as the result of the defendant's negligent act, because it could not have anticipated such a consequence, said:

"A still further contention is that the disease of pulmonary consumption did not result proximately from the blow plaintiff received on the chest, and it was error to permit the jury to take it into consideration in considering their verdict. This was a question for the jury under the evidence, which tended to show that consumption was superinduced by the blow on the breast. There was no intervening agency in this case, between the blow on the chest and the consumption, which followed in a few months thereafter."

In *Kentucky Heating Co. v. Hood*, 133 Ky. 389, 118 S. W. 338, 22 L. R. A. (N. S.) 588, 134 Am. St. Rep. 457, citing many authorities, we said:

"It is not material whether it was in the contemplation of the wrongdoers that loss of business or profit would result to the injured party. In actions for breach of contracts the rule generally held to is that only such damages can be recovered as are actually sustained, or such as it is reasonable to conclude were within the contemplation of the parties at the time the contract was entered into. 2 Chitty on Con-

tracts, p. 1324. But this measure that obtains in contracts will not be applied in actions sounding in tort. There is a wide difference between the rights and remedies allowable in the one case and in the other. 1 Sutherland on Damages, § 15.

"It is the wrongful act done, and the consequences that naturally result from it, that the law looks at and holds the wrongdoer responsible for. A person who commits a tort like this is liable for all the damages that naturally flow from, and are the result of, this wrongful act, although he may not at the time have given any thought to or have anticipated that injurious consequences would follow. It is no excuse or defense for the wrongdoer that he did not mean to commit any wrong, or did not know that any injury or loss would ensue."

This ruling was expressly approved in *L. & N. R. Co. v. Haggard*, 181 Ky. 317, 170 S. W. 956, *Lyttle, Adm'r, v. Harlan T. C. Co.*, 167 Ky. 345, 180 S. W. 519, and *L. & N. R. Co. v. Comley*, 169 Ky. 11, 183 S. W. 207; but it must be noticed that cases which go to the extent of holding the tortfeasor liable for all damages which proximately follow, or at all, regardless of whether any injury ought to have been reasonably anticipated are sustained by reason only where the tort amounts to active or wanton wrong such as trespass or assault, rather than ordinary negligence—for example, the wrongful act complained of in the case at bar is only ordinary negligence; that is, a failure to perform a duty, and not an active invasion of a right. Nevertheless it is based upon tort, and not upon a breach of contract, and the damages cannot therefore be limited to anticipated injuries; but the right of action, being for ordinary negligence, depends necessarily upon the reasonable anticipation of some injury because otherwise there is no breach of duty, and hence no negligence or wrongful act.

These distinctions are frequently ignored in the preparation and trial of cases, and as a consequence many decisions may be found in which it is broadly stated that only such consequences as ought to have been anticipated are proximate results, without reference to whether the suit is for damages for breach of contract, ordinary negligence, or active wrong, and this fact accounts for much of the confusion that exists with reference to proximate cause and its proximate results.

But we are relieved of the duty of an examination of the cases in an effort to harmonize or distinguish them according to these distinctions, since we find in 22 R. O. L. pp. 125 and 126, a statement of the rule, or rather an exception to the general rule, which we believe to be applicable here, with citation of authorities, an examination of which proves, not only the recognized existence and soundness of the exception, but also that the application of the general rule

in the Pinkley and Collins Cases was not in harmony with the decisions in either Illinois or Texas. After restating the general rule in almost the exact language employed in *Gosney v. L. & N. R. Co.*, supra, the author proceeds:

"It must not be supposed that the principle thus stated requires that he should have been able to foresee the injury in the precise form in which it in fact resulted, or to anticipate the particular consequence which actually flowed from his act or omission of duty. In other words, it is not necessary to a defendant's liability, after his negligence has been established, to show, in addition thereto, that the consequences of his negligence could have been foreseen by him; it is sufficient that the injuries are the natural, though not the necessary and inevitable, result of the negligent fault—such injuries as are likely, in ordinary circumstances, to ensue from the act or omission in question. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow. The test is: Would ordinary prudence have suggested to the person sought to be charged with negligence that his act or omission would probably result in injury to some one? It is otherwise, however, where there is an intervening efficient cause, in itself sufficient to break the causal connection between the original wrong and the injury. The reasoning on which this rule is founded is that the law regards only the general character of the act, for, as was remarked: 'When there is danger of a particular injury which actually occurs, we must surely say that is the usual, ordinary, natural, and probable result of the act exposing the person or thing injured to the danger.' The result seems to be that, when the act complained of was such that, in view of all the circumstances, it might not improbably cause damage of some kind the doer of the act cannot shelter himself under the defense that the actual consequence was one which rarely follows from that particular act. To hold so would be to say that a plaintiff must show similar injuries to have occurred in the same manner before he could recover. And it would lead to the anomalous result that for the first, and perhaps the second, injury occurring in such manner there could be no recovery; but for the third, or when the circumstances ceased to be peculiar or became familiar, the defendant would be liable."

See, also, 18 Cyc. 46; 29 Cyc. 493; *Thompson on Negligence*, § 59; note at page 810 in 36 Am. St. Rep., and cases cited on page 665 of 6 L. R. A. Extra Ann.

[2, 3] Anticipation of injury as a natural and probable result has nearly always been recognized as a necessary element of actionable negligence, and correctly so; but we submit, in reason and upon authority, too, it is only necessary to constitute actionable negligence that some injury ought to have been reasonably anticipated from the negli

gent act, and that when actionable negligence has been established the tort-feasor is liable for all consequences that proximately result, without regard to just what injuries he ought to have anticipated, and that the jury rather than the court must decide from the evidence what consequences are proximate results; otherwise the court invades the province of the jury to determine the amount of damages that have proximately resulted from actionable negligence.

[4] In the case at bar the jury have found from the conflicting evidence, as they had the right to do, that plaintiff's internal and permanent, as well as his external and temporary, injuries followed in unbroken sequence and solely from the failure to warn plaintiff of any danger. There was no evidence of any other or intervening cause to account for his change from a strong, robust man at the time of the injury to a physical wreck at the time of the trial, and we can see no justification for permitting the court to say that as a matter of law only such injuries as the defendant ought to have foreseen are proximate results, although we can and do understand perfectly the reason why the court must say as a matter of law there was no actionable negligence where no injury ought to have been anticipated, because if no injury ought to have been foreseen there was no duty to warn; but, when the failure to perform a duty has been established, the proximate results and amount of the recovery depend upon the evidence of direct sequences, and not upon the defendant's foresight, and are for the jury, subject only to the power and duty of the court to set aside a verdict flagrantly against the evidence.

[5] 3. It is also insisted the court erred in refusing instructions C and D offered by defendant, the former eliminating any idiosyncrasy or peculiar susceptibility of plaintiff, as a basis of recovery and the latter limiting the recovery to external injuries; but there was no proof to support the former, which would not have been proper in any event, and the latter was not authorized as we have already decided.

[6] 4. Another insistence is that the motion for a directed verdict should have been sustained because of plaintiff's failure to prove his alleged lack of knowledge of danger; but upon this question the evidence was conflicting, as plaintiff testified he did not know of any such danger, in which he was contradicted by one of defendant's witnesses, and although he admitted some inconvenience the first evening, July 6th, we do not consider it possible to so separate the two successive days, July 6th and 7th, he was engaged in this work, as to be able to say as a matter of law that his injuries were the result of the second day's work, and that the

first day's experience was sufficient to establish knowledge of danger; hence the court did not err in refusing to take the case from the jury.

[7, 8] 5. Finally, it is urged the instruction defining plaintiff's right to recover was prejudicially erroneous in failing to make his alleged ignorance of danger an element of that right, and this was error, as this fact was at issue upon both the pleadings and the proof, and he could recover only if the jury believed from the evidence that he did not know the work was dangerous. Defendant objected and excepted to this instruction, but counsel for plaintiff insist the instruction is correct as far as it goes, and as defendant offered no instruction covering the point he cannot complain of the error under the thoroughly established rule to that effect. The trouble with this argument is that neither the statement of fact nor the rule, though thoroughly established, is applicable. The instruction complained of presents plaintiff's theory of the case, and in so doing omits a necessary element of his cause of action and right to recover, and all that the defendant needed to do to save the question of any defect therein was to object and except; since it was under no duty to supply omissions or correct mistakes in the instruction for his adversary. The rule relied upon refers only to instructions presenting the theory of the party objecting, who, to save an omission, must not only object and except, but offer an instruction covering, though incorrectly, the point omitted. See *L. & E. Ry. Co. v. Roberts*, 144 Ky. 824, 139 S. W. 1073, for a statement of the rule; also *L. & E. Ry. Co. v. Crawford*, 155 Ky. 723, 160 S. W. 267; *Hobson on Instructions*, § 41, and cases there cited. It would not do to say an instruction presenting an adversary's theory of the cases was correct as far as it goes, or correct in any sense, if it did not go far enough to present all essential elements of his right to recover, and to apply the rule, as plaintiff seeks to do here and as was said in *O., N. O. & T. P. Ry. Co. v. Martin*, 146 Ky. 262, 142 S. W. 410, might be done under similar circumstances, although the case was in fact affirmed because the omitted part complained of was not essential, would place upon the defendant, not only the duty of seeing that its defense was properly presented, but also the duty of showing the plaintiff and the court how his right of recovery ought to be presented to the jury. Such a duty cannot be imposed upon an adversary, and the rule under consideration cannot be carried to that length, without doing violence to every recognized rule of practice. As this error permitted a recovery, regardless of a necessary element of the right to recover,

which was in issue, it was necessarily prejudicial.

Wherefore the judgment in the original case is reversed, and the cause remanded for another trial consistent herewith.

(183 Ky. 710)

**MERRIWEATHER v. WESTERN UNION TELEGRAPH CO.**

(Court of Appeals of Kentucky. March 28, 1919.)

**TELEGRAPHS AND TELEPHONES §54(5) — LIMITATIONS OF LIABILITY — VALIDITY — "PROPERTY RECEIVED FOR TRANSPORTATION."**

Under Act June 18, 1910, a telegraph company may, by contract, limit its liability for negligence in failing to deliver an unrepeat interstate message, notwithstanding the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa), as amended by the first and second Cummins Acts of March 4, 1915, and August 29, 1916, the Cummins Acts not relating to telegrams, since a telegram is not "property received for transportation."

Appeal from Circuit Court, Franklin County.

Action by Mrs. Susie Merriweather against the Western Union Telegraph Company. Judgment for defendant and plaintiff appeals. Affirmed.

Ira Julian, of Frankfort, for appellant.  
A. E. Richards and A. B. Bensinger, both of Louisville, and Albert T. Benedict, of New York City, for appellee.

CLARKE, J. The only question upon this appeal is whether or not a telegraph company may, by contract, limit its liability for negligence in failing to deliver an unrepeat interstate message. The lower court held such a contract valid, and plaintiff has appealed.

Prior to the act of Congress approved June 18, 1910, it was held by this court in *Chapman v. Western Union Telegraph Co.*, 90 Ky. 265, 13 S. W. 880, 12 Ky. Law Rep. 265, *Western Union Telegraph Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 18 Ky. Law Rep. 995, 36 L. R. A. 711, 66 Am. St. Rep. 361, *Postal Telegraph Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119, 23 Ky. Law Rep. 344, and *Postal Telegraph Co. v. Terrell*, 124 Ky. 822, 100 S. W. 292, 30 Ky. Law Rep. 1023, 14 L. R. A. (N. S.) 927, that such a contract was contrary to public policy and violative of section 196 of the Constitution of the state, and therefore invalid; but it was held in *Western Union Telegraph Co. v. Lee*, 174 Ky. 212, 192 S. W. 70, Ann. Cas. 1918C, 1026, upon an exhaustive review of the authorities, that by Act June 18, 1910, c. 309, 36 Stat. 544, the federal Congress in

the exercise of its exclusive authority to regulate interstate commerce had authorized such contracts, and that neither the local public policy nor Constitution could affect the validity of such an interstate contract; nor could either affect, it would seem independent of the act of 1910, the liability of a common carrier, where the delivery was to be made outside of the state, and the damage alleged is mental suffering only, as is the case here. *Southern Express Co. v. Byers*, 240 U. S. 610, 36 Sup. Ct. 410, 60 L. Ed. 825, L. R. A. 1917A, 197.

However, we shall confine ourselves to a consideration of the contention of plaintiff that by the amendments to Carmack Amendment of March 4, 1915 (38 Stat. 1196, c. 176), and August 29, 1916 (39 Stat. 538, c. 415), known as the first and second Cummins Acts, the rule announced in *Western Union Tel. Co. v. Lee*, supra, has been changed, and therefore that case is no longer authoritative.

It should be noticed first that the *Lee Case* was rested upon the act of June, 1910, and not upon the Carmack Amendment approved June 29, 1906 (34 Stat. 595, c. 3591, § 7, pars. 11, 12 [U. S. Comp. St. §§ 8604a, 8604aa]), which does not seem to have ever been held to apply to telegraph and telephone companies, notwithstanding it was held in *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, to occupy the entire field of legislation and supersede all state rules, laws, and regulations pertaining to interstate commerce; on the contrary, it was held by this court in the *Lee Case* "that Congress had not acted upon the subject of interstate messages until the act of June 18, 1910." To the same effect, and in addition to the authorities cited in the *Lee Case*, see *Cultra, etc., v. Western Union Tel. Co.*, 44 Interst. Com. Com'n R. 673.

It would therefore seem improbable that Congress in the Cummins Amendment to the Carmack Amendment, which did not affect telegraph and telephone messages, and referred rather to "any common carrier, railroad or transportation company receiving property for transportation," intended to alter the provisions of the act of 1910, which in explicit terms regulated interstate messages, and the ability of such common carriers to contract with reference thereto, even though of course all these acts treat of interstate commerce and are amendatory to the original act of 1887.

In so far as applicable here, the acts of 1906, 1915, and 1916, supra, deal with and refer to the liability of common carriers for losses to property transported, while the act of 1910 refers to and deals with the transmission by common carriers of interstate messages, plainly different classes of



interstate carriers and commerce, unless telegraph and telephone messages are property received for transportation.

That the Carmack Amendment as originally enacted and as changed by the Cummins Amendment in dealing with carriers' liability relates only to liability for property losses is too apparent for argument, since it expressly applies in both instances to "any common carrier, railroad or transportation company receiving property for transportation"; requires the initial carrier to issue "a receipt or bill of lading therefor" when it receives property for transportation from a point in one state to a point in another; makes the initial carrier liable "for any loss, damage or injury to such property caused by it" or by any common carrier, railroad or transportation company to which such property may be delivered; and affirmatively declares that no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability imposed. And in addition, as finally amended, provides that "any such common carrier, railroad or transportation company so receiving property for transportation" shall be liable "for the full, actual loss, damage or injury to such property caused by it or by any such common carrier, etc., to which such property may be delivered," notwithstanding any limitation of liability or of the right of recovery however attempted.

It therefore remains only to determine whether or not a message received for transmission is property received for transportation as contemplated by the Carmack and Cummins Amendments. That it is not seems clear, not only from the ordinary meaning of the terms, as apparently was recognized in section 15 of the act of 1910, where the two classes are separately specified, but as well from the essential differences in the

character of the services performed and the rules of law affecting liability in connection therewith, as pointed out in *Primrose v. Western Union Tel. Co.*, 154 U. S. 17, 14 Sup. Ct. 1101, 38 L. Ed. 883, thus:

"The rule of the common law, by which common carriers of goods are held liable for loss or injury by any cause whatever, except the act of God, or of public enemies, does not extend even to warehousemen or wharfingers, or to any other class of bailees, except innkeepers, who, like carriers, have peculiar opportunities for embezzling the goods or for collusion with thieves. The carrier has the actual and manual possession of the goods; the identity of the goods which he receives with those which he delivers can hardly be mistaken; their value can be easily estimated, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods. But telegraph companies are not bailees in any sense. They are intrusted with nothing but an order or message, which is not to be carried in the form or characters in which it is received, but it is to be translated and transmitted through different symbols by means of electricity, and is peculiarly liable to mistakes. The message cannot be the subject of embezzlement; it is of no intrinsic value; its importance cannot be estimated, except by the sender, and often cannot be disclosed by him without danger of defeating his purpose; it may be wholly valueless, if not, forwarded immediately; and the measure of damages for a failure to transmit or deliver it has no relation to any value of the message itself, except as such value may be disclosed by the message, or be agreed between the sender and the company."

We therefore conclude that the Cummins Amendments do not apply to telegraph companies or messages, and do not affect the rule announced in *Western Union Tel. Co. v. Lee*, *supra*, which must be accepted as conclusive upon the question involved here. Judgment affirmed.

(109 Tex. 363)

**McKNEELY v. ARMSTRONG.**  
(No. 2535.)

(Supreme Court of Texas. March 12, 1919.)

**ASSIGNMENTS — WAGES — SUBSEQUENT EMPLOYER—VALIDITY OF ASSIGNMENT.**

Assignment of wages to be subsequently earned was void as to any wages thereafter earned by assignor in any other employment than that in which he was engaged at the time the assignment was executed, where subsequent employment by any particular employer was not contemplated by parties in making assignment; such wages having no actual or potential existence at time assignment was entered into.

**Certified Question from Third Supreme Judicial District.**

Action by O. Armstrong against the Houston Belt & Terminal Railway Company, in which defendant interpleaded C. E. McKneely and another. On certified question from Court of Civil Appeals. Question answered. See, also, 141 S. W. 1003.

J. V. Meek, of Houston, for plaintiff.

Andrews, Ball & Streetman, Tom C. Rowe, and W. H. Nall, all of Houston, for defendant.

**HAWKINS, J.** The following certified question, with statement of the facts, comes from our Court of Civil Appeals for the First Supreme Judicial District, at Galveston:

"In this cause, which is now pending in this court on appeal from the county court of Harris county, appellee sued the Houston Belt & Terminal Railway Company to recover wages alleged to be due him by said company for services rendered by him during the month of September, 1910. The railway company answered that it owed the wages claimed by appellee, but that appellant C. E. McKneely claimed said wages under an assignment of wages made to him by appellee, and, having deposited the amount of said wages in court, asked that said McKneely be made a party to the suit. The appellant McKneely was duly cited and answered, claiming the amount deposited in court under the following assignment of wages made to him by appellee:

"The State of Texas, County of Harris.

"Know all men by these presents, that I, Odine Armstrong, of Harris county, Texas, for and in consideration of one hundred and twenty-nine and 50/100 dollars to me in hand paid by C. E. McKneely of Houston, Harris county, Texas, and other valuable considerations, have sold, alienated and transferred, and by these presents do sell, alienate and transfer to the said C. E. McKneely the sum of one hundred and forty-two and 90/100 dollars out of the salary or wages due or to become due me from T. & N. O. R. R. Co. for the month of February, A. D. 1910.

"In case said sum of one hundred and forty-

two and 90/100 dollars is not satisfied out of said month's salary or wages, then all moneys, claims or demands accruing thereafter to me from said T. & N. O. R. R. Co., as wages or salary, up to said amount of one hundred and forty-two and 90/100 dollars, are to become the property of the said C. E. McKneely, and said C. E. McKneely is hereby authorized and empowered to ask for, collect and sue for same in either my name or its or his own name as he elects, and I hereby direct that said T. & N. O. R. R. Co. pay to said C. E. McKneely the sum of one hundred and forty-two and 90/100 dollars, and if same is not paid to said C. E. McKneely and this assignment is placed in the hands of an attorney to collect the said sum, or if suit is brought on same, then, in either event, I do assign and transfer to said C. E. McKneely the sum of eight dollars that may be due or to become due as wages, as attorney's fees and court costs, and said C. E. McKneely is authorized to collect and receipt for same, and if not paid, it or he may recover same by suit.

"If the above amount is not paid to C. E. McKneely by the party for whom I am now working, then, in addition to the above, I further transfer and assign to said C. E. McKneely any sum of money due, or which may become due me as salary or wages, for any subsequent month or months, within a period of four years from the date of this instrument, from any person, firm or corporation whomsoever for whom I may work, or so much of said sum or sums as may be required to satisfy said sum of one hundred and forty-two and 90/100 dollars, and attorney's fees and court costs, if any, and the said C. E. McKneely is hereby authorized to collect and receipt for same, and said receipt shall be absolutely binding and conclusive upon me.

"Witness my hand at Houston, Texas, this the 16th day of February, A. D. 1910.

his  
Odine X Armstrong.  
mark

"Witness: C. E. McKneely, Josio Matheny."

"The answer of McKneely set out this assignment, and claimed said wages under the paragraph of said instrument above set out, which provides: 'If the above amount is not paid to C. E. McKneely by the party for whom I am now working, then, in addition to the above, I further transfer and assign to said C. E. McKneely any sum of money due, or which may become due me as salary or wages, for any subsequent month or months, within a period of four years from date of this instrument, from any person, firm or corporation whomsoever for whom I may work, or so much of said sum or sums as may be required to satisfy said sum of one hundred and forty-two and 90/100 dollars, and attorney's fees and court costs, if any, and the said C. E. McKneely is hereby authorized to collect and receipt for same, and said receipt shall be absolutely binding and conclusive upon me.'

"No facts are alleged in the answer showing or tending to show that at the time the agreement was made it was contemplated by the parties thereto that appellee would enter the service of the Houston Belt & Terminal Railway Company. The trial court held that this por-

tion of the assignment was void, and sustained a general demurrer to said answer.

"At a former day of this term we affirmed the judgment of the trial court holding 'that the assignment of wages under which appellant claims was void as to any wages thereafter earned by appellee in any other employment than that in which he was engaged at the time the assignment was executed.'

"The question presented is one of public importance, and we have deemed it wise to certify for your decision the question:

"Did we err in the holding above set out?"

As to the subsequent employer, Houston Belt & Terminal Railway Company, the language of the assignment contract covers no wages having, at its date, any existence, either actual or potential. It is not even shown that, in making the contract of assignment, any subsequent employment of the assignor by any particular employer was in contemplation of the parties. As related to the facts and issues of the case at bar, the above-quoted former holding of the Court of Civil Appeals was correct. *McDavid v. Phillips*, 100 Tex. 73, 94 S. W. 1131; *Richardson v. Washington*, 88 Tex. 339, 31 S. W. 614.

The equitable doctrine concerning mortgage liens, as announced in those cited cases, should be held applicable to contracts assigning future wages growing out of employment in contemplation of the parties to the assignment contract, but we do not think that its scope should be extended further. See, also, *Railway v. Woodring*, 116 Pa. 513, 9 Atl. 58; *Bell v. Mulholland*, 90 Mo. App. 612; *Heller v. Lutz*, 254 Mo. 704, 164 S. W. 123, L. R. A. 1915B, 192; *Kane v. Clough*, 36 Mich. 438, 24 Am. Rep. 599; *Twiss v. Cheever*, 2 Allen (Mass.) 40; *Herbert v. Bronson*, 125 Mass. 475; *Eagen v. Luby*, 133 Mass. 543; *Mulhall v. Quinn*, 1 Gray (Mass.) 105, 61 Am. Dec. 415; *Kennedy v. Tiernay*, 14 R. I. 530; *Bank v. Kimberlands*, 16 W. Va. 592; *Cooper v. Douglass*, 44 Barb. (N. Y.) 416; 5 C. J. 871, § 41.

(85 Tex. Cr. R. 23)

# CHILDRESS v. STATE. (No. 5343.)

(Court of Criminal Appeals of Texas. March 5, 1919.)

## 1. CRIMINAL LAW §780(2)—INSTRUCTION—ILLEGAL COHABITATION—ACCOMPLICE TESTIMONY.

In prosecution for unlawfully living with a woman not defendant's wife while he was lawfully married to another, in view of the facts, court should have instructed on defendant's request that, in order to convict, the woman with whom he was charged to have lived, an accomplice, should be corroborated as to the fact of intercourse.

## 2. LEWDNESS §10—ILLEGAL COHABITATION—SUFFICIENCY OF EVIDENCE.

In prosecution for unlawfully living with a woman not defendant's wife while he was lawfully married to another, evidence consisting of mere suspicious circumstances held insufficient to justify the verdict of guilty.

Appeal from Hill County Court; R. T. Burna, Judge.

Ollie Childress was convicted of unlawfully living with a woman not his wife while lawfully married to another, and appeals. Judgment reversed, and cause remanded.

J. Webb Stollenwerck, of Hillsboro, for appellant.

Earl E. Carter, Co. Atty., and H. P. Shead, First Asst. Co. Atty., both of Hillsboro, and E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Omitting formal allegations, the complaint and information charge that appellant "did then and there unlawfully live together and have carnal intercourse with Annie May Blakemore, a woman not his wife, he being then and there lawfully married to another person then living."

Annie May Blakemore testified that about the 7th of May appellant employed her to go to his house, take care of his home, keep house for him and look after his children, and do the cooking for which he agreed to and did pay her \$3 a week. She went to his house about the 7th of May and stayed about three months, or until about the 30th of July following. Appellant's wife had left him and his two girl children, six and eight years of age, respectively, and had gone to Ft. Worth. She further stated that appellant told her he was going to get a divorce from his wife and marry her. After this occurred they had intercourse with each other. They occupied different rooms. She further stated that appellant would sometimes come to her room, and sometimes she would go to appellant's room; that the little girls stayed in the room with defendant. On cross-examination she stated she was unaware of the fact appellant had a wife at the time she made the trade to become his housekeeper, cook, and take care of his children. She also testified that the defendant worked in the basement of the courthouse, and that she would go to the courthouse in a buggy, taking the little girls with her, and bring defendant back. So far as she knew, no one had ever seen defendant in bed with her, or had seen any improper relations between them. No one had ever heard him address her or see him in endearing terms, or seen him kiss her. She says the reason she left defendant's home was because defendant's wife came home and ordered her off the place, and tore her dress off; that she got scared and excited and left, and defendant's

wife accused her of beating up her children. After she got this beating from defendant's wife she told Mr. Curtis, an officer, about it, and he went with her to appellant's home, but there was no one there, but they met the defendant when they came back to town, and Mr. Curtis told the defendant in witness' presence that if he would pay the witness \$15 for the skirt his wife had torn off of her there would be no more trouble, or nothing more said about it, but if defendant did not pay it he would file a case against him for adultery with witness. She says that Henry Miller and his wife, Emily, lived close by them, and saw her in the discharge of her duties as housekeeper and washerwoman on appellant's place.

Henry Miller testified that he lived about 300 yards from where defendant lived, and was living there last May, June, and July. He saw witness Blakemore at defendant's house. She was living there, cooking, washing, and attending to defendant's children. She would come to witness' house to get water. Upon cross-examination this witness said he knew defendant's wife had left him and gone to Ft. Worth, and the witness Blakemore was living with defendant during the absence of his wife, keeping house, washing, cooking, and attending to the little children; that defendant worked in the basement of the courthouse, and came backwards and forwards for his meals. During all the time that the witness Blakemore stayed at defendant's house this witness never saw any act of intimacy or undue familiarity of any kind between defendant and Annie May Blakemore. Emily Miller testified as did her husband.

The witness Curtis testified that he was deputy sheriff of Hill county, and was called to defendant's house about the 30th of July on account of a difficulty between Maggie Childress, wife of defendant, and Annie May Blakemore. When he went to the house he found no one at home; that Annie May Blakemore and himself came to town and met defendant. Witness says he never was in defendant's house, but the defendant was working in the basement of the courthouse, and this woman, Blakemore, would come frequently in a buggy in the evening and get defendant and drive him from the courthouse to his home. He further testified defendant told him he was going to get a divorce and marry this woman; that he never saw any improper relations between them. He also testified on cross-examination that he told the defendant if he would pay this woman for the silk dress his wife tore off her there would not be anything else, so far as he was concerned, to it, and he would give him until the next day at 3 o'clock to pay for the dress; otherwise he would file a case for adultery against him. It seems defendant did not pay for the dress, and

prosecution was instituted. Appellant introduced no evidence.

[1, 2] The court charged on circumstantial evidence, and gave a charge on accomplice testimony. In addition to the charge given by the court on accomplice testimony, in several requested instructions appellant sought to have the jury instructed that in order to convict the defendant the accomplice, Blakemore, should be corroborated as to the act of intercourse. The court did not give this phase of it in his charge, but charged generally that she would have to be corroborated as to the commission of the offense. She was amply corroborated as to the fact that she lived in the house, and was doing the washing and cooking and looking after the children, and would go to the courthouse in a buggy and take defendant home. So far as their occupying the same house there was corroboration. Neither of the children was placed on the witness stand. We are of opinion that under the peculiar facts of this case the court should have instructed the jury as requested by appellant. Intercourse might be shown by circumstances, but the circumstances must be of such a nature as to exclude every reasonable hypothesis except that as applied directly to this case of the fact of intercourse. Evidently the court thought, and correctly so, that unless this act of intercourse was proved, it was a case of circumstantial evidence. There are two ingredients in this phase of the statute: First, living together; and, second, one or more acts of intercourse. The woman testified he had intercourse with her, but no other witness did. No one saw any act of intimacy between them. We are of opinion the charge should have been given; and also that the facts and circumstances are not sufficient to justify the verdict of the jury in holding that the parties had intercourse. See Branch's Ann. Pen. Code, p. 601, § 1059, and Branch's Crim. Law, p. 8, § 20, for collation of authorities. It is correctly stated by Mr. Branch in his Crim. Law:

"Where no act of intercourse is shown, proof of mere suspicious circumstances is insufficient. *Manuel v. State*, 45 Texas Crim. Rep. 97, 74 S. W. 30; *Eaton v. State* [60 Tex. Cr. R. 429] 132 S. W. 356." "Proof that the parties lived in the same house, but occupied different rooms, is not sufficient of itself to sustain a conviction. *Smelser v. State*, 31 Tex. 96; *Bradshaw v. State*, 61 S. W. 713."

In *Kahn v. State*, 38 S. W. 989, where defendant employed a woman as housekeeper during the absence of his wife, he was seen once to kiss her, and once he met and escorted her home, and when his wife returned he said he "was in a sweat, as he had two women on his hands." This evidence was held insufficient. In his Annotated Penal Code Mr. Branch collates quite a number of cases in section 1059, where the evidence was

held insufficient to support a conviction for adultery. There the rule is again stated:

"Where no act of carnal intercourse is shown proof of mere suspicious circumstances is not sufficient to sustain a conviction for adultery." *Ham v. State*, 15 S. W. 406; *Kahn v. State*, supra; *Manuel v. State*, supra; *Green v. State*, 53 Tex. Cr. R. 540, 110 S. W. 908; *Eaton v. State*, supra; *Koger v. State*, 73 Tex. Cr. R. 448, 165 S. W. 577.

It is deemed unnecessary to quote from these authorities. They all sustain the rule announced by Mr. Branch, and an inspection of the cases cited sustains the proposition asserted that the evidence is not sufficient under such circumstances.

Believing the evidence is not sufficient as presented by this record, the judgment will be reversed, and the cause remanded.

(85 Tex. Cr. R. 36)

ALSUP v. STATE. (No. 5116.)

(Court of Criminal Appeals of Texas. Jan. 22, 1919. On Motion for Rehearing, March 12, 1919.)

**1. CRIMINAL LAW §936(6)—NEW TRIAL—DEPRIVATION OF TESTIMONY — SURPRISE — FAILURE TO MOVE FOR CONTINUANCE.**

Where defendant, charged with murder, lost testimony of desired witness, because witness was indicted for complicity in same offense, but defendant did not move for postponement on ground of surprise, under Code Cr. Proc. 1911, art. 616, he could not for first time set up matter in his motion for new trial. Defendant should have moved for postponement, and then have demanded witness' trial first.

On Motion for Rehearing.

**2. CRIMINAL LAW §1056(1) — APPEAL — FAILURE TO EXCEPT TO CHARGE.**

Defendant cannot complain of charge, or of failure of the Court of Criminal Appeals to discuss it in its former opinion, where no exceptions were taken to it, or any other part of the charge, prior to reading to the jury, as required by Code Cr. Proc. 1911, art. 735.

**3. HOMICIDE §300(3) — SELF-DEFENSE—INSTRUCTION.**

In prosecution for murder, charge that reasonable apprehension of death or serious bodily injury will excuse a person in using all necessary force to protect himself, whether or not there is actual danger, if he acts on a reasonable apprehension of danger from his standpoint at the time, *held* not erroneous.

**4. CRIMINAL LAW §829(5)—INSTRUCTION—SELF-DEFENSE.**

Instruction that if it reasonably appeared to defendant from his standpoint that deceased was about to take his life, or do him serious injury, he was justified in the killing, taken in connection with main charge on self-

defense, *held* to sufficiently instruct jury to view situation from defendant's standpoint, so as to justify refusal of a special charge.

**5. CRIMINAL LAW §806(1)—INSTRUCTIONS—REPETITION.**

Charges already given should not be repeated.

**6. CRIMINAL LAW §761(6)—INSTRUCTION—ASSUMPTION OF FACTS—SELF-DEFENSE.**

In prosecution for homicide, defendant's request to charge that each juror must place himself in defendant's position, and determine from all facts, as they appeared to defendant, whether or not his apprehension of death or serious injury was reasonable, *held* properly refused as on weight of evidence, as assuming defendant had fear of death or injury.

**7. CRIMINAL LAW §1122(6)—APPEAL—QUESTIONS REVIEWABLE—REFUSAL OF INSTRUCTION.**

Where it does not appear from defendant's requested special charge, or from the bill of exceptions taken to its refusal, whether it was presented or refused before or subsequent to reading of charge to jury, Court of Criminal Appeals cannot consider the matter.

**8. CRIMINAL LAW §829(1)—INSTRUCTIONS—REFUSAL OF REQUEST.**

A special charge, given almost verbatim in the main charge, is properly refused.

**9. HOMICIDE §188(5)—SELF-DEFENSE—EVIDENCE—REPUTATION OF DECEASED.**

In prosecution for murder, defendant setting up self-defense, the state was properly permitted to ask a witness if he knew the general reputation of deceased in his community for being a quiet, peaceable man, over objection that alternative was not included in, and that something was omitted from, the question.

**10. CRIMINAL LAW §451(3) — EVIDENCE—ANGER.**

In prosecution for murder, defendant setting up self-defense, the state properly asked a witness if he had talked to deceased just before the difficulty, and whether he was mad or not.

**11. CRIMINAL LAW §398(1)—EVIDENCE—LOCATION OF BULLET HOLES.**

In prosecution for homicide, defendant setting up self-defense, the state properly asked witnesses as to the location of bullet holes in the clothing worn by deceased at the time of the fatal difficulty.

**12. CRIMINAL LAW §1037(2)—APPEAL—RESERVATION OF GROUNDS OF REVIEW—REMARKS OF PROSECUTING ATTORNEY.**

Where defendant's counsel privately stated to court that he excepted to remarks in argument of state's attorney, but did not request, verbally or in writing, that jury should be instructed not to consider such remarks, defendant cannot complain of them on appeal.

Appeal from Criminal District Court, Williamson County; James R. Hamilton, Judge.

Will Alsup was convicted of murder, and he appeals. Affirmed.

J. F. Taulbee, of Georgetown, for appellant.

E. B. Hendricks, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted of murder, and his punishment fixed at seven years' confinement in the penitentiary.

[1] On this appeal his most serious complaint is that he was deprived of the testimony of his witness Allison, by reason of the fact that while the jury were being selected in his case, and after the witness had been sworn and put under the rule, said witness Allison was indicted for the same offense as that charged against appellant, and he was thereby unable to have the benefit of Allison's testimony, which facts, and the testimony he expected to obtain from said witness, were set out at length in appellant's motion for new trial. It also appears that appellant did not know of such indictment or the arrest of said witness thereunder, until after the completion of the jury and the arraignment and plea of not guilty of the appellant, but that he did know of same before any testimony was introduced.

There is no claim or allegation on the part of appellant, in his motion for new trial, that the indictment of Allison was fraudulently or purposely obtained, without just ground, and to deprive appellant of his testimony, nor is such proposition suggested or sustained by any evidence introduced in support of said motion for new trial. From the record it seems that the indictment against Allison for complicity in the same offense charged against appellant was rather expected by the parties. The grand jury met on the first Monday in January, 1918, and recessed on the 11th, after returning an indictment against appellant; said recess being taken until the 28th of said month. On the 14th the trial court set the case of appellant down for January 29th. The grand jury reconvened on the 28th and on the 29th returned into court the indictment complained of by appellant here. The district attorney states, without controversy, that he was not with the grand jury on the day the indictment against Allison was returned, and also says that when the grand jury took its recess, as mentioned, he was surprised that an indictment had not been returned against Allison.

Our statute (article 616, C. C. P.) plainly provides for a continuance or postponement of a case upon application of either party, when by some unexpected occurrence, after the trial has begun, the applicant is so taken by surprise as that a fair trial cannot be had. If appellant really desired the testimony of Allison he should have availed himself of his right under this statute and should have made such motion. While same is addressed to the sound discretion of the trial court,

its apparent abuse has always been revised by this court, and if an accused failed to avail himself of this plain remedy, he cannot for the first time set up the matters which constitute the unforeseen occurrence in his motion for new trial.

As said by this court in *Childs v. State*, 10 Tex. App. 183, speaking of a case where the appellant claimed surprise during the trial:

"It then became the duty of the defendant to apply to the court for either a continuance or postponement, and not to pass it by and depend upon a new trial to enable him to counteract the effect of the surprise. He should have acted at the time and in the manner prescribed by law, and not having done so, he cannot now be heard to complain."

See *Higginbotham v. State*, 3 Tex. App. 447; *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595; *Roach v. State*, 21 Tex. App. 249, 17 S. W. 464; *Eldridge v. State*, 12 Tex. App. 208.

That such matter is not available when set up for the first time on motion for new trial is well settled. *Raleigh v. State*, 74 Tex. Cr. R. 484, 168 S. W. 1050; *Graves v. State*, 65 Tex. Cr. R. 419, 144 S. W. 961; *Bryant v. State*, 35 Tex. Cr. R. 394, 33 S. W. 978, 36 S. W. 79.

Other witnesses testified substantially as appellant claimed Allison would have done, and one accused, on the trial, or at any other stage in his case, may not neglect his plain statutory remedies, and take chances on the result, and on motion for new trial make his first complaint because the result was unfavorable to him. Appellant should have made a motion for a postponement, setting up the facts, and if same had been granted he could then have demanded the trial first of Allison in due statutory form.

The other matters set up by appellant we do not think constitute any reversible error. The judgment is affirmed.

#### On Motion for Rehearing.

At a former time during this term this case was affirmed, and is now before the court upon the appellant's motion for rehearing.

We first notice that complaint is made of the language of the former opinion, which was as follows:

"There is no claim or allegation on the part of appellant, in his motion for a new trial, that the indictment of Allison was fraudulently or purposely obtained, without just ground, and to deprive appellant of his testimony, nor is such proposition suggested or sustained by any evidence introduced in support of said motion for a new trial," etc.

In the original opinion we called attention to the facts leading up to and surrounding the indictment of the witness Allison, which facts are so wholly variant from those in *Dodson v. State*, 52 Tex. Cr. R. 247, 106 S. W.

378, as not to make that case an authority in our consideration before or now, and as this court is not inclined to impute fraud or unfair dealing to the trial courts, or to grand juries, or district attorneys, unless same be set out and brought to our attention in some way other than by inference or presumption, we made the observations complained of in appellant's motion. We do not think this court is the proper place to first make complaint of matters which should be alleged and proven at some stage of the proceeding in the lower court.

Appellant's second complaint in his motion is that his main ground for reversal was not discussed at length, same being that the trial court's charge on danger and apparent danger was not the law, and in support of his contention he cites *Hays v. State*, 190 S. W. 621, claiming that the charge held erroneous there is identical with the one given in this case. We have again carefully considered this matter. The charge of the trial court complained of is as follows:

"A reasonable apprehension of death or serious bodily injury will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger, as it appeared to him from his standpoint at the time, and in which case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant."

[2, 3] An inspection of the record will show that no exceptions were taken to this or any other part of the court's charge prior to the time when same was read to the jury, as is directed and required by article 735, C. C. P., so that it will be here observed that appellant is in no position to complain of said charge, or of this court's failure to discuss the same in its former opinion. We might let the matter rest here, but an inspection of the *Hays* Case falls to sustain the contention. Paragraph 2 of the charge in the *Hays* Case is as follows:

"Exception was reserved to the fifth and sixth subdivisions of the charge on self-defense, and a special charge requested, which was refused. In subdivision 6 the court instructed the jury that, if they should believe the defendant killed deceased, Bean, and at the time of doing so Bean had made an attack on defendant, which from the manner and character of it caused the defendant to have a reasonable expectation or fear of death or serious bodily injury, and acting under such reasonable expectation and fear the defendant killed deceased, they would acquit him. The fifth subdivision reads thus: 'A reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger, as it appeared to him from his standpoint at the time, and in such case the

party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant.' It will be noticed these charges submitted the self-defense theory from the standpoint of the jury rather than from the standpoint of the defendant, for that body was instructed if they should believe at the time of so doing the deceased had made an attack on the defendant, which from the manner and character of it caused the defendant to have a reasonable expectation or fear of death, etc. The charge should have instructed the jury, not as they viewed it in the light of the testimony and the events subsequent to the homicide, but as defendant viewed it at the time of the killing."

There is no question of the similarity of part of the charge of the court in that case with the part complained of in the instant case, but if the language of the opinion in that case is read closely, to wit:

"It will be noticed these charges submitted the self-defense theory from the standpoint of the jury rather than from the standpoint of the defendant, for that body was instructed, if they should believe at the time of so doing the deceased had made an attack on the defendant, which from the manner and character of it caused the defendant to have reasonable expectation or fear of death, etc. The charge should have instructed the jury not as they viewed it in the light of the testimony and the events subsequent to the homicide, but as defendant viewed it at the time of the killing"

—the difference will be apparent. We have given all the court said in that paragraph of the charge, because it is clear from reading same that the court in its criticism was referring to subdivision 6 of the charge, which is the one quoted substantially, and not to the fifth subdivision, set out; and while the word "these" might be taken to refer to both subdivisions, it is not correctly inserted, for there is nothing in the quoted part of subdivision 5 subject to the criticism of the court, but quite the contrary appears.

[4-6] Appellant further complains in this connection, that the court did not give his special charge No. 2, which is as follows:

"The defendant asks the court to charge the jury that each juror must place himself in the position of the defendant, and determine, from all the facts as they appeared to the defendant at the time, whether or not his apprehension or fear of death or serious bodily injury was reasonable, and, if you so find, then you must acquit the defendant."

We call attention to the fact that, in addition to the main charge on this point, the trial court gave, at the request of the appellant, the following special charge:

"The defendant asks the court to charge the jury that if, at the time the defendant fired the shot, if he did fire it, it reasonably appeared to him from the circumstances of the case, viewed from his standpoint, that the deceased was about to take his life or do him serious bodily injury, he was justified in killing the deceased,

although, in fact, the jury might believe from the evidence that the defendant was in no danger at the time of losing his life or receiving serious bodily injury at the hands of the deceased."

This, taken with the main charge, fully instructed the jury that they should view the situation from the standpoint of the appellant. In addition to being objectionable as a repetition of charges already given, it appears to us that this special charge is on the weight of the evidence, as assuming that appellant had an apprehension or fear of death or serious bodily injury; that being a sharply contested issue in the case.

[7] Appellant asked special charge No. 4, and neither from the charge nor bill of exceptions No. 6, taken to the action of the court in refusing the same, does it appear whether same was presented or refused before or subsequent to the reading to the jury of the charge, and in this condition we cannot consider same.

[8] Appellant's special charge No. 3, the refusal to give which is complained of in his bill of exceptions No. 8, was given almost verbatim by the court in his main charge.

Special charges Nos. 1 and 2 asked by the appellant were given by the court.

[9-11] The only remaining errors complained of were some exceptions to the testimony. Appellant complains that the state was permitted to ask the witness Burns if he knew the general reputation of Lee Shields in the community in which he lived for being a quiet, peaceable, law-abiding man; the objection apparently being that the alternative of the question was not inserted therein, and that something was left out of the question. It was also objected that said witness was asked by the state if he had talked to Shields just before the difficulty, "and was he mad or not;" also to the witnesses Collins and Grammell being asked as to the location of the bullet holes in the clothing worn by deceased at the time of the fatal difficulty.

We have again carefully considered each of these matters, and find no error in any of them.

[12] Appellant presents a bill to the language of the prosecuting attorney in his closing argument to the jury. The court approved the bill, with the qualification that appellant's attorney stepped up to him when such argument of the district attorney was made, and said privately to him that he excepted to the remarks, but did not request, either verbally or in writing, any instructions to the jury that they should not consider said remarks. This matter has been passed upon by this court so frequently as not to need citation of authorities.

This disposing of all of the appellant's contentions before this court, his motion for rehearing is accordingly overruled.

(85 Tex. Cr. R. 3)

# PITTS v. STATE. (No. 5321.)

(Court of Criminal Appeals of Texas. March 5, 1919.)

## 1. CRIMINAL LAW $\Rightarrow$ 742(2)—ACCOMPLICES—QUESTION FOR JURY.

Whether witnesses on whose testimony the state relied to connect defendant with the theft charged were accomplices, *held* an issue of fact for jury under evidence.

## 2. CRIMINAL LAW $\Rightarrow$ 1160—APPEAL—FINDING ON CONFLICTING EVIDENCE.

A verdict of guilty on conflicting evidence, implying a decision that witnesses on whose testimony the state relied to connect defendant with the larceny charged were not accomplices, is binding on the Court of Criminal Appeals; it having been approved by the trial court.

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

Harrison Pitts was convicted of larceny, and appeals. Affirmed.

Stanley Thompson, of Houston, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

MORROW, J. The prosecution is for theft.

[1, 2] The theft of sacks was established by the owner. To connect appellant with it the state relied upon two negro boys, one 11 years of age, and the other's age not stated. These witnesses testified in substance that they were passing along the street in the evening about sundown, and the appellant, who was at the warehouse, offered them each a dollar to assist him in loading some sacks out of the warehouse on his wagon; that they undertook the enterprise, loaded the sacks, and that after doing so the appellant, instead of paying them the money, delivered each of them 10 or 11 sacks, which they separately took to different dealers and sold. Each of them claimed in his testimony that he was innocent of any criminal intent on the part of the appellant—ignorant of the fact that the sacks were stolen. Their cross-examination developed facts that would have justified the conclusion that they were accomplices. However, we think the facts were not such, in view of their testimony that they knew nothing of the criminal purpose, and believed that the appellant had a right to the sacks, as to make them accomplices as a matter of law. Whether they were accomplices or not became an issue of fact. If the jury believed their statement that they were not aware that the sacks were stolen, they were not accomplices, but innocent agents. If the jury believed that the circumstances overcame their testimony to the contrary, and showed that they did



have knowledge of the crime, they would have been accomplices. The court submitted this question to the jury in a charge to which there was no objection, and the verdict of guilty implies a decision by the jury that they were not accomplices. This finding of the jury on conflicting evidence is binding upon this court. It having been approved by the trial court, their testimony, if true, was sufficient to support the conviction.

The judgment is affirmed.

(85 Tex. Cr. R. 14)

**PITTS v. STATE. (No. 5320.)**

(Court of Criminal Appeals of Texas. March 5, 1919.)

**1. CRIMINAL LAW §1056(2) — FAILURE TO CHARGE—LATE EXCEPTION.**

Where no instruction was asked, and no exception to the failure of the trial court to charge the law of accomplice testimony was taken, except in the motion for new trial, it came too late under the statute.

**2. CRIMINAL LAW §1054(3)—APPEAL—CONVICTION ON ACCOMPLICE TESTIMONY—REVERSAL.**

Lack of timely exception to failure to charge law of accomplice testimony does not prevent reversal for failure of evidence to corroborate accomplices, a point which can be raised whether charge was given or not.

**3. CRIMINAL LAW §510—TESTIMONY OF ACCOMPLICE—CORROBORATION.**

A conviction cannot be had upon the uncorroborated testimony of an accomplice.

**4. CRIMINAL LAW §742(2) — ACCOMPLICE TESTIMONY—QUESTION FOR JURY.**

In prosecution for burglary, whether the two negro witnesses on whose testimony the state relied were accomplices of defendant, held for jury under evidence.

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

Harrison Pitts was convicted of burglary, and appeals. Affirmed.

Stanley Thompson, of Houston, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary on the testimony of two boys.

[1-4] The facts are sufficiently stated in the companion case of Pitts v. State, 210 S. W. 198, in an opinion by Judge Morrow, this day decided. In this case the court did not charge the law of accomplice testimony, none was asked, and no exception taken to the failure of the court to so charge except in

the motion for a new trial. This exception comes too late under the statute. This failure of the court, however, to charge the law applicable to accomplice testimony would not interfere with a reversal for failure of the evidence to corroborate the accomplice. This can be raised whether the charge was given or not, inasmuch as a conviction cannot be had upon the uncorroborated testimony of an accomplice. Under the view taken by the court of the facts it is a question of fact as to whether the boys were or not accomplices. Under the facts they would not be held as accomplices as matter of law. They denied being accomplices, and testified they did not know the property was stolen at the time they received it. If they were accomplices it was by reason of the fact they received the property at the time and place of the burglary. Under these circumstances it is the opinion of the court that the judgment should not be reversed. Had they been accomplices as a matter of law, a different conclusion would be reached; but as the record presents the matter, we are of opinion they were not accomplices as matter of law.

The judgment is affirmed.

(85 Tex. Cr. R. 28)

**WHITE v. STATE. (No. 5267.)**

(Court of Criminal Appeals of Texas. Feb. 5, 1919. On Motion for Rehearing, March 12, 1919.)

**1. CRIMINAL LAW §1092(8), 1099(7) — APPEAL — TIME FOR FILING STATEMENT OF FACTS AND BILL OF EXCEPTIONS.**

Where, on conviction for violating the local option law, the court adjourned July 20, 1918, after granting defendant 60 days from adjournment in which to file statement of facts and bills of exception, and before the expiration of such time granted an additional 30 days, a statement of fact and bills of exception filed October 19, 1918, were not within the 90-day period, and will not be considered.

On Motion for Rehearing.

**2. CRIMINAL LAW §1181 — POWER OF APPELLATE COURT TO DETERMINE COMMENCEMENT OF SENTENCE.**

The Court of Criminal Appeals has no power to direct that the day of sentence and term of imprisonment begin on the date of a defendant's conviction below.

Appeal from District Court, Montague County; John Speer, Judge.

Ernest White was convicted of violating the local option law, and he appeals. Affirmed, and rehearing denied.

Ernest White, in pro. per.

E. A. Berry, Asst. Atty. Gen., for the State.

LATTIMORE, J. In this case appellant was convicted for violating the local option law in Montague county, and his punishment fixed at confinement in the penitentiary for one year.

[1] The Assistant Attorney General has made a motion to strike from the record the statement of facts and bills of exception of appellant for the reason that same are not filed in time. The record shows that the court adjourned on July 20, 1918, after entering an order granting to appellant 60 days from such adjournment in which to file statement of facts and bills of exception. Before the end of this 60-day period the court made an order further extending said time for filing, for an additional 30 days. The statement of facts and bills of exception were not filed until October 19, 1918, and this was clearly not within the 90-day period allowed by the court, and the motion of the state must be sustained.

An additional objection to the statement of facts is that same was not approved by the trial judge. The indictment and charge of the court, together with the remaining portions of the record, show no error which we can consider, in the absence of the statement of facts and bills of exception.

The judgment of the lower court will be affirmed.

#### On Motion for Rehearing.

This case comes before the court upon motion for rehearing filed by the appellant in propria persona in which he complains that upon a former hearing he was without representation either in person or by attorney, and that the court erred in not acting upon the fundamental error apparent of record in this case.

The court fully considered all of the errors presented, and as none are pointed out in this motion for rehearing we are unable to say wherein any error was committed in the former judgment of this court.

[2] This court has no power to grant to appellant the relief prayed for, to wit, by directing that the day of his sentence and the term of his imprisonment begin on the date of his conviction in the court below.

There being no errors shown by the motion for rehearing, the motion will be accordingly overruled.

(84 Tex. Cr. R. 545)

#### WHITE v. STATE. (No. 5268.)

(Court of Criminal Appeals of Texas. Feb. 5, 1919. Rehearing Denied March 12, 1919.)

#### 1. CRIMINAL LAW §1092(7)—APPEAL—TIME FOR FILING EXCEPTIONS.

Under Vernon's Ann. Code Cr. Proc. 1916, art. 845, the court is not authorized to consider bills of exception filed after the expiration of

90 days allowed by the court from the expiration of the term.

#### 2. CRIMINAL LAW §1099(11) — APPEAL — STATEMENT OF FACTS—APPROVAL.

A statement of facts not approved by the trial judge will not be considered on appeal in a criminal case.

#### 3. INTOXICATING LIQUORS §25—LOCAL OPTION LAWS—REPEAL—TEN-MILE ZONE LAW.

The act of the Legislature establishing the ten-mile zone law did not repeal or suspend the prohibition of the sale of intoxicating liquor in local option territory.

#### 4. INTOXICATING LIQUORS §25—LOCAL OPTION LAWS—REPEAL.

After the local option prohibition law has been adopted in a given locality by a vote of the people, its abrogation in that locality is not within the power of the Legislature, but its repeal rests with the people by their vote expressed at an election.

#### 5. INTOXICATING LIQUORS §25—LOCAL OPTION LAWS—REPEAL.

The local option prohibition law was not repealed by Acts 35th Leg. (4th Called Sess.) c. 24, providing for state-wide prohibition.

Appeal from District Court, Montague County; John Speer, Judge.

Ernest White was convicted of selling intoxicating liquor in local option territory, and he appeals. Affirmed.

Ernest White, in pro. per.

E. A. Berry, Asst. Atty. Gen., for the State.

MORROW, J. The conviction is for the sale of intoxicating liquors in a district in which the sale of such liquor is prohibited under the local option law.

[1, 2] The court adjourned on the 20th day of July, 1918. Appellant has several bills of exception which were filed on the 19th day of October. There were two orders extending the time within which to file bills of exception and statement of facts, one granting 30 days after adjournment, and another 60 days additional. The Assistant Attorney General has called attention to the fact that more than 90 days elapsed between the expiration of the term of court and the time that the bills were filed, and insists that, under the statute (article 845, C. C. P.), the court is not authorized to consider them, and under the construction of that article by the decisions of this court his contention must be sustained. *Roberts v. State*, 62 Tex. Cr. R. 10, 136 S. W. 483; *Griffin v. State*, 59 Tex. Cr. R. 424, 128 S. W. 1134. The same ruling, upon the same ground, must be made with reference to the statement of facts, to the consideration of which the Assistant Attorney General addresses additional objection that its consideration is precluded under the statute by reason of the fact it

was not approved by the trial judge. The record sustains this point. *Taylor v. State*, 73 Tex. Cr. R. 192, 164 S. W. 844; *Vernon's Texas O. C. P.* p. 819, note 22, and cases referred to.

In the absence of statement of facts and bills of exception presenting the evidence, we are unable to sustain the motion to quash, based upon the ground that no election prohibiting the sale of intoxicating liquors had been held in Montague county.

[3, 4] The motion to quash the indictment upon the ground that the town of Bowie, in Montague county, is within ten miles of a certain ranch used by the United States aviators as a landing ground, cannot be sustained. Appellant contends that by chapter 12 of the Acts of the Fourth Called Session of the Thirty-Fifth Legislature, known as the ten-mile zone law, the local option prohibition law in the territory mentioned was repealed. This cannot be sustained for the reasons: First, that we have before us no facts showing that the point at which the offense is charged to have taken place was within ten miles of a military post as described in the act mentioned; and, second, because the act of the Legislature did not have the effect of repealing or suspending the prohibition of the sale of intoxicating liquors in localities in which prohibition was put in force by a vote of the people. The act of the Legislature mentioned was sustained as a valid law, as relating to the facts presented in the case of *Ex parte Hollingsworth*, 203 S. W. 1102. The basis of that decision is, that the ten-mile zone law constituted a regulation designating the locality in which the sale of intoxicating liquors could not be made. The fact that it is a regulation of the sale of intoxicating liquors precludes its operation in localities in which the sale is prohibited. Prohibition of the sale of intoxicating liquors interdicts the sale altogether, except for certain specified purposes mentioned in the local option law. The regulation of the sale of such liquors constitutes a requirement that those engaging in their sale must conform to prescribed rules. From *Ex parte Hollingsworth*, supra, we take the following quotation:

"The effect of section 1 of the act of the Thirty-Fifth Legislature in question is to withdraw a part of the territory of Tarrant county from the operation of the laws permitting the sale of such liquors, and to prohibit the sale of such liquors in the territory thus withdrawn."

[5] Moreover, it has frequently been held that after the local option prohibition law has been adopted in a given locality by a vote of the people, its abrogation in that locality it not within the power of the Legislature, but its repeal rests with the people

by their vote expressed at an election. *Ex parte Pollard*, 51 Tex. Cr. R. 488, 103 S. W. 878; *Ex parte Elliot*, 44 Tex. Cr. R. 575, 72 S. W. 887; *Lewis v. State*, 58 Tex. Cr. R. 359, 127 S. W. 808, 21 Ann. Cas. 656; *Ex parte Brown*, 38 Tex. Cr. R. 295, 42 S. W. 554, 70 Am. St. Rep. 743; *State v. Texas Brewing Co.*, 106 Tex. 121, 157 S. W. 1166; *Dawson v. State*, 25 Tex. App. 670, 8 S. W. 820. In the case of *Ex parte Hollingsworth*, supra, the controlling principle was that laid down in *Cohen v. Rice* (Civ. App.) 101 S. W. 1053, *Ex parte King*, 52 Tex. Cr. R. 385, 107 S. W. 549, *Ex parte Abrams*, 56 Tex. Cr. R. 465, 120 S. W. 883, 18 Ann. Cas. 45, and *Andrews v. City of Beaumont*, 51 Tex. Civ. App. 625, 113 S. W. 615, in which cases the ruling was that, although the sale of intoxicating liquors was permitted by law in a given territory, it was within the legislative power to designate localities therein in which such sales would be unlawful.

The contention in the motion to quash the indictment that the local option prohibition law was repealed by chapter 24 of the Acts of the Thirty-Fifth Legislature, Fourth Called Session, known as the state-wide prohibition law, is without merit, for the reason that section 2 of that act, wherein the Legislature sought by the passage of a law to prohibit the sale of intoxicating liquors throughout the state, was held invalid because, to give it effect, it would annul the local option prohibition laws and practically repeal the provision of the Constitution of the state which commits the prohibition of the sale of intoxicating liquors to the people of the counties and districts affected to be determined by their vote. See *Ex parte Myer*, 207 S. W. 100.

Finding no error presented by the record, the judgment of the district court is affirmed.

(85 Tex. Cr. R. 42)

THOMAS v. STATE. (No. 5243.)

(Court of Criminal Appeals of Texas. Feb. 19, 1919. On State's Motion for Rehearing, March 12, 1919.)

1. CRIMINAL LAW §1099(10) — APPEAL— AGREED STATEMENT OF FACTS—SIGNING BY BOTH PARTIES.

Where a statement of facts, signed only by appellant's attorney, was approved by the judge, and no attack made on its correctness, and no effort made to show that it was not agreed to by state's attorney, it must be held sufficient.

2. CRIMINAL LAW §1098—APPEAL—STATEMENT OF FACTS—SUFFICIENCY.

In a criminal appeal a purported statement of facts, made up wholly of questions and answers, will be stricken from the record upon motion.

### 3. CRIMINAL LAW §1097(4) — APPEAL — STATEMENT OF FACTS — ADMISSIBILITY OF EVIDENCE.

An exception to the court's action in admitting as a part of the *res gestæ* a statement to the effect that defendant shot deceased cannot be determined, where there is no statement of facts.

### 4. HOMICIDE §277, 301—DEFENSE OF ANOTHER—INSTRUCTIONS.

Where there was evidence that deceased shot defendant's sister, and at once advanced toward her, and while so advancing was himself shot by defendant, it was a question for the jury as to whether the shooting was justifiable, and failure to instruct thereon was reversible error.

### 5. HOMICIDE §300(9)—SELF-DEFENSE—INSTRUCTION.

Where nothing appears in evidence which could have caused defendant to think deceased was making an unlawful attack upon him, there was no error in refusing to charge on self-defense.

### 6. HOMICIDE §196—IMMATERIAL EVIDENCE.

Where defendant shot deceased immediately after deceased had shot defendant's sister, and while he was advancing toward her, evidence that deceased had a bottle of whisky in his pocket held immaterial, and its exclusion not error.

### 7. WITNESSES §379(11)—IMPEACHING TESTIMONY.

In a murder trial evidence of one witness as to what another witness told him after the killing was admissible, if sufficient predicate was laid, for the purpose of impeachment.

Appeal from District Court, San Jacinto County; E. W. Love, Special Judge.

Milton Thomas was convicted of manslaughter, and he appeals. Reversed and remanded.

Wm. McMurrey, of Cold Springs, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

LATTIMORE, J. In this case appellant was tried in the court below for the offense of murder, and was convicted of manslaughter, and his punishment fixed at confinement in the penitentiary for a period of five years.

We are confronted at the very beginning with a motion made by the Assistant Attorney General to strike out the statement of facts, based upon two grounds: First, because the same is not signed and agreed to by counsel representing the state as well as the appellant in the trial court; second, because said statement of facts is wholly in the form of questions and answers.

[1] The statute upon the question of statement of facts contemplates that both parties to a cause shall sign such statement of facts, thereby certifying their agreement thereto,

and that thereafter it shall be presented to the trial court, who shall approve it, if correct; but the statute also provides that if the parties do not agree, or the court fail to find the agreed statement correct, in either event the trial court shall make out, sign, and file with the clerk a correct statement of facts proven on the trial.

The whole purpose of this statute is to give the parties appealing a method of getting evidence on their contested issues before the appellate court, and to make it so that in any event the trial court be the party to whose approval this court would look in deciding whether or not said statement of facts be correct. In the instant case the statement of facts is approved by the trial judge, though signed only by the attorney for the appellant. No attack is made on the correctness of the statement, and no effort made to show that the same was never agreed to by the attorney for the state in the lower court. Two authorities are cited in support of the state's motion, both of which we have examined. *Pollock v. State*, 60 Tex. Cr. R. 265, 131 S. W. 1094, was cited, and holds the contrary of the state's contention here, as Judge Ramsey in that case allows a statement of facts to be considered which is not signed by either counsel in the lower court, and is merely marked, "Approved, T. A. Bledsoe, Judge." Nor is there any certificate of said judge that there was a disagreement between counsel for the parties in that case. In the other case cited in support of the motion, it appears upon examination that no statement of facts was filed within the time allowed by law. We believe the correct rule to be other than that as stated in the motion. *Trammell v. State*, 1 Tex. App. 121; *Pollock v. State*, 60 Tex. Cr. R. 265, 131 S. W. 1094; *Serop v. State*, 69 Tex. Cr. R. 399, 154 S. W. 557; *Miles v. State*, 200 S. W. 158.

[2] The other ground of the state's motion is well taken, and the purported statement of facts will be stricken from the record because the same appears to be made up wholly of questions and answers. *Hawkins v. State*, 77 Tex. Cr. R. 520, 179 S. W. 448; *Stephens v. State*, 77 Tex. Cr. R. 30, 177 S. W. 92; *Mooney v. State*, 73 Tex. Cr. R. 121, 164 S. W. 828; *King v. State*, 198 S. W. 782.

[3] Appellant's first bill of exceptions is to the court's action in admitting as part of the *res gestæ* the statement of one Asa Thomas to the effect that appellant had shot deceased. The statement of facts having been stricken out, we are unable to say whether such evidence comes within the rule of *res gestæ* or not.

[4] We are of opinion that the court should have given the law substantially as set forth in appellant's special charges Nos. 3 and 4. The facts stated in said bills, as approved

by the trial court, show that deceased had just shot the sister of appellant while she was standing in the front door of appellant's home, and that deceased at once started into the house where said assaulted sister was, and that appellant then shot him, all transpiring in a moment's time. The main charge of the court below did not submit self-defense either of appellant or another, and the said special charges Nos. 3 and 4 are as follows:

"Special charge No. 3: You are further charged: A reasonable apprehension of death or great bodily harm to a near relative of a person will excuse a party using all necessary force to protect the life or person of said near relative, and it is not necessary there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time.

"If from the evidence you believe the defendant killed said Major Bass, but further believe that at the time of so doing the deceased had made an attack upon Bettie Hardin, a sister of defendant, which from the manner and character of it, and the relative strength and situation of the parties, caused defendant to have a reasonable expectation or fear of death or serious bodily injury to his said sister, and that acting on such reasonable expectation or fear the defendant killed the deceased, then you should acquit him.

"Special charge No. 4: You are further charged that if you believe from the testimony that the deceased, Major Bass, at the time of the killing, was attempting to do serious bodily harm to the sister of defendant, Bettie Hardin, and the defendant shot and killed the said Major Bass in order to prevent serious bodily harm to his said sister, Bettie Hardin, you will find the defendant not guilty."

Under the just provision of our law our citizens are permitted, in proper cases, to defend the person of another against real or apparent danger under substantially the same rules governing the defense of one's own person, and when the evidence raises that issue the trial court cannot ignore same. If, as stated in said bill of exceptions, the deceased had in fact shot appellant's sister, and at once advanced toward the place where she was, and while so advancing was himself shot by appellant, it becomes at least a question of fact for the jury, under appropriate instructions, as to whether the shooting by appellant under such circumstances was justifiable. This court through its presiding judge, said, in *Mayhew's Case*, 65 Tex. Cr. R. 293, 144 S. W. 230, 39 L. R. A. (N. S.) 671: "The law is that whatever he may do for himself he may do for another under such circumstances, and this to be viewed from his standpoint." See, also, authorities cited in that case.

[6] As appears by this record, we can see no error in refusing appellant's special charge No. 5, as there appears nothing herein to cause appellant to think deceased was making an unlawful attack upon him, and

therefore nothing to give him the right to a charge on self-defense as applied to himself.

[8, 7] We can find nothing in the record making it material evidence that deceased had a bottle of whisky in his pocket when he was shot, and hold that the trial court did not err in excluding testimony of that fact. In the absence of a statement of facts, which is referred to in that part of his bill of exceptions complaining thereof, we can see no error in allowing the evidence of the witness Wash Hardin as to what Bettie Hardin told him after the killing. If a sufficient predicate were laid, the evidence was admissible for the purpose of impeaching said witness.

This disposes of the errors complained of, and, for the reason that the court below declined to give the substance of the law applicable to defense of another, the judgment of the court below is reversed, and the cause remanded for another trial.

#### On State's Motion for Rehearing.

In a former opinion of this court the statement of facts in this case was stricken out upon motion of the state, said motion containing two grounds, with one of which this court did not agree. The state has filed this motion for a rehearing, asking that we either modify our holding in the original opinion declining to sustain the motion of the state to strike out the statement of facts on the ground that it was not properly authenticated, or else that we expressly overrule certain decisions which are cited and discussed by the able Assistant Attorney General in his motion for rehearing, and which it is contended are not in line with that portion of our original opinion.

Again inspecting the purported statement of facts in this case, we observe that it begins with the words:

#### "Statement of Facts.

"State of Texas v. Milton Thomas. No. 8231.

In the District Court, Ninth Judicial District, San Jacinto County, Texas, Special July Term, 1918."

We also note that at the end of said purported statement appears the following:

"I, J. D. Harwood, official shorthand reporter for a special term of the district court of San Jacinto county, Texas, held in August, A. D. 1918, do hereby certify that the foregoing 37 pages contain a true and correct statement of all the evidence adduced on the trial of the above cause.

"Witness my hand this the 30th day of August, A. D. 1918. J. D. Harwood,

"Official Shorthand Reporter for a Special Term of the District Court of San Jacinto County, Texas, held in August, A. D. 1918.

"We, the undersigned attorneys, who participated in the trial of the foregoing cause of the State of Texas v. Milton Thomas, do hereby agree that the foregoing 37 pages con-

tain a true and correct statement of all the evidence adduced on the trial of the said cause, and we agree that the same shall be filed with the records of this cause as the statement of facts herein.

"Witness our hands this the 30th day of August, A. D. 1918.

"\_\_\_\_\_  
"\_\_\_\_\_  
"\_\_\_\_\_

"Attorneys for the State.

"Wm. McMurray,

"Attorney for the defendant.

"Approved this the 30th day of August, A. D. 1918. E. W. Love,

"Special Judge Presiding at a Special Term of the District Court of San Jacinto County, Texas, at a Special Term, August, A. D. 1918."

We call attention to the case of Brown v. State, 56 Tex. Cr. R. 87, 119 S. W. 312, in which will be found a very similar authentication to that in the instant case, and this court there approves the rule laid down in the Lozano Case, 81 S. W. 37, and, after discussing them, expressly overrules those cases holding to the contrary, most of those discussed in the state's motion for rehearing being overruled in said opinion.

We have found many forms of authentication of statements of fact upheld by this court and the Supreme Court, the general conclusion being that the main object of our statutes and decisions on this subject is to secure to appellants and to the appellate courts a correct presentation of the facts and testimony in the trial courts, to attain which object a substantial compliance with the statutes is necessary, but to prevent the defeat of which object the question as to what is a substantial compliance must be left to the sound judgment of the appellate courts. No hard and fast rule as to such authentication has been found, but we suggest that it is always safest to follow the plain path pointed out by our statute.

Believing our former opinion correct in principle, and that the decisions contrary thereto were disposed of in the Brown Case, supra, the motion for rehearing is overruled.

(85 Tex. Cr. R. 98)

Ex parte HART. (No. 5362.)

(Court of Criminal Appeals of Texas. March 19, 1919.)

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

Application by Wm. M. Hart for writ of habeas corpus. Relator was allowed bond for appearance to answer a charge of murder, and he appeals. Order made reducing bail.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. On the trial of a habeas corpus, relator was allowed bond in the sum

of \$15,000 on a charge of murder. This appeal is for the purpose of securing a reduction of the amount of bail fixed by the trial court.

We have read the statement of facts carefully, in connection also with evidence in regard to ability to give bond. We are of opinion that the court was correct in admitting relator to bail, and that the amount of it is excessive and should be reduced. Without going over or discussing the facts, an order will be made reducing the amount of bail and fixing it in the sum of \$3,000.

(85 Tex. Cr. R. 115)

Ex parte GREGORY. (No. 5257.)

(Court of Criminal Appeals of Texas. Feb. 26, 1919. On Motion for Rehearing, March 26, 1919.)

# 1. HABEAS CORPUS ~~§~~44—JURISDICTION OF SUPREME COURT—RELEASE FROM CONTEMPT ORDER IN CIVIL CASE.

Under Rev. St. 1911, art. 1529, original application for writ of habeas corpus to obtain release from restraint under order of district court adjudging relator in contempt for refusing to obey an injunction issued in a divorce proceeding, pending in the court, to which relator and his wife were parties, should have been addressed to the Supreme Court, not to the Court of Criminal Appeals.

# 2. DIVORCE ~~§~~206 — VERIFICATION — AMENDMENT—STATUTE.

If Rev. St. 1911, art. 4649, relating to injunction suits, requiring that petitions be verified, applies to a divorce proceeding, wherein district court, by article 4639, has special authority to make temporary orders respecting property of parties, verification of petition for divorce, irregular in that it was before notary public who was an attorney of record, is subject to amendment, and does not defeat jurisdiction of district court to enter order prohibiting disposition of property of community estate.

On Motion for Rehearing.

# 3. DIVORCE ~~§~~206 — INJUNCTION AGAINST DISPOSITION OF PROPERTY—INDORSEMENT OF ORDER.

Where district court indorsed its order for issuance of injunction, under Rev. St. 1911, art. 4639, prohibiting disposition of property of community estate involved in divorce suit, on day before divorce petition was filed and injunction writ issued by clerk, injunction was nevertheless effectual, and husband, in disregarding it, was guilty of a contempt.

Application for writ of habeas corpus on behalf of Charles Gregory. Application dismissed.

W. C. Linden and Joe H. H. Graham, both of San Antonio, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

MORROW, J. The relator seeks release by an original application for writ of habeas

corpus from restraint under an order of the district court of the Forty-Fifth judicial district, adjudging him in contempt for refusing to obey an injunction issued in a divorce proceeding pending in that court, to which the relator and his wife were parties.

[1] It being the purpose of the application to obtain release from an order made in a civil case, we think the application should have been addressed to the Supreme Court. *Ex parte Alderete*, 208 S. W. 363. In order to avoid conflict in the decisions of the courts of last resort, and to give effect to the evident purpose of the Legislature in the passage of article 1529 of the Revised Statutes, conferring jurisdiction upon the Supreme Court in such cases, the practice generally followed by this court is to pursue the course mentioned. With no intent to pass upon the merits of the application, we would say it presents no reasons sufficient to justify a departure from the rule stated.

We find no statement of facts, but from the exhibits attached to the application it appears that May Gregory, wife of relator, brought suit in the district court of the Forty-Fifth judicial district of the state for a divorce. The petition is signed by Hellbron & Matthews, attorneys, and sworn to by May Gregory before A. E. Hellbron, notary public, September 26, 1918, and entered upon it is the undated order of the judge of the court mentioned, directing the clerk to issue a notice for the hearing of the application for alimony, and to issue an order requiring the filing of an inventory, and an injunction restraining the alienation or disposition of community property. The petition was filed September 27, 1918. An amended petition appears to have been signed by the same firm of attorneys, and sworn to before O. J. Matthews on the \_\_\_\_\_ day of October, 1918, the date of filing not appearing. An injunction was issued, it appears from the exhibits, on the 27th day of September, 1918. On the 15th day of November, 1918, on a hearing the court adjudged the relator guilty of disobedience of the injunction, assessing a fine of \$50 and two days' confinement in jail as the punishment; the disobedience consisting in the disposition of property contrary to the order of the court.

The relator, based, so far as we can learn from the record, upon inferences from the exhibits mentioned, charges his restraint is illegal, first, because the acts upon which the contempt is founded are not forbidden by the injunction; second, because the contempt judgment is not shown to have been rendered on a hearing; third, because the judgment of contempt does not accurately recite the injunction order; fourth, because the court is without jurisdiction in that the affidavit charging contempt was made before an attorney of record; fifth, because of the alleged discrepancies between the original and

amended petition for divorce; and, sixth, because of an absence of jurisdiction growing out of the fact that the original petition was sworn to before a notary public who was also an attorney of record.

[2] The injunction inhibited the disposition, alienation, conversion, or incumbrance of community property. The judgment of contempt recites that he had failed to obey this order. The judgment also recites that on the hearing of the contempt proceeding both plaintiff and defendant appeared in person and by counsel. The application to have the relator held in contempt is not found in the record. The only information touching the manner in which it is verified is that contained in an unsworn motion made by the relator to dismiss the application; the record furnishing no proof that the application was not properly verified. The original petition does not show on its face that the notary who took the affidavit thereto was one of the attorneys of record, nor is there proof thereof made. Even if it affirmatively appeared on this proceeding that one of the attorneys of record took the affidavit, it would not defeat the jurisdiction of the trial judge or court to enter the order prohibiting the disposition of property belonging to the community estate of the parties to the divorce proceeding. The district courts are given jurisdiction of divorce cases, and article 4639, Revised Statutes, gives special authority in such cases to the court or judge thereof to make temporary orders respecting the property of the parties. Even if article 4649, relating to injunction suits, and requiring that petitions therefor be verified, applies to the divorce proceeding, the irregular verification would be subject to amendment. *Michie's Texas Civil Digest*, vol. 10, p. 31. It has been held, however, by the Supreme Court, in *Ex parte Davis*, 101 Tex. 611, 111 S. W. 394, 17 L. R. A. (N. S.) 1140, that one violating the order made by the court in a divorce proceeding under article 4639, *supra*, should be held in contempt and punished therefor.

The record does not disclose that the amended petition was filed, nor that it bears any relation to the proceeding under which relator is held.

The application for writ of habeas corpus is dismissed.

#### On Motion for Rehearing.

[3] On motion for rehearing the appellant asked that the record filed be amended to show that the judge indorsed his order for the issuance of injunction on the day before the petition was filed and the injunction writ issued by the clerk. Treating the record as so corrected, we regard the disposition made of the case the proper one, and order the motion for rehearing overruled.

(85 Tex. Cr. R. 91)

**WALLACE v. STATE. (No. 5324.)**

(Court of Criminal Appeals of Texas. March 19, 1919.)

**1. HUSBAND AND WIFE  $\Leftrightarrow$ 304—WIFE DESERTION—ELEMENTS OF OFFENSE.**

In a prosecution for wife desertion, the state must show, not only that the husband willfully and without justification deserted his wife and neglected and refused to support and maintain her, but also that he left her in destitute and necessitous circumstances.

**2. HUSBAND AND WIFE  $\Leftrightarrow$ 304—WIFE DESERTION.**

In a prosecution brought nine days after the alleged desertion of wife, no desertion was shown, where during such time defendant's father had paid her \$10 for him, and just prior to the alleged desertion the defendant had paid \$20 for groceries and left the wife credit on which to purchase groceries.

Appeal from Tarrant County Court; Jesse M. Brown, Judge.

E. S. Wallace was convicted of wife desertion, and appeals. Reversed and remanded.

R. H. Smith, of Ft. Worth, for appellant.  
E. A. Berry, Asst. Atty. Gen., for the State.

**LATTIMORE, J.** This appellant was convicted of wife desertion in the county court of Tarrant county, and his punishment fixed at 30 days in jail and a fine of \$25.

The case must be reversed and remanded because of the failure of the evidence to show a violation of the law.

[1] It is held in *Windham v. State*, 80 Tex. Cr. R. 551, 192 S. W. 248, that not only must the proof show that the husband willfully and without justification deserted his wife, and neglected and refused to support and maintain her, but the state must go further and show that he left her in destitute and necessitous circumstances as well.

[2] It is substantially held in *Furlow v. State*, 78 Tex. Cr. R. 544, 182 S. W. 308, that if a husband and wife separate, she having means of support at the time, his failure to support her or furnish her such means as he can thereafter will not make him guilty of a violation of this statute, where it is shown that she made no effort to obtain support from him, or to bring knowledge to him that she was in a condition of need.

Authorities are collated in *Verse v. State*, 193 S. W. 303, which hold that the facts in the case must be such as to show a willful desertion, neglect, or refusal to provide in order to meet the requirements of the law.

In the instant case no such facts are shown. It is true that the wife says her

husband deserted her and left her in necessitous circumstances nine days before she filed a complaint against him, but the record otherwise is barren of facts which show either desertion, or that she was necessitous. Due regard must be had in cases such as this to the situation of the parties. Appellant was a salaried fireman of the city of Ft. Worth, receiving \$66 per month, and his duties permitted him only one day and night at home in each week. It is uncontroverted that he had arranged credit at a grocery store only a block from his home, and just prior to the alleged desertion had paid \$20 on his grocery bill, and the grocer testified that the wife could have continued to get goods upon credit, and that he would have let her have the same as he had theretofore done. She admits that after the date of the alleged desertion she made no effort to get groceries, money, support, or anything else from the appellant. Just what day the alleged desertion occurred is a bit conjectural, and what occurred between the parties is wholly left out of the record. We have searched the entire evidence carefully to see if any of the witnesses say anything as to why or how or under what circumstances the alleged desertion or separation was had. Appellant says there was no separation as far as he was concerned; that he went home to dinner from his work about September 20th, and found his house empty, his wife and baby and furniture all gone.

The wife details no conversation occurring on the day of the alleged desertion, other than that he came home about 11 p. m. the night before, and she asked him what made him late, and he told her it was none of her "damned" business. As to what passed between them on the day she says he deserted her, we are left wholly in the dark. Whether he told her he was tired of home life, and no longer loved her, or that he did not intend to live with her, or to come back, or further support her, or whether they parted in good will or ill humor, or whether he removed any of his belongings or not—all these details and all others are absolutely omitted. The wife says that she filed the complaint against her husband on October 2, 1918, and that at that time she had been deserted by her husband for nine days. She says that when he "deserted" her he left her three days' provisions; that he left her all the furniture they had accumulated, which she at once sold and appropriated the proceeds. She also admits that during this nine days' interval after the alleged desertion, and before she filed the complaint, appellant's father paid her \$10 for him. She also admits that she made no effort to communicate with him, or to obtain any money, or provisions, or support from him or on his account prior to the filing of the complaint. We have de-



talled these facts at length, because, in our opinion, they wholly fail to show a case of willful desertion of the wife and the leaving of her in needy and necessitous circumstances.

Things might have occurred between the husband and wife on the day of the alleged desertion, which are not disclosed by this record, which might be sufficient to show that there was no intention on appellant's part to return home. Things might have occurred there between them which would justify the conclusion that he was willfully deserting her; but, if so, the record does not present such facts to us. The salary of the husband was very small, and, as far as the record discloses, went to pay for groceries and make a possible payment upon the house, and it is quite possible that the wife may not have had those things which she desired or felt were her due; but where the husband furnishes to his wife such things as are in accord with his income and with their station in life, and where the proof shows that she has credit upon which she may obtain the necessary things of life, and a home in which are sufficient comforts to enable her to live, and a reasonable share of the money he earned, and there is no showing as to why she left these things and refused to further avail herself of them, we have no option but to hold that the law is not shown to have been violated.

The judgment of the lower court is reversed, and the cause remanded for a new trial.

(85 Tex. Cr. R. 97)

**FOVELLA v. STATE.** (No. 5344.)

(Court of Criminal Appeals of Texas. March 19, 1919.)

**CRIMINAL LAW** §1090(1) — **ABSENCE OF BILL OF EXCEPTIONS—AFFIRMANCE.**

In the absence of bill of exceptions and statement of facts, judgment will be affirmed, the indictment being sufficient, and no fundamental error appearing.

Appeal from District Court, El Paso County; W. D. Howe, Judge.

Fermina Fovella was convicted of receiving and concealing stolen property, and she appeals. Affirmed.

E. A. Berry, Asst. Atty. Gen., for the State.

**LATTIMORE, J.** In this case the appellant was tried for the offense of receiving and concealing stolen property valued at more than \$50, and was convicted, and her punishment fixed at confinement in the state penitentiary for a term of two years.

The case is before this court without a

bill of exceptions or a statement of facts; the motion for new trial complains of certain errors, the decision of which would be governed by the facts if properly before us; but in the absence of a statement of facts we cannot tell whether the matters complained of were error or not.

The indictment sufficiently charges the offense, and, there appearing no fundamental errors, the judgment of the lower court is affirmed.

(35 Tex. Cr. R. 98)

**CONNOR v. STATE.** (No. 5352.)

(Court of Criminal Appeals of Texas. March 19, 1919.)

**1. INDICTMENT AND INFORMATION** §176—**VARIANCE—PROVING DATE ALLEGED.**

That indictment charged that burglary was committed on December 1st, and the evidence showed that accused was on the 18th of the same month found in possession of property which came out of the burglarized house, would not create a fatal variance.

**2. INDICTMENT AND INFORMATION** §176—**VARIANCE—PROVING DATE ALLEGED.**

The facts may show that the offense was committed either before or after the alleged date, provided the date fixed in the indictment precedes the return of the indictment.

**3. BURGLARY** §41(1) — **EVIDENCE — SUFFICIENCY.**

In prosecution of defendant servant for burglarizing his master's house at night, evidence held sufficient to support conviction.

**4. CRIMINAL LAW** §1159(1)—**REVIEW—PROVINCE OF JURY.**

In prosecution for burglary, the jurors were the judges of the facts.

**5. BURGLARY** §2—**LIABILITY OF DOMESTIC SERVANT OF OWNER.**

The fact that defendant was a domestic servant of the owner of the house burglarized was immaterial, where his service was that of a delivery boy and he had no authority in the house at night.

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

Chute Connor was convicted of burglary, and appeals. Affirmed.

W. A. Rowe, of Houston, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** Appellant was convicted of burglary, his punishment being assessed at two years' confinement in the penitentiary.

[1,2] The indictment charged that the burglary was committed on the 1st day of December, 1918. Evidence was introduced

that the property which came out of the house and disposed of by appellant was found in his possession, and was delivered to the party to whom he sold it about the 18th or 19th of December. The contention was made by appellant that there is a fatal variance, in that the property was taken or found in his possession on the 18th, and the indictment alleged the burglary occurred on the 1st of the month prior thereto, and he says: "It is such an elementary principle of law on this question that a conviction for an offense cannot stand, committed after the date alleged in the indictment;" that he deemed it unnecessary to cite authorities to support that proposition. We are of opinion that counsel is in error in the assertion of this proposition. As we understand the law, the indictment may allege the time, and the proof may not correspond with it literally; but the state would be permitted to prove any date prior to the filing the indictment and within the period of limitation. This question has been before the court in other cases. See *Herrera v. State*, 75 Tex. Cr. R. 120, 170 S. W. 719; *James v. State*, 72 Tex. Cr. R. 457, 163 S. W. 61; *Perry v. State*, 69 Tex. Cr. R. 644, 155 S. W. 263. The pleader may allege one date; the evidence may not correspond with that date. The facts may show that the offense was committed either before or after the alleged date, provided the date fixed in the indictment precedes the return of the indictment by the grand jury.

[3-5] It is contended that the evidence is not sufficient to support the conviction. We have carefully read the testimony, and it occurs to us that counsel is in error in this contention. The facts show that appellant was in the employ of the owner of the burglarized house, which was a business concern, and took from the house some bran, oats, and flour, and sold it to another party. The defendant so testifies. He also testified to facts that would show it was not a burglary, but that he had taken the property during business hours from the house while the doors were all open. Had the jury believed this testimony, they would have undoubtedly acquitted him, for such facts would not constitute burglary. But the state's theory is, and its testimony shows, that the house was broken at night and the goods taken. Appellant also testified that he took property from the house on the 18th of the month. The state's evidence shows that the house was broken about the 1st of the month, and had been broken previously on two or three occasions, and, as one of the witnesses says, from the 1st to about the 18th. The fact that appellant had the property on the 18th would not necessarily indicate that he had not taken it prior to that time. He testified he did not, but the jury

were the judges of the facts, and, if the house was broken at the time indicated by the state's testimony, the jury had a right to so believe. We are of opinion that the fact that he was a domestic servant would be immaterial, if he burglarized the house as contended by the state. He was not a domestic servant in connection with the family residence. His service was that of a delivery boy or man, carrying feed and groceries from the house to the parties who purchased. He had no authority in the house at night, and no right to be in there by breaking. The breaking was by force and from the outside, under the state's testimony. Whether he was a domestic servant or not would not justify him in breaking the house, nor relieve him from the charge of burglary. See *Neiderlueck v. State*, 23 Tex. App. 38, 3 S. W. 573; *Peters v. State*, 33 Tex. Cr. R. 170, 26 S. W. 61; *Love v. State*, 52 Tex. Cr. R. 84, 105 S. W. 791.

There is a bill of exceptions complaining of the statement of the court during the examination of the witness Blunt. Without discussing this, we are of opinion it is not of sufficient importance or bearing to require a reversal of the judgment, especially as explained by the court.

Finding no reversible error in the record, the judgment is affirmed.

(85 Tex. Cr. R. 62)

#### CHANCE v. STATE. (No. 5339.)

(Court of Criminal Appeals of Texas. March 12, 1919.)

#### 1. INTOXICATING LIQUORS $\S$ 146(1, 3), 169—UNLAWFUL SALES.

Under local option law, one who sells intoxicating liquors or acts as agent of another selling intoxicating liquors is guilty of crime, but one who acts purely for accommodation of purchaser is not guilty of crime.

#### 2. CRIMINAL LAW $\S$ 792(2)—LOCAL OPTION LAW—INSTRUCTIONS—"PRINCIPAL."

In prosecution for unlawful sale of intoxicating liquor, where defensive theory raised by evidence was that accused was not interested in sale, but acted solely for accommodation of purchaser, it was error for court, in addition to submission of such issue, to instruct on law of principals embodying substance of Pen. Code 1911, art. 74, defining a principal as one who, knowing of unlawful act and being present at its commission, aids and encourages it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Principal.]

Appeal from Criminal District Court, Bowie County; P. A. Turner, Judge.

Walter Chance was convicted for an unlawful sale of intoxicating liquors, and he appeals. Reversed and remanded.

O. B. Pirkey, of New Boston, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

**MORROW, J.** The conviction is for the unlawful sale of intoxicating liquors, in a part of the state where such liquors were prohibited under the local option law.

The state's evidence showed that the purchaser asked appellant if he could obtain some whisky for him; that appellant consented to do so, stating that a pint would cost \$3, and that some time thereafter he returned and delivered a pint of whisky, the purchaser paying him \$3 therefor.

[1] The appellant's theory and testimony was to the effect that the purchaser asked him to get some whisky for him, and that on appellant's promise to try to buy some for him the purchaser gave him \$3 for that purpose, which he afterwards used in buying for the purchaser the pint of whisky which he delivered. He claimed that he bought it from one Rudy, and introduced some corroborating evidence. He claimed to have no interest in the matter further than to accommodate the purchaser. There arose from this evidence three theories: First, that appellant sold the whisky; second, that he acted as the agent of Rudy, the seller, in either of which events he would be guilty; and, third, that he acted purely for the accommodation of the purchaser, and was without interest in, and derived no benefit from, the transaction. In this event he would not have been guilty.

[2] The court, in addition to the submission of the issues mentioned, instructed the jury on the law of principals, embodying the substance of the statute (article 74, Penal Code) defining a principal as one who, knowing of the unlawful act, and being present at its commission, aids or encourages it.

Looking alone to the definition of principals, it can be plausibly contended that one who, knowing the sale of intoxicating liquor is unlawful, aids and encourages the unlawful act by making the purchase is a principal. To regard him so would tend to obstruct the conviction of the seller by rendering unavailable to the state the testimony of the purchaser. To obviate this disadvantage the Legislature declared that the purchaser was not an accomplice (Penal Code, art. 602); and this court, in construing the law has held that he was not a principal. *Sears v. State*, 35 Tex. Cr. R. 442, 34 S. W. 124; *Fox v. State*, 53 Tex. Cr. R. 155, 109 S. W. 370; *Trinkle v. State*, 59 Tex. Cr. R. 257, 127 S. W. 1060. The uniform holdings of this court are to the effect that, where the

defensive theory raised by the evidence is that the accused was not interested in the sale and not acting as the agent of the seller, but acted solely for the accommodation of the purchaser in obtaining the liquor for him, the jury should be instructed affirmatively that this theory being sustained, an acquittal should result. *Cowley v. State*, 72 Tex. Cr. R. 173, 161 S. W. 472; *Scott v. State*, 70 Tex. Cr. R. 57, 153 S. W. 872; *Branch's An. P. C.* p. 713, art. 1248, and cases listed.

The charge on the law of principals is in conflict with the defense of agency for the purchaser, in that it leads to the conclusion that the act of the agent in buying the liquor for the purchaser was such "aid or encouragement" of the seller as would make the agent guilty as a principal. Its effect is to confuse and mislead the jury as to the true rule of law by which they are to be governed. The court, in our opinion, should have, in response to appellant's objection to the charge, eliminated the charge on principals. The appellant requested a more comprehensive and accurate charge on the law of agency, and on another trial it should, if requested, be given or embodied in the court's charge.

The judgment is reversed, and the cause remanded.

(35 Tex. Cr. R. 48)

**LAMM v. STATE.** (No. 5317.)

(Court of Criminal Appeals of Texas. March 12, 1919.)

**HUSBAND AND WIFE — §313 — DESERTION — EVIDENCE — SUFFICIENCY.**

In prosecution for willful desertion of wife, evidence held insufficient to support conviction.

Appeal from Kendall County Court; J. W. Lawhon, Judge.

Louis V. Lamm was convicted of willfully deserting his wife, and appeals. Reversed and remanded.

W. C. Linden and Joe H. H. Graham, both of San Antonio, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** Appellant was convicted under a charge of willfully deserting, neglecting and refusing to provide for his wife.

The evidence discloses that appellant married the daughter of a man named Reinhard about seven years prior to the trial of this case. Reinhard testified he bought them a home for which he paid \$2,200. After living on it for some time appellant suggested to his father-in-law that he would like to go on one of his farms. Reinhard permitted this.

Appellant lived upon the farm awhile. When this move was made he sold the home in town given him by his father-in-law, and purchased another town home for \$1,300. The remainder of the money seems to have been invested in Jersey cows for dairy purposes. In December, 1917, appellant's wife gave birth to her second child. Her mind became deranged, and appellant moved back to town, and for a month lived with his father-in-law, and then moved to his home. Appellant went into the jitney business. The living made from it was rather precarious; at least not very satisfactory. He went to Camp Stanley and secured work. This gave him a definite and certain employment. He spent his time pretty closely about home until his wife's mind improved before going to Camp Stanley. Camp Stanley is a few miles away from his residence. Reinhard's feelings were quite hostile to defendant. He testified there were some financial transactions between himself and defendant. Among other things, he stated defendant owed him a note for \$100, and had owed it for a number of years, and that at one time he advanced him \$32 to pay for repairs on the radiator of his automobile. Some of the Jersey cattle taken to the farm by appellant were sold, and Reinhard got the proceeds; \$50 at one time and \$80 at another, which Reinhard mentions. He still claims that appellant owed him the \$100 note, which was of about six years standing. He seemed to know nothing about the amount of money appellant earned, or furnished his family, or what necessities appellant furnished his wife. Reinhard says that he would send them butter and eggs, and also paid one small grocery bill at Mr. Davis' grocery store. He testifies, further, that with appellant's permission he took appellant's wife to San Antonio and left her with an aunt of appellant, but he did not know who paid her expenses in San Antonio; that he himself did not, and that after she had been there two or three weeks, without appellant's knowledge or consent, he went for and brought her to his house, where she was still living at the time of the trial; that he went to appellant's house and locked the door and nailed up the windows and carried the keys off and kept them, and still has them. He says that the things he had furnished his daughter and given her amounted to about \$100 in value.

Appellant's testimony is that he went to the farm mentioned and remained awhile; that his wife's mind became deranged; that she gave birth to a child in 1917; that he moved to town, and shortly after moving her to town went to his own home, where he took care of her; that he went in the jitney business to make a living; that it was not a very satisfactory way of earning a living by such precarious jobs; that after his wife got well and recovered her mind he went to work

at Camp Stanley; that he worked there and received his wages and would go home at night; that the expense of running backward and forward, the cost of gasoline and other expenses, were beyond what he thought was proper, so he limited his visits to three times a week, working in the day and going home, spending the night; that he furnished his wife all the money he could spare, and that he furnished her with ample groceries and necessities, amounting to something like \$6 or \$7 a week. In this he is sustained by two merchants with whom he and his wife traded, whose names are Davis and Wendler. Davis testified that he had done business with appellant indirectly; that he had delivered groceries to appellant's family. These groceries were paid for twice by Mrs. Mills; they were cash sales of between \$1 and \$2 each time, and that Mrs. Mills' boy came to his store with a note from Mrs. Lamm, asking for groceries for defendant, and he sent her groceries, and charged them to defendant. Another time this boy came with a note, and he asked if defendant was at home, and was informed that he was not, so he phoned Mr. Reinhard, and asked him if he should send the groceries, and, being answered in the affirmative, he sent them. This is the bill that Mr. Reinhard says he paid. He says Mrs. Mills often came over for groceries, and he gave them to her, and she paid for them; that he did not know whether those groceries were for Mrs. Mills or for Mrs. Lamm. He further stated at different times appellant came to his store and bought groceries and paid cash. This was before he went to work at Leon Springs. After that he did not remember whether he came to the store and bought groceries or not. The only bill of groceries ever paid for by Reinhard was the bill which he delivered to Mrs. Mills, already mentioned. Wendler testified he was in the mercantile business, and was acquainted with defendant and had known him for years; that he had traded at his place a long time, and had traded there during the time he lived at Kritzburg on Reinhard's farm, and after that time when he lived in Boerne and out in Oak Park. The sales witness made to defendant were cash transactions, and averaged from \$5 to \$7 per week for groceries. He bought groceries at the rate of from \$5 to \$7 per week all during the time he was at Kritzburg and at Oak Park up until the time he went to work at Camp Stanley, which was about three months before. Since that time he had not bought groceries to any considerable amount from witness. He says Reinhard did not pay him any money, that defendant paid him, and that these sales would occur anywhere from one to three times a week, and were all cash sales. The witness Adler testified that he had known defendant, and that he traded with him for years; that he was a baker; that appellant bought bread from him about two or three times a week;

that appellant would buy 30 to 40 cents worth of bread every two or three days, and on Saturdays he usually bought more than that, and such things as ginger cake, coffee cake and stuff that average about 90 cents to \$1.30 a week; that the defendant still buys bread from him; that while defendant lived at Oak Park he bought about 30 cents worth every other day. Mrs. Mills testified that she knew the defendant, and had worked for him for some time; that she helped cook and wash. She says:

"I got things at Davis' store, and Mr. Reinhard sent things. I didn't work all day. I got there about 9 or 10 o'clock in the morning, and worked until 3 or 4 o'clock in the afternoon. I was hired by Mr. Reinhard, and I was discharged because the defendant said he could not pay any longer. The defendant paid me \$9 for the time I was there. I was not there at night, and I don't know whether Mr. Lamm was there at night or not."

Mrs. Layton testified that she worked sometimes at defendant's place in Mrs. Mills' place when Mrs. Mills wanted to go away anywhere. She saw while she was there bread, bacon, and potatoes, but they were short of wood.

Appellant testified to buying groceries and staying with his wife until she recovered from her insanity and sickness, and that he worked around home and took care of her and furnished her a home and the necessities, and that when his wife recovered sufficiently he went to Camp Stanley to work, and went home at night until he was spending what he thought too much money in going home every night, and that he lessened his visits to three nights a week, making arrangements to live cheaper at Camp Stanley, and that he furnished his wife with money with which to buy groceries and the necessities of life, and that he furnished her all the money he could make and spare, and that it was out of this money she paid for the groceries at Davis' and Wendler's, where she did make purchases, and that on one of his visits home his wife asked his permission, or if he had any objection, to her going to San Antonio with her father; that her father would take her if she would go; that he gave his permission, and she went to San Antonio, where he made arrangements to pay her board while she remained, and did pay her board, except in part, which he agreed to pay in work to his aunt, with whom his wife was staying. Without his knowledge, shortly before the institution of this suit, Reinhard went to San Antonio and brought appellant's wife home to his (Reinhard's) house, and that when he ascertained that she had returned he went home and found his house locked and the windows nailed up, and he was unable to get in his home. This prosecution was then instituted. The witness Reinhard also testified:

"It is a fact that I offered to dismiss this prosecution if this property which he sold was deeded back."

It seems that appellant owed \$350 on the place, and that there were some extra lots in addition to that upon which the residence was situated; that he sold these lots to meet outstanding obligations. Reinhard objected to this, and wanted these lots deeded back, and offered to dismiss the prosecution if appellant would deed them back. This we think is a fair statement of the testimony. The wife did not testify.

We are of opinion this evidence does not show a desertion by appellant of his wife. There was no evidence of desertion, unless it is found in the fact that he had not lived with her since his father-in-law took her to his house just before the institution of this prosecution. If there is any desertion in this act it occurs to us it was by the wife; at least her father testifies he took her to his house, and practically took possession of appellant's home and locked and nailed it up. Nor do we believe the evidence sufficient to show that she was in necessitous circumstances, or that he failed to provide for her. The testimony seems to be uncontroverted that while she was living at home during his absence at Camp Stanley he furnished her money with which she purchased groceries. This is shown by himself and the other witnesses mentioned. He made but few if any, accounts; his wife was paying cash for groceries, and appellant furnished the money to his wife; and he is not contradicted by the testimony. Take the case as it stands, we are of opinion the evidence is not sufficient to support the conviction.

The judgment is reversed, and the cause remanded.

(35 Tex. Cr. R. 69)

# LAGOW v. STATE. (No. 5071.)

(Court of Criminal Appeals of Texas. March 12, 1919.)

## 1. CRIMINAL LAW §507(1)—"ACCOMPLICE" TESTIMONY.

Prisoner in jail, who picked up from ground near window a file thrown there by defendant, was an "accomplice" of defendant, charged with having conveyed file to prisoner to aid him and others to escape, though, seemingly, one incarcerated, who merely accepts means provided by one outside to effect his escape, is not within the accomplice rule.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

## 2. CRIMINAL LAW §511(3)—ACCOMPLICE TESTIMONY—CORROBORATION—CIRCUMSTANTIAL EVIDENCE.

Before possession of a file by defendant, charged with conveying it to a prisoner in jail

to aid him to escape, could become basis for inference that he caused it to be conveyed to jail (the inference corroborating the accomplice testimony of the prisoner), it was necessary that his possession be established beyond a reasonable doubt by evidence meeting legal test of circumstantial evidence.

**3. CRIMINAL LAW §553, 554—REJECTION OR DISBELIEF OF TESTIMONY.**

The jury was authorized to reject or disbelieve defendant's testimony and that of his witnesses on controverted matters.

**4. CRIMINAL LAW §511(2)—ACCOMPLICE TESTIMONY—CORROBORATION.**

Under Vernon's Ann. Code Cr. Proc. 1916, art. 801, jury were not authorized to convict defendant, charged with having conveyed file to prisoner in jail to aid him to escape, on testimony of such prisoner, an accomplice, unless they believed prisoner's testimony was true, that it showed, with other evidence, defendant's guilt, and was corroborated by other testimony tending to connect defendant with offense.

**5. CRIMINAL LAW §511(2)—ACCOMPLICE TESTIMONY—CORROBORATION—SUFFICIENCY OF EVIDENCE.**

In prosecution for conveying file to prisoner in jail to aid him to escape, evidence held insufficient to establish defendant's possession of file in corroboration of accomplice testimony of prisoner charged to have been aided.

Appeal from District Court, Hale County; R. C. Joiner, Judge.

S. F. Lagow was convicted of conveying a file to a prisoner in jail to aid him to escape, and appeals. Judgment reversed, and cause remanded.

See, also, 197 S. W. 217.

W. W. Kirk, of Plainview, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

MORROW, J. Appellant's conviction was upon a charge that he conveyed a file to one Crockett, a prisoner in jail, for the purpose of aiding said Crockett to escape.

[1] The conviction rests upon circumstantial evidence alone. Material and essential circumstances were testified to by Crockett, the prisoner in jail named in the indictment, who was under a charge of felony. If the offense was committed, this witness was an accomplice. According to the state's theory the appellant threw a certain file against the jail in which Crockett was confined pursuant to an agreement with Crockett and another prisoner for their use in making their escape. It fell on the ground near a window, and was picked up by Crockett, and by him conveyed into the jail and concealed. His testimony, therefore, connected him with the commission of the crime in a manner that made his testimony subject to the statutory rules governing accomplice testimony. On this subject the statute declares:

"A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient, if it merely shows the commission of the offense." Vernon's Texas Crim. Stats. vol. 2, p. 782, art. 801.

From the testimony of Crockett there was a conspiracy, to which he and appellant and the other prisoners were parties, to secure the escape from the jail, not of Crockett alone, but of the other prisoners as well. He and the other prisoners, according to his statement, had talked the matter over before the appellant was put in jail, and the key which Crockett was making was partly completed before the appellant was put in jail, and the object in obtaining the smaller file was that the key might be completed and used by the appellant and his coconspirators. Under this state of facts he, having, as he says, conveyed the file into the jail after appellant put it within his reach, would have been an accomplice. It seems that one incarcerated, who merely accepts the means provided by one outside to effect his escape, is not within the accomplice rule. *Peeler v. State*, 3 Tex. App. 533; *Veal v. State*, 56 Tex. Cr. R. 221, 120 S. W. 173. A different rule applies, however, where the purpose is the liberation of others. *Hillman v. State*, 50 Ark. 523, 8 S. W. 834; *Luke v. State*, 49 Ala. 30, 20 Am. Rep. 269; *State v. Duff*, 144 Iowa, 142, 122 N. W. 830, 24 L. R. A. (N. S.) 625.

The criminating testimony given by the accomplice was, in substance, that at the time the offense was committed he was confined in jail on a charge of felony, and had been there confined for some months. The appellant was placed in jail, and remained part of a day and one night. The witness Crockett had procured a piece of steel, and was in possession of what he described as a 12-inch file, which had been in jail for some time, and with which it is not claimed appellant had any connection. There were two other prisoners in jail, one Hampton and one Waggener. While thus engaged he, in a conversation with Hampton, expressed a desire for a smaller file in order that he might complete the key, when the appellant, who was present, said that he had about the size and kind of file that was wanted; that nothing further was said about the file at that time. Hampton said that he had some saw blades, and told appellant where they could be found. Appellant said that he did not care for the information; that he had a friend in the garage business from whom he could get all the saw blades he needed, stating that he had "the guts to put anything in jail." This conversation, witness said, took place on Saturday evening, and he obtained the file the following day. He described the manner of obtaining it, in substance, as follows:

"I saw Mr. Lagow around at the jail that afternoon. When I first saw him he was right east of the window, and I was standing inside of the cell. It was about 2 o'clock in the afternoon. What caused me to see him was he hollowed, 'Hello boys.' Lagow was on the east side of the jail, and I came out of the cell into the run-around, and back to the window. While doing so I heard something hit the wall about the window. It made a noise that sounded like steel. When I reached the window I did not see Mr. Lagow, but threw my eyes down and seen the file, and picked it up and hid it. A few minutes later I saw Mr. Lagow again. He was at the fence some 10 feet from the window where I could talk to him. He asked us how we were getting along, and I said all right. When he was leaving he said to us, 'Good-bye; and I told him, 'Much oblige,' and he said, 'All right boys.' He did not ask me anything about what I was thanking him for. Hampton was standing by the window at the same time, both facing the window."

Hampton was not present at the trial, and did not testify as a witness.

Waggener testified as a witness for the defendant, and contradicted Crockett's testimony, concerning the conversation which he said took place while the appellant was in jail. About a week after the appellant was released from jail the sheriff, on searching the jail, found a key which Crockett had made and two files, one the 12-inch file which was mentioned by Crockett, and had been in jail for some time, and an 8-inch file. The latter was of a brand of make of files which were used by the Santa Fé Railway Company, which had a station at Plainview, where the offense is charged to have been committed. There was no direct testimony that the appellant had ever been in possession of the 8-inch file, but the state sought by circumstances to connect him with the possession of it. The circumstances relied upon were, in substance, that the appellant had been an employé of the said railway company, his duties consisting in work at the coal chute and at the pumphouse. These were about 400 yards apart. It appears that another employé had charge of the pumphouse at night, and had keys to it, and that appellant's duties required him to do some work there in the mornings. The exact time of his terminating his service with the railroad is not disclosed, but it appears that he received an injury about the 10th or 11th of August, and was put in jail about the same time. A bridge foreman named Kraft had in July made requisition upon the company's agent at Amarillo for some supplies, including a dozen 8-inch files. The company operated a supply train, going over the road once a month, and the supplies, including a box which was supposed to contain a dozen 8-inch files, were sent on this supply train, which, according to the evidence, reached Plainview some time on the 8th of August, at which time Kraft had transferred his

bridge gang to Stanton, another station on the same railroad, and the supplies which he had ordered were left at Plainview apparently by the crew of the supply train, though they were not left in charge of any one so far as the evidence discloses. The company's agent said that on receiving an inquiry about the supplies, and having no knowledge of them, he looked them up and finally found them in the pumphouse. He made no examination of them, but directed Munger, the man who was in charge of the pumphouse, to ship them to Kraft at Stanton, and Munger said that he did ship them, though the date he did so is not disclosed. Munger made no examination of the articles, but says he saw a box with some articles in it, and a bundle of handles, which he shipped on one of the railroad company's trains to Kraft at Stanton. The shipment was received by Kraft, according to his testimony, on the 18th of August, but the box containing the files had been opened and contained, when received by him, only nine files. The state's testimony showed that it was the custom of the employes, in the event they needed for the use of the company any of the supplies that were in a shipment, to take them out and make use of them.

[2] The only circumstance which we find from reading the record, which would have been sufficient to have met the requirement of the statute that the accomplice be corroborated by evidence tending to connect the appellant with the offense would have been proof that appellant was in possession of the 8-inch file which was found in jail. This, of course, could have been established by circumstantial evidence. But before the possession of the file by the appellant could become the basis for an inference that he caused it to be conveyed to the jail, it was necessary that his possession of it be established beyond a reasonable doubt by evidence meeting the legal test upon circumstantial evidence.

The question is, Do the facts proved meet this requirement? In other words, Do the facts proved relative to the file authorize the inference by the jury that appellant abstracted one of the files which was shipped to Kraft? To justify this inference, the evidence showing that he did abstract it must exclude any other reasonable method by which its absence from the box which reached Kraft could, under the evidence adduced, be explained. It is not shown that the agent at Amarillo counted the files that were placed in the box, but we gather from his testimony that he filled the order or requisition by shipping a box supposed to contain a dozen files. Assuming that it did contain a dozen, no member of the crew of the supply train which conveyed the shipment from Amarillo to Plainview was introduced to negative the fact that pursuant to the custom mentioned some of the files in

the box were abstracted while the shipment was en route. It is not shown to whom the shipment was delivered when same reached Plainview. No information is given concerning them when they first arrived there, but the only testimony upon the subject is that, after the agent received an inquiry from Kraft, he located a box and a bundle of handles situated in the pumphouse, and that he directed Munger, who had charge of the pumphouse, to ship them to Kraft. Neither Munger nor the agent made any examination or learned the contents of the box, nor was there proof made that the missing files were not abstracted after they were shipped from Plainview and before they reached Kraft at Stanton. The presumption that appellant abstracted the files rests upon the presumption that the box, when originally shipped, contained a dozen files; that when it reached Kraft there were only nine files in it, and while it was in the pumphouse appellant had the opportunity to make the abstraction. The pumphouse itself was accessible to others. Appellant's main duties placed him 400 yards away from it while he was at work for the company. No reason is suggested for his obtaining the files prior to his incarceration in the jail and his supposed conversation with Crockett. It is not shown with any degree of certainty that the files had not been shipped from Plainview before the appellant was released from jail. Crockett's testimony touching the alleged conversation with the appellant, and touching his supposed throwing of the file from the fence to the jail, is not available on this phase of the case, but it was essential, to corroborate Crockett, to show by other testimony than his own the possession of the file by appellant. The only other circumstance that could be relied upon to corroborate Crockett is the fact that appellant was present at the jail on Sunday following his release on Saturday. Crockett admits that at the time there was another person present. The appellant introduced two witnesses, apparently disinterested, who claim that they reached the jail at the same time that the appellant did; that they heard none of the conversation at the jail described by Crockett; that they were in a position to hear it, and were in a position to have seen the file in appellant's possession, and to have seen him throw it if it had been done, but they negative the fact that they did see it. One of them testified that he threw to one of the inmates of the jail a half dollar in silver, and that it struck the building and made a noise.

[3-5] On the cogency of the evidence as a whole, tested by the rules of circumstantial evidence, it appears from the testimony of the state's witnesses that Crockett and Hampton were both desirous of release from jail; that they planned an escape and discussed the means, including procuring some instru-

ment to aid them. Crockett had a wife and several children, who resided in the vicinity, and who frequently visited him, his wife having visited him on the day before he claims to have obtained the file. He said he did not obtain the file from his wife. She did not testify. Hampton was also visited by various persons, friends of his, members of a carnival company. Their visits were made after the time that Crockett claims to have received the file, but before the time the file was found in the jail by the sheriff. The jail was in the basement of courthouse on the public square, which was frequented by the public generally, and the jail was protected by an open iron fence, situated 10 feet from the jail windows. It was shown that prior to the time that the appellant entered the jail, not only the 12-inch file, which has been mentioned, was in the jail, but the sheriff said that for months prior to the date of the alleged offense he had, from time to time, on searching the jail, found articles suitable for and intended as a means of escape, including skeleton keys and other articles. The appellant was a man 50-odd years of age, had a wife and two married daughters living in the community, and, so far as the evidence discloses, had no interest in Crockett, nor in securing his release, or that of other persons. He testified himself, denying all of the incriminating facts, and proved by his wife and daughters his movements from the time he was released from jail until the time that Crockett claims to have received the file, their testimony tending to negative any opportunity on his part to have gone to the pumphouse, or to have otherwise obtained the file during the time mentioned. The jury would have been authorized to have rejected or disbelieved the testimony of the appellant and that of his witnesses on controverted matters. They were not, however, authorized under the law to convict him upon the testimony of Crockett, unless they believed that Crockett's testimony was true, that it showed in connection with other evidence the guilt of appellant, and was corroborated by other testimony tending to connect the appellant with the commission of the offense. The evidence is not of a conclusive nature, aside from the fact that its essential elements are supported alone by accomplice testimony. *Lagow v. State*, 197 S. W. 217. The file found in the jail by the sheriff and identified as of the same make as many in use by the railroad company, and distributed among its employes, was not discovered for about a week after appellant's release from the jail, and before and after his release there were many opportunities for others to have conveyed the file to the jail, with strong motives to aid the prisoners to secure their liberty, and some of these other persons were not shown to have failed to take advantage of these opportunities. Conceding, however, that if the file had been satisfactorily traced



to appellant's possession the evidence would have been sufficient to support the verdict, we do not think the proof establishes such possession, and are of the opinion that the verdict should have been set aside by the trial court.

The judgment is reversed, and the cause remanded.

(85 Tex. Cr. R. 52)

GRIBBLE v. STATE. (No. 5251.)

(Court of Criminal Appeals of Texas. Feb. 12, 1919. On Motion for Rehearing, March 12, 1919.)

1. STATUTES  $\Leftrightarrow$ 190—CONSTRUCTION—AMBIGUITY.

The court need only look to rules of construction when law is ambiguous and its language not clear.

2. CRIMINAL LAW  $\Leftrightarrow$ 1092(4), 1099(1) — APPEALS—TIME—STATUTES.

Acts 31st Leg. c. 39, relating to time for filing statements of facts and bills of exceptions, not only repealed Acts 30th Leg. (1st Called Sess.) c. 24, but also all other laws in conflict therewith, including Acts 30th Leg. (1st Called Sess.) c. 7, as to district court procedure; and Code Cr. Proc. 1911, art. 845, giving 30 days in which to file statements of facts and bills of exceptions, governs appeals in misdemeanor cases.

3. HOMICIDE  $\Leftrightarrow$ 77—NEGLIGENT HOMICIDE—FIRST DEGREE.

One turning over a boat, thus drowning a child, if guilty of negligent homicide, is guilty of such crime in the first degree, under Pen. Code 1911, art. 1124; the causative act not being a misdemeanor, nor, per se, cause for a civil action.

4. CRIMINAL LAW  $\Leftrightarrow$ 453 — OPINION EVIDENCE.

In a prosecution for negligent homicide, court properly refused to allow witness to testify that he considered the defendant a cautious man, being merely hearsay opinion of witness.

5. CRIMINAL LAW  $\Leftrightarrow$ 656(9) — TRIAL — COMMENTS OF COURT.

Comments of court on matters material and admissible, where same are upon the weight of the evidence and in the presence of the jury, are error.

6. CRIMINAL LAW  $\Leftrightarrow$ 829(1) — TRIAL — REQUESTED INSTRUCTION.

It was not error to refuse a requested special charge substantially covered by main charge.

7. CRIMINAL LAW  $\Leftrightarrow$ 763, 764(1)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

A special requested charge which was on weight of testimony was properly refused.

8. HOMICIDE  $\Leftrightarrow$ 305 — INSTRUCTION — NEGLIGENT HOMICIDE.

There was no error in telling jury that accused, who was indicted alone for negligent homicide

but who was accompanied by another person who seemed to be acting with him, would be guilty, if he or his companion, acting together, committed the offense.

9. CRIMINAL LAW  $\Leftrightarrow$ 726—RETALIATORY ARGUMENT.

An accused cannot complain of remarks made by county attorney in closing the case in response to the argument of his own counsel.

10. HOMICIDE  $\Leftrightarrow$ 74—NEGLIGENT HOMICIDE.

One who overturned a boat with knowledge that a boy therein could not swim, causing the boy's death, was guilty of negligent homicide.

On Motion for Rehearing.

11. CRIMINAL LAW  $\Leftrightarrow$ 656(3) — TRIAL — REMARKS OF COURT.

It was error under Code Cr. Proc. 1911, art. 787, for court, in overruling objection to evidence of prosecuting attorney, to state, "It will do so little harm that I believe I will admit the testimony," although the evidence was incompetent.

Appeal from Coryell County Court; H. E. Bell, Judge.

John Gribble was convicted of negligent homicide, and he appeals. Reversed and remanded.

T. R. Mears, of Gatesville, for appellant.

E. B. Hendricks, Asst. Atty. Gen., for the State.

LATTIMORE, J. This is a misdemeanor case, and it appears from the record that appellant's bills of exceptions were filed more than 20 days after the adjournment of court. An order was made by the court, when overruling appellant's motion for a new trial, allowing him 30 days after adjournment of court in which to file statement of facts and bills of exceptions. The statement of facts and bills of exceptions were filed within 30 days after such adjournment.

The Assistant Attorney General has moved to strike out the bills of exceptions on file herein on the ground that they were not filed within 20 days after the adjournment of the county court, and consequently came too late, even though filed within 30 days after the said adjournment.

There has been much misapprehension among the courts and litigants as to the course to be pursued in regard to filing statements of facts and bills of exceptions in misdemeanor cases, and many cases have been dismissed in recent years when the parties at interest seemed to think themselves within what appeared to be the direction of the statute in these matters. In view of this fact, we wish to review some of the legislation and decisions bearing upon the question of the time for filing such matters in appeals from county courts, in the hope of arriving at some harmony of understanding.

The Thirtieth Legislature, Acts 1907, p. 446, granted, to parties trying causes in both district and county courts, the right, by having an order to that effect entered on the docket, 20 days after adjournment of the court within which to file statements of facts and bills of exceptions. The same Legislature, later in the term, by an act which appears on page 509 of the acts of said Legislature, passed a bill which was the re-enactment of what is commonly called the "Stenographer's Bill," a part of which bill provided that all statements of facts and bills of exceptions which were filed as provided in said act would be in time if filed within 30 days after the adjournment of the court. This session of the Legislature adjourned April 12, 1907, and said bill took effect 30 days after adjournment. This court, in a number of cases arising during the latter part of 1907 and 1908, pointedly held that under the provisions of the act appearing on page 509, which is chapter 24 of the laws of the said Thirtieth Legislature, statements of facts and bills of exceptions, in cases appealed from district courts, were properly filed within 30 days after adjournment, but that said act did not apply to appeals from county courts. The act in question did not, in express terms, repeal the act first passed by said Legislature, allowing 20 days for filing such matters in both district and county courts; but this court seemed to construe that said law no longer had application to appeals from district courts, the inference being from said decisions that it appeared to the court that said Stenographer's Bill, by implication, at least, repealed said act giving 20 days after adjournment in so far as it affected district court cases. As stated, these decisions frequently pointed out that in appeals from county courts no change had been made in the law on the point under consideration. See *Howard v. State*, 53 Tex. Cr. R. 378, 111 S. W. 1038; *Dobbs v. State*, 54 Tex. Cr. R. 579, 113 S. W. 921; *Nichols v. State*, 55 Tex. Cr. R. 211, 115 S. W. 1196; *Webb v. State*, 117 S. W. 131.

Such was the situation when the Legislature met in 1909 and passed a law on this subject. See Acts 1909 (1st Called Sess.) p. 374. Section 7 of this act reads as follows:

"When an appeal is taken from the judgment rendered in any cause in any district court or county court, the parties to the suit shall be entitled to and they are hereby granted thirty days after the day of adjournment of court in which to prepare and file a statement of facts and bills of exception; and upon good cause shown the judge trying the cause may extend the time in which to file a statement of facts and bills of exception. Provided, that the court trying such cause shall have power in term time or in vacation, upon the application of either party, for good cause, to extend the several times as hereinbefore provided for the preparation and filing of the statement of facts and bills of exception, but the same shall not

be so extended so as to delay the filing of the statement of facts, together with the transcript of record, in the appellate court within the time prescribed by law, and when the parties fail to agree upon a statement of facts, and that duty devolves upon the court the court shall have such time in which to do so, after the expiration of the thirty days as hereinbefore provided, as the court may deem necessary, but the court in such case, shall not postpone the preparation and filing of such statement of facts and bills of exceptions so as to delay the filing of same, together with a transcript of the record in the appellate court within the time prescribed by law. Provided, if the term of said court may by law continue more than eight weeks, said statement of facts and bills of exception shall be filed within thirty days after final judgment shall be rendered unless the court shall by order entered of record in said cause extend the time for filing such statement and bills of exception."

The language of this quoted enactment is plain and unambiguous. It says:

"When an appeal is taken from the judgment \* \* \* in any \* \* \* county court, the parties \* \* \* shall be entitled to \* \* \* thirty days after the day of adjournment \* \* \* in which to prepare and file statement of facts and bills of exception."

We cannot believe the Legislature wrote county courts and county court procedure in this act carelessly or without purpose. They very well knew that such courts had no official stenographers, and if it be asserted that they only intended giving the right to file such statements and bills within 30 days after adjournment, to county courts in cases where stenographers were appointed, an adequate reply would be that such construction would be a contradiction of the plain words of the statute as written, and would be construing into the law that which the Legislature could and would have so stated in a few words had it been their intention.

[1] As we understand it, we need only look to rules of construction when the law is ambiguous and its language not clear, which is not the case in this act.

The first misdemeanor appeal to come before this court after the taking effect of the act of 1909, in which this question was involved, was *Sanders v. State*, 60 Tex. Cr. R. 34, 129 S. W. 605, in which Judge McCord held the act to apply to statements of fact in an appeal from a county court of Erath county, in which he held that the court might consider a statement of facts filed more than 30 days after the adjournment of the term where the court had made a proper order during the term extending the time for such filing. In the *Sewall Case*, 130 S. W. 1003, an aggravated assault conviction in 1910, Judge Ramsey says the statement of facts was filed more than 30 days after adjournment, and therefore was not filed in time. In *Brunk v. State*, 60 Tex. Cr. R. 263, 131

S. W. 1125, appealed from the county court of Hamilton county, Judge Davidson says:

"The court adjourned October 23d. The statement of facts was filed November 23d. This filing was one day too late. A statement of facts must be filed within 30 days \* \* \* after adjournment of the term."

These cases are cited as showing what seems to have been their construction of the act of 1909 prior to the rendition of the opinion in the Mueller Case, 61 Tex. Cr. R. 544, 135 S. W. 571, in which the court struck out a statement of facts in a county court cause upon the ground that the statement, being filed more than 20 days after adjournment, came too late. The court in the Mueller Case uses the following language:

"By many it seems to have been thought that chapter 39 of the Acts of the 31st Legislature, p. 374, repealed chapter 7 of the Acts of the 30th Legislature. By referring to that act it will be seen that it repeals only chapter 24 of the Acts of the 30th Legislature (the stenographers' Act), providing for their appointment, etc. In the Acts of the 31st Legislature, in section 1, it is provided that the terms of the latter law apply only in the event of the appointment of a court stenographer. In this law there is no provision for the appointment of a court stenographer in criminal cases tried in county courts. By its terms it only applies to and authorizes the appointment of stenographers in criminal cases in district courts."

[2] We think the court is wrong in saying that the act of 1909 repealed only chapter 24, Acts of the 30th Legislature. The repealing clause of chapter 39, Acts of the 31st Legislature, page 374, Acts 1909, is as follows:

"That chapter 24, p. 509, Acts of the First Called Session of the Thirtieth Legislature of the State of Texas, providing for the appointment of court stenographers, prescribing their duties and regulating their charges, and all other laws or parts of laws in conflict with this act, be and the same are hereby expressly repealed; provided, however, that nothing in this act shall be so construed as to prevent parties from preparing statements of facts on appeal independent of the transcript of the notes of the official shorthand reporter. Provided, the provisions of this act as to preparing and filing statements of facts and bills of exceptions shall apply only to cases hereafter tried; as to cases heretofore tried the law now in force shall govern."

From which it clearly appears that not only was chapter 24 repealed, but also all other laws in conflict therewith. We might observe, in this connection, that neither chapter 24 of the Acts of the 30th Legislature, nor chapter 39 of the Acts of the 31st Legislature, expressly repealed chapter 7 of the Acts of the 30th Legislature with reference to appeals from district courts; but it has apparently been conceded by this court,

in all its opinions, that said chapter 7 has been repealed as to such district court procedure, because it was in necessary conflict with the later enactments.

The Mueller Case was followed by the Mosher Case, 62 Tex. Cr. R. 42, 136 S. W. 467, and by others subsequently; the effect of which decisions was to hold that a statement of facts and bills of exceptions filed more than 20 days after the adjournment of a county court came too late.

The latest statute on the subject seems to be the Act of 1911, chapter 119, § 7, p. 264 of the Acts of the Regular Session (Vernon's Sayles' Ann. Civ. St. 1914, art. 2073), which almost in terms re-enacted section 7 of the act of 1909, quoted above, and said section is carried into our Code Criminal Procedure as article 845. An examination of said section and of article 845, C. C. P., discloses that the plain language directs the litigant how he may appeal his case as far as the time for filing statement of facts and bills of exception is concerned.

That much confusion has resulted from the efforts of litigants to get their cases before this court under the apparent direction of this article, which, under the Mueller and Mosher Cases cited, was held to have no application to appeals from county courts in criminal matters, is very evident from the number of those cases appealed since the decisions in the above-mentioned cases, and in which statements of facts and bills of exceptions filed well within the time fixed for such action in appeals from county courts under the provision of article 845 have been stricken out, upon motion, because not filed in time.

This, in the opinion of the writer, at least, is very unfortunate. The requisites of appeal in all matters of practice are not easily kept in mind, and most careful litigants go to the statutes to find the same, and our experience is that able lawyers representing them from time to time need to do the same, and we think it is very unfortunate both for the profession and for the appellants to find any lack of harmony between the plain language of the statute and the holdings of this court.

We are not sufficiently wedded to the doctrine of stare decisis, in matters of criminal procedure at least, to deny entrance and consideration here to one who has followed the plain road indicated by a statutory signboard in trying to get here with what he believes to be his wrongs suffered on a trial in the court below.

We overrule the motion of the Assistant Attorney General to strike from the record these bills of exceptions and hope to bring about harmonious understanding of the rules by saying that the provisions of article 845 of our C. C. P., in the opinion of this court, govern appeals in misdemeanor cases as ap-

plied to filing of statements of facts and bills of exceptions.

Appellant was convicted in the county court of Coryell county of negligent homicide of the first degree, and his punishment fixed at one year's confinement in the county jail.

It is charged against appellant that he negligently and carelessly turned over a boat in which was a small boy, whose death by drowning was caused therefrom.

[3] Appellant's first contention was that the indictment was defective, in that he claims that the charge of negligent homicide was of the second degree and not of the first degree. To this we cannot agree. The act, if any, of appellant which caused the death of the boy, was the turning over of the boat, and this act is not a misdemeanor, nor, per se, would the same give just occasion for a civil action. See Pen. Code, art. 1124. Unless the causative act fall within one of these two classes named in the statute referred to, the negligent homicide would be of the first degree.

[4-6] We think the evidence sought to be elicited from appellant's witness Harris, as set out in his second assignment of error, was clearly erroneous, and that the witness should not have been permitted to state that he considered appellant a cautious man. This was merely hearsay opinion of said witness and was not admissible. The remark of the court was erroneous; but, as the evidence was inadmissible in itself, such error on the part of the court was not reversible. The authorities cited by appellant correctly hold that comments of the court on matters material and admissible, where same are upon the weight of the evidence, and in the presence of the jury, are error.

[7] The charge complained of in appellant's third assignment was substantially given by the court in his main charge, and the other special charge of appellant was on the weight of the testimony and erroneous.

[8] We fail to see any error on the part of the trial court in telling the jury that appellant, who was indicted alone but who was accompanied by another person who seemed to be acting with him, would be guilty if he, or he and his companion acting together, committed the offense. This disposes of the fifth ground of complaint made by the appellant.

[9] The remarks of the county attorney in closing the case for the state, as explained by the court in his qualification to the sixth bill of exceptions, seem to have been in response to the argument of counsel for the appellant.

[10] We have carefully reviewed the evidence in this case. The testimony of the six or seven boys, who were in swimming when the appellant and his companion came up to where they were and stated they were going to turn over the boat in which the deceased was, seems to agree as to the main

facts, that is, as to what appellant said when he came up, and further that he was told by the deceased and several of the others that the deceased could not swim; and also to the fact that he did turn over the boat and that thereby deceased was drowned. Appellant denied all these substantial facts; said he did not turn over the boat, that, in fact, it was not turned over, and that he did not make the statements attributed to him by the boys. All these issues were fairly submitted to the jury and by them decided against appellant, and we see no sufficient reason to disturb their verdict.

The cause is affirmed.

#### On Motion for Rehearing.

In this case appellant has filed an able and well-prepared motion for rehearing, each ground of which has been carefully examined, and we are unable to sustain any of appellant's contentions, except that we believe we were in error in not upholding his first contention as set forth in his second bill of exceptions.

[11] It therefore appears that, when appellant was introducing his evidence, he asked the witness Harris, in view of his knowledge of appellant, whether he would or would not say that appellant was a cautious, prudent man. To this the state objected for various reasons, and we think the question subject to objection. Thereupon the court made the following remark to state's counsel:

"Well, you may be right, but it will do so little harm that I believe I will admit the testimony."

It will be observed that this remark of the trial court was in direct violation of article 737, C. C. P., which is as follows:

"In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceedings previous to the return of a verdict, make any remark calculated to convey to the jury his opinion of the case."

Violations of the injunctions of this article have been the subject of much discussion by the courts and have given rise to conflicting opinions as to whether this remark or the other, of the trial court, was calculated to convey to the jury the judge's opinion of the case on trial.

It is clear that the framers of our law recognized the strategic position occupied by the judge of a trial court and the weight which the jury attach to his words and acts; and in article 736, C. C. P., the judge is forbidden to discuss the facts or use any argument in his charge calculated to arouse the sympathy or excite the passion of the jury; and we also see in article 842, C. C. P., that

a judge is forbidden to sum up, discuss, or comment on the evidence in granting or refusing a motion for a new trial. Article 787, *supra*, is plain, and it is to be regretted that departures from its provisions make difficult the question as to which are, and which are not, reversible errors.

In the McGee Case, 37 Tex. Cr. R. 608, 40 S. W. 987, this court held it was not reversible error for the trial court to say in overruling the objection of the state: "It is not very material, but it may go to the jury." The trial courts were also, in that opinion, admonished of the danger of expressing an opinion in such matters; but the court held that if the offered testimony was immaterial, or slightly material and could have had no appreciable effect on the jury, this court would not reverse for such comment.

See similar expressions in *Huntley v. State*, 34 S. W. 948. But in the *Simmons Case*, 55 Tex. Cr. R. 441, 117 S. W. 141, citing the *Moore Case*, 33 Tex. Cr. R. 306, 26 S. W. 403, and ruling on an objection made by defendant which was sustained, accompanied by the following comment of the trial court, "If there had been an objection made at the start, I might have sustained it on the ground that it was immaterial and irrelevant," Mr. Justice Ramsey, rendering the opinion, says:

"The rule laid down in the first case quoted (*Moore Case, supra*) ought to be strictly and literally observed; that is, the court ought, without discussion or comment, to rule and either admit or reject proffered testimony. The fact that a statement of the court as to the importance or unimportance of testimony is stated from the bench would often make it no less hurtful than if contained in the written charge. The trial judge is to the jury the Lord's anointed; his language and his conduct have, to them, a special and peculiar weight. Literally, in such matters, his communication should be, yea, yea, and nay, nay."

In approving substantially the opinion of Judge Ramsey, we would not be understood as abrogating the well-settled rule, found in many cases, that remarks of trial courts, in particular comments on evidence, are not necessarily reversible error; the rule being that they should not be so considered unless it reasonably appears that injury could have resulted therefrom.

In the instant case, upon more mature reflection upon the effect of the remarks of the court, we are convinced that we were in error in the original opinion in holding that no injury could have resulted from same.

The state had rested its case, and, as disclosed by the statement of facts, the witness Harris was placed upon the stand as appellant's first witness and was asked the question, as above set forth. As stated, the court overruled the state's objection with the statement that "It will do so little harm I believe I will admit the testimony." The average

juror very well knows that the court will not admit testimony unless he thinks it to be material, and we think the very admission of this evidence would carry with it to the jury the impression that the court believed it material. Now, when the court says, "It can do no harm," or, "It can do so little harm," there seems to us serious danger that this, in the minds of the jury, would give rise to the belief that the court was of the opinion that the state's case was so strong, or so thoroughly made out, as that the material evidence of the appellant could do little harm. This is more than the expression of the court in the McGee Case or in the *Huntley Case*; we think it is more in line with the *Simmons Case, supra*, *Chancey v. State*, 58 Tex. Cr. R. 56, 124 S. W. 426, the *Moore Case*, 33 Tex. Cr. R. 306, 26 S. W. 403, and the *Bradshaw Case*, 44 Tex. Cr. R. 222, 70 S. W. 217. There can be no question but that it is a direct comment on the weight of the evidence, and we cannot say it was not calculated to convey to the jury the court's opinion of the merits of the case.

The motion for rehearing is therefore granted, and the judgment is reversed, and the cause remanded for a new trial.

#### ROUSSET v. SETTEGAST. (No. 7641.)

(Court of Civil Appeals of Texas. Galveston. Dec. 12, 1918. On Motion for Rehearing, Feb. 25, 1919.)

#### 1. TAXATION $\S$ 573—DELINQUENT TAX—ACTION—CITATION—STATUTE.

In a tax suit against a nonresident owner, the requisites of the necessary citation, in October, 1906, were exclusively prescribed by Rev. St. 1911, art. 7698.

#### 2. TAXATION $\S$ 591 — ACTION FOR DELINQUENT TAXES—CITATION.

Writ against nonresident owner in delinquent tax suit running, "To the sheriff or any constable of Harris County, Greeting," and further reciting, "You are hereby notified that suit has been brought by the state for the collection of said taxes," and "You are commanded to appear and defend said suit," instead of the owner of property himself, was fatally defective as not in compliance with Rev. St. 1911, art. 7698.

#### 3. TAXATION $\S$ 591 — ACTION FOR DELINQUENT TAXES—CITATION OF NONRESIDENT—STATUTES.

That suit for delinquent taxes was against the nonresident owner and his unknown heirs, the petition specifically reciting the suit was brought pursuant to Acts 24th Leg. c. 42, relating to the collection of delinquent taxes, did not bring it within Rev. St. 1911, arts. 1874, 1875, as to service of citation, instead of article 7698.

## On Motion for Rehearing.

4. APPEAL AND ERROR  $\Rightarrow$  662(4)—STATEMENT OF FACTS—CONCLUSIVENESS.

Suit to set aside judgment for delinquent taxes being a direct attack on the tax judgment, under the record as presented the Court of Civil Appeals is not at liberty to go behind the statement of facts approved below, and to assume or presume there may have been some other and different citation, foundation of the tax judgment, than the one shown in the record.

5. APPEAL AND ERROR  $\Rightarrow$  539—AGREEMENT IN STATEMENT OF FACTS—RIGHT OF APPELLEE TO DENY.

Defendant appellee, in suit to set aside judgment for delinquent taxes, having agreed in statement of facts that proceedings referred to constituted record in tax suit, there being no intimation they were even objected to when offered in evidence, is not in position to say they did not in fact comprehend the whole record.

6. TAXATION  $\Rightarrow$  832—SALE FOR DELINQUENT TAXES—SETTING ASIDE—RIGHT OF PURCHASER TO TAXES PAID.

In action to set aside judgment for delinquent taxes, legal on its face, and to cancel sheriff's deed, defendant purchaser should have been given judgment for aggregate amount paid out by him as actual taxes on lot since the tax sale, with legal interest from date of judgment below until paid, and a lien to insure payment.

Appeal from District Court, Harris County; Wm. Masterson, Judge.

Suit by Paul Rousset against Charles S. Settegast. From judgment for defendant, plaintiff appeals. Reversed and rendered, with allowance of recovery to defendant.

P. Harvey, of Houston, for appellant.  
W. P. Neblett, of Houston, for appellee.

GRAVES, J. Appellant as plaintiff brought this suit against appellee in the court below to set aside a judgment for certain taxes theretofore rendered in cause No. 36212 by the same court in favor of the state of Texas against appellant, and to cancel and annul a sheriff's deed issued thereunder, wherein attempt had been made to convey appellant's property, lot No. 8, in block No. 224, in Houston Heights, Tex., to appellee.

It was alleged that the proceedings complained of were void, in that the citation issued in suit No. 36212 was fatally defective, but that a cloud was thereby cast upon plaintiff's title to the lot, the removal of which was prayed for.

The court, sitting without a jury, rendered judgment for the appellee, from which this appeal is presented.

We think the court erred. The facts were undisputed, showing that the tax suit had been brought against appellant in 1905, un-

der allegation that he was a nonresident of Texas, this being the citation issued:

## "The State of Texas.

"In the name of the State of Texas and County of Harris. To the Sheriff or any Constable of Harris County, Greeting: You are hereby commanded that you summon, by making publication of this citation in some newspaper published in the county of Harris for eight consecutive weeks previous to the return day hereof, Paul Rousset and the unknown heirs of Paul Rousset, and all persons owning or having or claiming any interest in the following described land, delinquent to the state of Texas and county of Harris for taxes, to wit: Lot 8 in block 224, in the town of Houston Heights, in Harris county, Texas. On account of taxes due for the years 1897, 1898, 1900, 1901, 1902, and 1903. Which said land is delinquent for taxes for the following amounts: One and  $\frac{1}{100}$  dollars (\$1.01) for state taxes, and one and  $\frac{7}{100}$  dollars (\$1.77) for county taxes, together with legal interest thereon, and three dollars collector's costs, three dollars county clerk's costs, one dollar and fifty cents for advertising; and you are hereby notified that suit has been brought by the state for the collection of said taxes, which suit is numbered on the docket of the 55th judicial district court of said county No. 36212, and you are hereby commanded to appear and defend such suit at the November term, 1906, of the 55th judicial district court of Harris county and state of Texas, to be begun and holden in the city of Houston, in said county, on the first Monday of November, 1906, it being the 5th day of November, 1906, and show cause why judgment shall not be rendered condemning said land, ordering sale and foreclosure thereof, for said taxes and costs of suit.

"Herein fail not, and have you before said court, on the said first day of the next term thereof, this writ, with your return indorsed thereon, showing how you have executed the same."

[1, 2] This writ was evidently framed in an effort to conform to article 1874, Revised Statutes, relating to citation by publication in suits generally, whereas we think that statute at the time this citation was issued, October 25, 1906, had no application to delinquent tax suits against nonresident owners, but that in such suits the requisites of the necessary citation were then exclusively prescribed by article 7698, Revised Statutes. And if that be true we think there can be no doubt that the writ here was fatally defective, since it ran "To the Sheriff or any Constable of Harris County, Greeting"; further reciting that "You are hereby notified that suit has been brought by the state for the collection of said taxes," and "You are commanded to appear and defend said suit," instead of the owner of the property himself; notifying him that the suit had been brought for collection of taxes, and commanding him to appear and defend it, as required by article 7698. *Earnest v. Glaser*, 32 Tex. Civ.

App. 378, 74 S. W. 606; Garvey v. State, 88 S. W. 873; Borden v. Patterson, 51 Tex. Civ. App. 173, 111 S. W. 186; Kenson v. Gage, 34 Tex. Civ. App. 547, 79 S. W. 606; Young v. Jackson, 50 Tex. Civ. App. 351, 110 S. W. 74.

It was agreed that at the time the tax suit was filed, as well as when all other proceedings thereunder were taken, Rousset was and still is a nonresident of Texas, living in New Orleans, La.

In these circumstances, that article 7698 alone applied in a suit to collect delinquent taxes against a known owner, alleged to be a nonresident, is not, we think, an open question. That article embodied what was known as the Colquitt Act, passed in 1897 (General Laws 1897, p. 138, c. 103). Being a special act upon the single subject of taxation, and having for its purpose the collection of taxes against both nonresident and unknown owners, by its express terms it repealed all former laws in so far as they conflicted with its provisions. Now, as the Supreme Court pointed out in *Dunn v. Taylor*, 42 Tex. Civ. App. 241, 94 S. W. 350, there had before its enactment been no provision at all for citing an unknown person in any case, and this act was intended to remedy that condition by providing that such could be done by publication. The statute did not stop, however, with directing that unknown owners should be cited according to its detailed requirements, but specifically included also all nonresident owners, without confining it to such of the latter class as were unknown; thereby directly trenching in that respect upon the provisions of pre-existing article 1874, which commanded citations in suits against nonresidents generally to be addressed to the sheriff or constable of the county where instituted. Under such condition, the later and special act would prevail, and it is no answer to say, as the appellee here does, that to tax suits against a known owner the old statute would still apply.

[3] Neither can the fact that the suit was against Paul Rousset and his unknown heirs make any difference, or bring it within article 1874 and the succeeding one, 1875, because the petition specifically recited that the suit was brought in pursuance of the act of the 24th Legislature (chapter 42), relating to the collection of delinquent taxes. *Gammel's Laws*, vol. 10, p. 1886 et seq.; *Babcock v. Wolfarth*, 35 Tex. Civ. App. 512, 80 S. W. 642; *Cyc.* vol. 36, p. 1151; *Kenson v. Gage*, 34 Tex. Civ. App. 547, 79 S. W. 606.

It follows from what has been said that the tax judgment assailed was void for want of a sufficient citation upon which to rest, and hence could not become the source of a title in appellee to appellant's land. Accordingly, since the facts were all fully de-

veloped, the trial court's judgment will be reversed, and judgment will be here rendered for appellant canceling and nullifying the sheriff's deed to appellee, and removing the cloud thereby cast upon the title to the lot involved.

Reversed and rendered.

#### On Motion for Rehearing.

[4] After mature reconsideration of the issues involved upon this appeal, so fully and ably presented in the appellee's motion for rehearing, while the matter is not free from doubt, we adhere to our former determination that the citation was insufficient, the tax judgment invalid, and that the sheriff's deed should be canceled, and the cloud thereby cast upon appellant's title removed. We think it clear that this suit was a direct attack upon the tax judgment, and that, under the record as here presented, this court is not at liberty to go behind the statement of facts approved below, and assume or presume that there might have been some other and different citation constituting its foundation than the one copied in our original opinion as being the citation upon which that judgment rested. Without detailing here the contents of the statement of facts, it is sufficient to say that it recited the introduction in evidence of the record in the tax suit No. 36212, detailed the proceedings had therein, including enumeration of plaintiffs' amended petition, the particular citation above mentioned, with the sheriff's return thereon, the answer, the judgment, and this agreement: "It is agreed that a printed copy of the citation above set out is on file in the papers of cause No. 36212." "The citation above set out" was the one called for in the sheriff's return; hence was the one upon which the judgment was rendered, and the agreement that a printed copy of it was so on file obviated any necessity of again copying it in the statement of the facts.

[5] Having agreed in the statement of the facts presented to this court that the proceedings referred to constituted "the record" in the tax suit, there being no intimation that they were even objected to when offered in evidence upon the trial of this suit below, it is not thought the appellee is in position to now say they did not in fact comprehend the whole record, nor that, if he were, this court could so disregard what is before it.

[6] But in one respect we conclude the motion is well taken, and that is its contention that appellee should have been given judgment for \$83.75, the aggregate amount paid out by him as actual taxes upon the lot at and since the tax sale, together with legal interest thereon from the date of this judgment below until paid, and a lien against the property to insure its payment.

This was a proceeding in equity, an appeal

to the equitable powers of the court, and the tax judgment against which it sought relief was not absolutely void upon its face, as was that passed upon in *Stewart v. Kemp*, 54 Tex. 248, where a judgment condemning land to be sold for taxes purported to have been rendered at a special term of the county court, when no authority then existed for holding special terms of that court. A distinction seems to be made between that class of cases, notwithstanding the somewhat indiscriminate use of the terms "void" and "voidable," as was pointed out by the court in *Carpenter v. Andersen*, 33 Tex. Civ. App. 484, 77 S. W. 291, and those like the present one, where the judgment is regular upon its face, and recites that due citation and service was made. In the latter instances it is held, upon the general principles of equity, that the purchaser at tax sale is entitled to be reimbursed for the amount paid out by him in satisfaction of taxes. *Rowland v. Klepper*, 189 S. W. 1033; *Ry. Co. v. Hoffman*, 193 S. W. 1140; *State v. Dashiell*, 32 Tex. Civ. App. 454, 74 S. W. 780.

It is admitted in the record here that the appellee paid in taxes upon the property involved, exclusive of court costs, the total sum of \$83.75, nor is any question raised as to the existence or validity of the original tax lien to that extent. The motion for rehearing is accordingly granted in part, and our former judgment so reformed as to allow appellee a recovery for that amount, with 6 per cent. interest per annum thereon from September 13, 1917, until paid, and a lien upon the lot to secure its payment. In all other respects the motion is refused and our former judgment remains unchanged.

Granted in part.

Refused in part.

#### FIRST STATE BANK OF BEN FRANKLIN v. HAMER. (No. 2094.)

(Court of Civil Appeals of Texas. Texarkana.  
Feb. 27, 1919.)

#### BILLS AND NOTES 527(2)—PAYMENT—EVIDENCE.

In an action against a bank in the nature of conversion of two vendor's lien notes, deposited by plaintiff as collateral for his note, but claimed by defendant also to secure another note on which plaintiff was indorser, evidence held to sustain a finding that the indorsed note had been paid out of the assets of the maker under an agreed transfer and assignment thereof to the bank.

Appeal from District Court, Delta County;  
A. P. Dohoney, Judge.

Action by A. F. Hamer against the First State Bank of Ben Franklin. Judgment for plaintiff, and defendant appeals. Affirmed.

Newman Phillips, of Cooper, for appellant.  
James Patteson, of Cooper, for appellee.

LEVY, J. The appellee's suit against the First State Bank of Ben Franklin, appellant, is in the nature of conversion of two vendor's lien notes for \$300 and \$500, respectively, alleged to have been placed with the bank by F. M. Nidever as collateral security for his note of \$149, due October 1, 1916. F. M. Nidever, as alleged, on the 4th day of October, 1916, tendered the bank the money due on the note of \$149, which the bank refused to accept, and refused to deliver his two vendor's lien notes. On November 1, 1916, F. M. Nidever, as alleged, transferred to the appellee, Hamer, his interest in the two notes. The said bank answered by general denial and in defense that the two vendor's lien notes were held by the bank as collateral security for the note of F. M. Nidever in the principal sum of \$149, and also for a note of the Ben Franklin Drug Company in the balance of \$500.78, which note was indorsed by F. M. Nidever; that on October 7, 1916, the two land notes were paid in full, and the proceeds so received were applied by the bank to the payment in full of the two notes above, leaving a balance of \$190.29 tendered by the bank to the owner thereof. The case was tried on special issues, and the jury made the following findings of fact: (1) That F. M. Nidever placed the two vendor's lien notes with the said bank as collateral security only for his individual note in the principal sum of \$149; and (2) that the indebtedness to the bank of the Ben Franklin Drug Company was paid and discharged out of the assets of the drug company under an agreed transfer and assignment thereof to the bank.

In accordance with the verdict of the jury the court entered judgment against the bank for the difference between the \$149 note held by the bank and the \$849 collected by the bank in payment of the two land notes held as collateral security for the \$149 note.

The first assignment of error assails the ruling of the court refusing to set aside the answer of the jury to the second special issue submitted to them. The contention is that the transfer of the assets of the drug company and the creditors that were to be paid out of the proceeds was reduced to writing, and that the written list of creditors did not include the note of the drug company to the bank. The following is the written transfer:

"Cooper, Texas.

"This will certify that I, the Ben Franklin Drug Company, of Ben Franklin, Delta county, Tex., for and in consideration that the First State Bank of Ben Franklin, Tex., has for me



fully paid, settled off, and discharged my creditors as shown by the list thereof furnished to said bank all of my property, books, notes, and accounts of the said drug company for such trust act. This January 14, 1915.

"[Signed] Ben Franklin Drug Company."

And the bank offered in evidence a typewritten list of creditors of the drug company, which was identified by the cashier of the bank as the list furnished by the manager of the drug company to be used in making the settlement of debts out of the assets. This list does not have on it the name of the First State Bank of Ben Franklin or the debt of the drug company to the bank. But the manager of the drug company challenges the identity of the list offered by the cashier as the list of creditors referred to in the transfer as "furnished to said bank." He testified:

"I turned the whole business over to Mr. Miller to make a distribution among the creditors and to release me. He agreed to furnish the money to settle with the creditors. I turned over to him, with a list of the creditors, and he was to settle with the creditors and to release me. I did furnish him the list; he and I made it out together. I do not remember whether it was made out on the typewriter or not. It is not a fact that the list as made out did not contain the debt of the Ben Franklin Drug Company to the bank. It was all included together. I know Will and I were in the bank together, and we set down all the indebtedness of the drug company. I do not remember making a typewritten list of the debts of the Ben Franklin Drug Company that did not include the debt owing to the bank. I do not remember that part at all."

It is clear from the evidence and the written transfer that a list of the creditors of the drug company to be paid out of the assets was furnished to the bank in their undertaking to pay the creditors out of the assets of the bank. And the effect of the evidence of the cashier is that the list offered in evidence by him is the real and original list of the creditors furnished the bank, and that the list so furnished did not have on it the name of the bank and the debt of the drug company to it; while, on the contrary, the effect of the evidence of the manager of the drug company is that the real and original list of creditors furnished the bank did have on it the name of the bank and the debt of the drug company to it. Thus the evidence is conflicting respecting the identity of the list offered by the bank. And in view of the conflict of the evidence the court did not err in passing the decision of the question to the jury. If the name of the First State Bank of Ben Franklin was, as found by the jury, on the list of creditors furnished the bank, then it follows, as concluded by the trial court, that the debt of the drug company to the bank was paid off and discharged out of the

assets of the drug company. This being so, then the bank was legally liable, as found by the court, for the proceeds of the two land notes above the payment of the \$149. The first assignment and the other assignments of error are overruled.

Affirmed.

PRINCE LINE, LIMITED, OF NEWCASTLE, ENGLAND, v. STEGER et al.\*  
(No. 7507.)

(Court of Civil Appeals of Texas. Galveston. June 13, 1918. On Motion for Rehearing, Feb. 6, 1919. Dissenting Opinion Feb. 12, 1919.)

1. DAMAGES ⇐184—CONTRACTS—MITIGATION—EVIDENCE.

In an action by the owner of a vessel against a charterer who failed to provide cargoes according to contract, evidence held to warrant a finding that the owner would not have suffered any loss by reason of the charterer's breach of contract if it had accepted substitute cargoes offered.

2. SHIPPING ⇐58(1)—ACTIONS—DEFENSES.

Where the charterer of a vessel failed to furnish cargoes agreed upon, but offered substitute cargoes which the owner refused to accept, and finally secured another cargo, which was transported, held that in an action by the owner for damages the charterer was not precluded on the ground the vessel was held at his request from relying on the fact that if the substitute cargoes had been accepted, or any diligence used, no loss would have been suffered.

3. DAMAGES ⇐62(4)—MITIGATION—BREACH OF CHARTER PARTIES—WILLFUL BREACH.

Where defendant was unable to furnish a cargo of horses because the French government inspectors had not been able to inspect them, held that the failure of defendant to furnish the horse cargo pursuant to a contract with a vessel owner was not a willful breach, and the owner could not recover damages, where by the exercise of ordinary care it could have saved itself from loss.

4. DOMICILE ⇐10—EVIDENCE—SUFFICIENCY.

In an action by the owner of a vessel against one not in the state of Texas, and who was not personally served, evidence held to show that he was a resident of New York, and so the action was properly dismissed as to him.

5. SHIPPING ⇐58(1)—BREACH—DEFENSES.

Where the charterer of a vessel, being unable to furnish a cargo within the time fixed, contracted for another cargo, which was transported, and agreed to save the owner from any loss, but the agreement was conditional on his holding of the vessel, held that, where the owner refused to longer recognize any right under the charter party, it cannot recover on the conditional agreement.

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Writ of error refused March 26, 1919.

## On Motion for Rehearing.

## 6. SHIPPING ⇐58(2)—ACTIONS—EVIDENCE.

In an action by the owner of a vessel against a charterer who failed to furnish a cargo of horses according to agreement, evidence *held* to show that the owner of the vessel which transported another cargo of horses secured by the charterer did not do so on the latter's agreement to compensate the owner for any loss, but because it did not care to transport other cargoes.

## 7. TRIAL ⇐205—INSTRUCTION—BURDEN OF PROOF.

In an action by the owner of a vessel against a charterer who broke its contract by failure to furnish cargo according to agreement, *held* that the failure of the court to charge that the burden was on the charterer to sustain the defense that the owner would have suffered no loss had it used any diligence in accepting other cargoes was not error.

## 8. APPEAL AND ERROR ⇐750(7)—REVIEW—ASSIGNMENTS OF ERROR.

In an action against the charterer of a vessel, where the trial court, as a condition to overruling a motion for new trial, required the charterer to remit a judgment over in his favor, *held* that assignments of error predicated on the judgment in favor of the charterer should not be disregarded on the ground that that matter was no longer in the case, but should be treated as a general attack on the verdict and judgment.

## 9. APPEAL AND ERROR ⇐742(1)—REVIEW—ASSIGNMENTS OF ERROR.

Assignment of error, statement under which refers to the evidence set out on preceding pages 24-132 of the brief, a part of which had no bearing on the issues presented, need not be considered; the statement of the evidence being insufficient under rule 31 for the Courts of Civil Appeals (142 S. W. xiii).

Graves, J., dissenting.

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

Action by the Prince Line, Limited, of Newcastle, England, against E. D. Steger and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Harris & Harris, and Edward F. Harris, all of Galveston, for appellant.

James B. & Charles J. Stubbs, of Galveston, and Gill, Jones, Tyler & Potter, of Houston (Frank C. Jones, of Houston, and James B. Stubbs, of Galveston, of counsel), for appellees.

PLEASANTS, C. J. This suit was brought by appellant against E. D. Steger, B. F. Yoakum, W. B. Ridgely, E. F. Cragin, W. B. Fariss, Hutchings, Sealy & Co., and the Missouri, Kansas & Texas Railway Company of Texas, to recover damages for the breach of a contract for the shipment of horses from Galveston, Tex., to La Pallice,

France. The contracts sued on were executed by appellant as the carrier and E. D. Steger as the shipper, and were also signed by T. H. Andrews, agent of the above-named railway company, over whose lines the horses were to be transported to Galveston for shipment. The petition alleged that the other named defendants, except Hutchings, Sealy & Co., were partners of E. D. Steger in the transaction. Hutchings, Sealy & Co. were made parties under allegations that said firm held \$20,000 which had been placed in their possession by defendant Steger to guarantee the performance by him of his said contract.

The defendant railway company answered by plea of non est factum, which was sustained by the uncontradicted evidence, and a verdict was instructed in its favor.

Hutchings, Sealy & Co. answered as stakeholders.

The defendants Yoakum, Ridgely, Cragin, and Fariss were served in New York with statutory notice. They made no appearance, and no judgment was rendered against any of them. Appellant contends that B. F. Yoakum was a citizen of this state, and judgment should have been rendered against him by default.

One of the two contracts sued on was for three voyages to be made by appellant's steamer Portuguese Prince from Galveston to La Pallice. The portions of the contract material to this appeal are as follows:

"That the said owners agree to carry, and the said shippers agree to ship, on said steamship, for three consecutive voyages from Galveston, Texas, to La Pallice, France, horses to be furnished by shippers as required, and as hereinafter provided, which trips are to be made without steamer being employed for any other purpose.

"That the steamer is to be employed for the carriage of horses on the aforesaid voyages, and that shippers shall pay to the owners \$75.00 per head for all horses that the steamer is able to accommodate, in accordance with the United States regulations and specifications, regarding the necessary fittings. (The estimated capacity of the steamer is between 950 and 1,050 horses.)

"Shippers agree to deliver horses to the said steamer at the dock or wharf or place where she may be lying, wharfage or other charges on the horses to be paid by shipper. Each horse to be fitted with a halter and suitable rope for tying up in stall provided, which halter will, being the property of the shippers, be taken ashore at the port of discharge, on the discharge of the horses.

"That after notice of readiness of the vessel to take on board the horses, not more than 48 hours shall be allowed to load the same. If more than 48 hours elapse before the horses are delivered to the vessel, shippers shall pay demurrage at the rate of eight cents per registered ton per day or part of day."

The other contract was for three voyages of appellant's steamer *Burmese Prince*, and contains the identical provisions of the contract for the voyages of the Portuguese *Prince* above set out.

Plaintiff's petition, after alleging the execution of the two contracts and reciting the terms thereof, contains the following allegations:

"Acting under and in pursuance of said contracts, plaintiff and defendant carried out the provisions thereof as to the first trip of the steamship Portuguese *Prince*, and as to the first and second trips of the steamship *Burmese Prince*, and as the plaintiff performed in every respect its obligations as to the remaining three trips, namely, one trip to be made by the *Burmese Prince* and two trips to be made by the Portuguese *Prince*. That the defendant utterly failed and refused to perform his contracts in any and all respects relative to said remaining three trips, and did as to said three remaining trips violate and breach his said contracts, causing thereby to plaintiff damages due to said breach (in the sum of to wit, \$150,000), which damages, though due and lawful demand therefor has been made by the plaintiff upon the defendant, defendant has utterly failed and refused to pay.

"That after making her first trip under said contract the steamship Portuguese *Prince* steamed from La Pallice, France, January 6, 1915, for the port of Galveston, where she arrived to receive her second cargo of horses on the 7th of February, 1915, but the defendant Steger utterly failed to provide said cargo of horses, and at his request and upon his repeated insistence and because of the lack of cargo or any cargoes of horses at Galveston said steamer was detained in said port until the 24th day of March, 1915, awaiting cargo, at which time, in compliance with the request of said Steger, and for his benefit and behalf, and as right and proper, the Portuguese *Prince* steamed from Galveston to New Orleans, reaching said port on the 26th day of March, 1915, where she was held awaiting to take on board a cargo of horses destined for Genoa to be furnished and shipped by Miller Bros. of Oklahoma, and applied to the said Steger's contract; said horses arrived at New Orleans April 5, 1915, and were loaded April 6, 1915, and the Portuguese *Prince* steamed from New Orleans April 7, 1915, and carried said horses to Genoa, Italy, where she finished discharging said cargo on, to wit, May 3, 1915, all of which delay being caused by the defendant, and not caused by the fault of said vessel, her, owners or agents.

"That the vessel was thus kept and detained and used thereby over and above the contract period of use and detention 64 days, including 10 extra steaming days, due to the greater distance to Genoa as compared with La Pallice; and the reasonable value of such use, keeping, detention, and extra steaming days was \$1,250 per day, a total sum of \$80,000, and additional coal was consumed, made necessary by said extra detention and steaming in the amount of 400 tons, of the reasonable market value of \$3.30 per ton, being a total sum \$1,320; that the extra cost for fodder, being the reasonable value thereof, on account of longer passage to

Genoa as compared with the distance from Galveston to La Pallice, was \$2,160. That the distance from New Orleans, La., to Genoa, thence to La Pallice, France, is about, to wit, 2,400 miles greater than from Galveston direct to La Pallice. That the freight money which would have been earned under the contract on 1,200 horses at \$75 per head is the total sum of \$90,000. That plaintiff admits that it received as freight money on the substituted cargo, \$82.50 per head for 1,200 horses from New Orleans to Genoa, making a total of \$99,000, less 5 per cent. commission paid to M. & R. Warriner, New Orleans, La., for procuring said substituted cargo, being the sum of \$4,950 commission, leaving a remaining sum as freight money from New Orleans to Genoa on said substituted cargo, the sum of \$94,050.

"That the expense of earning said \$90,000, as per contract, being 1,200 horses at \$75 per head from Galveston to La Pallice, would have been \$32,222.16, which would have left the net earning or profit to the plaintiff on the trip of \$57,777.84. The expense of earning the said \$90,000 by hauling the substituted cargo from New Orleans to Genoa was \$42,914.72, leaving a net income or profit arising therefor in the sum of \$57,085.28, being \$692.56 less than the net earning or profit which would have arisen had the contract cargo been hauled from Galveston to La Pallice; that the number of days which the steamer would have taken under the charter party from La Pallice to Galveston to La Pallice was 56 days; the actual number of days required from La Pallice to Galveston to New Orleans to Genoa was 118 days, and the net profit the steamer would have earned in said extra 62 days consumed by reason of the default of the defendant is the sum of \$63,968.19, which, added to the \$692.56 above set forth, makes the total loss to the plaintiff upon this voyage the sum of \$64,660.75.

"That, owing to said breach of contract by defendant, the plaintiff had to hunt in the markets of the world employment for the Portuguese *Prince* in lieu of the third voyage of said boat, which had been contracted for by said defendant, and therefore as in duty bound the plaintiffs succeeded in getting a cargo of horses to be hauled from New York City to Brest, France, and the said Portuguese *Prince* proceeded from Genoa, Italy, May 8, 1915, to New York City, reaching said city May 22, 1915, and thereupon loaded 1,188 horses, steamed May 24, 1915, from New York, and reached Brest June 14, 1915, and received for transportation \$50 per head for the horses, making a total sum of \$59,150, said horses having been shipped by Mayer & Carpenter for account of J. H. Dunn of London, England, Borgham & Swift, agents.

"The plaintiff admits having received said \$59,150 as freight money on the substituted cargo, less 5 per cent. commission paid by plaintiff to Paul F. Gerhard & Co., and Thomas Harling & Son of New York City, said commission being \$2,957.50, leaving the remaining sum as freight money from New York to Brest on said substituted cargo the sum of \$56,192.50.

"That the freight money which would have been earned under the charter party sued on, on 1,183 horses at \$75 a head, would have been \$88,725, and the expense of earning said freight money would have been \$29,122.75, which would have left the net earning or profit to

the plaintiff on the trip of \$29,602.25; the expense of earning the said \$59,150 by hauling the substituted cargo from New York to Brest was \$17,336.62, and plaintiffs received on account of demurrage or detention in New York, and on behalf of said Dunn, the sum of \$2,250, which it hereby credits on account of damages for delay and otherwise herein sought by plaintiff, thus making the net income or profit arising from said substituted cargo the sum of \$44,063.60, being \$15,538.65 less than the net earnings or profit which would have arisen had the charter party been carried out as to this voyage. That the number of days which the steamer would have taken under the charter party was 47 days; the actual number of days required for the substituted cargo was 42 days; that the plaintiff therefore credits as against this claim for detention, damages, and delay the average value of the net profits of the steamer at the rate of \$1,267.65 per day, amounting for said 5 days to \$6,340.67, leaving the total loss to the plaintiffs upon this voyage herein set forth the sum of \$9,198.18, besides the commission item above of \$2,957.50.

"That after making her second trip under said contract, which trip was made at Steger's request to St. Nazaire, France, the steamship *Burmese Prince* steamed from St. Nazaire, February 1, 1915, for the port of Galveston, where she arrived to receive her third cargo of horses on the 27th day of February, 1915, but that defendant Steger utterly failed to provide said cargo of horses, and at his request and upon his repeated insistence, and because of the lack of any cargo of horses to be had or obtained at Galveston, said steamer was detained in said port until about the 12th day of March 1915, waiting cargo, at which time, and for the benefit and in behalf of Steger, and as was right and proper, the *Burmese Prince* steamed from Galveston for New York, reaching said port the 19th day of March, 1915, where she was held, waiting a cargo of horses destined for La Pallice, France, to be furnished and shipped by and on account of Dowler, Forbes & Co., and applied to said Steger's contract. Upon the arrival of said horses at New York they were promptly taken on board, and the *Burmese Prince* steamed from New York March 24, 1915, and carried said horses to La Pallice, where she finished discharging said cargo on or about the 10th day of April, 1915—all of which delay was caused by the defendant, and not caused by the fault of the said vessel, her owners and agents. The vessel was thus kept, detained, and used thereby over and above the contract period of use and detention, to wit, about 20 days, and the reasonable value of such use, keeping, and detention was \$1,250 per day, a total sum of \$25,000.

"Additional coal was consumed, made necessary by said extra detention, use, and keeping, in the sum of 75 tons, of the reasonable market value of \$3.30 per ton, being a total sum of \$247.50. That the extra working cost, being for wages, provisions, stores, marine insurance and storage, made necessary by said extra use, keeping and detention, was the sum of \$2,310. The extra war risk insurance made necessary by said extra detention, use, and keeping was the sum of \$400. That the freight money which would have been earned under the original contract on 1,111 horses at \$75 per head is the sum of \$83,325. The plaintiff ad-

mits that it received as freight money on the substituted cargo \$50 per head for 1,111 horses, a total of \$55,550, less 5 per cent. commission paid to Gerhard & Co. and Phillip Segaller of New York, for procuring said substituted cargo, being the sum of \$2,777.50 commissions, leaving a remaining sum as freight money from New York to La Pallice, the amount of \$52,777.50.

"That the expense of earning said \$83,325, as per original contract, being 1,111 horses at \$75 per head from Galveston to La Pallice, would have been about \$28,073.20, which would have left the net earning or profit to the plaintiff on the trip of \$55,251.70. The expense of earning the said \$55,550 by hauling the substituted cargo from New York to La Pallice was, to wit, about \$24,811.25, leaving a net income or profit arising therefrom in the sum of \$30,738.75, being \$24,512.95 less than the net earnings or profit which would and should have arisen out of the contract cargo had it been hauled from Galveston to La Pallice.

"That plaintiff collected 3 days' demurrage at La Pallice at the rate of £80 sterling per day, a total of £240 sterling or converted into American money at \$4.81 per pound, being the sum of \$1,164.40, which plaintiff admits as a credit in behalf of defendant Steger. That the number of days which the steamer would and should have taken under the charter party for the trip in question was 51 days; the actual number of days required for the substituted trip as above set forth was 69 days; and the net profit the steamer would have earned in said extra 18 days consumed by reason of the default of the defendant was the sum of \$19,500.34, which, added to \$24,512.95, makes the total loss to plaintiff upon this voyage the sum of \$44,013.29."

The prayer of the petition is for recovery of damages in the sum of \$150,000, with interest from January 1, 1915.

Defendant Steger answered by general and special exceptions, by general denial and special pleas, alleging that both of said steamers were taken away from said defendant Steger in an unreasonable time, no specified time being named in the contract during which time they should remain on demurrage, and that plaintiff, immediately upon arrival of said steamers in port and immediately upon the expiration of 48 hours after the arrival of each steamer, demanded excessive, unreasonable, and outrageous demurrage, to wit, the sum of \$750 per day in lieu of the rate named in the charter party and contract which amounted to about \$250 per day. Defendant further alleged that, both of said steamers having been taken away from him by plaintiff at the expiration of 48 hours after arrival, and said Steger having been declared in default, it was made the duty of the plaintiff, under the law, to use ordinary care in procuring for all of said remaining three voyages of said vessels substituted cargoes, so as to save or minimize the loss and damages, not only to the defendant Steger, but to the plaintiff itself, and that, had plaintiff exercised ordinary care in

procuring said substituted cargoes for the said remaining three voyages no loss or damage would have been sustained.

Defendant Steger further pleaded that, before he was in default and within a reasonable time under the demurrage clause of said contracts, he tendered and offered to plaintiff a shipment for the full capacity of both said vessels of 8,000 tons of hay, the cargoes to be carried from Galveston, Tex., to La Pallice, France, and agreed with plaintiff to pay therefor the sum of \$15 per ton for each voyage or \$120,000 for each voyage made in transporting said hay, and agreed at the same time to pay all expenses of remodeling said vessels to accommodate hay instead of horses, so as to net the plaintiff \$120,000 freight for each voyage, instead of \$75,000, the freight named in the charter party to be paid for transporting 1,000 horses.

Defendant further pleaded that, in lieu of the banker's guaranty provided for in the charter parties, \$20,000 in cash was deposited by E. D. Steger in the bank of Hutchings, Sealy & Co., of Galveston where said deposit still remained at the time of the trial, to protect plaintiff in all engagements of said E. D. Steger as contained in said charter parties, and he prayed, plaintiff having suffered no loss or damage except through its own negligence, that he, said Steger, should go hence without day, and have decreed to him the \$20,000 cash belonging to him on deposit in said bank, and he prayed for his costs.

By cross-action he asked for recovery of his \$20,000 cash deposited in said bank, and for damages for breach of contract to transport 24,000 tons of hay, 8,000 tons to the vessel for each of the remaining voyages setting up his agreement with plaintiff to transport same at \$15 per ton, and his readiness and willingness to load said hay and to pay his freight in advance, pleading a contract he had with the French government to ship 50,000 tons of hay, 24,000 tons of which he had contracted to ship by said three steamers. He alleged the breach of this contract, as well as the contract for shipment of the horses, and asked in his cross-action a judgment for breach of contracts to ship his horses in the sum of \$75,000 and breach of his contract to accept and carry his hay in said vessels in the sum of \$120,000.

By supplemental petition plaintiff specially denied each and all of the material allegations of defendant Steger's answer and cross-action.

The case as thus made between Steger and plaintiff was submitted to a jury upon special issues, the issues submitted and the findings of the jury thereon being as follows:

"(1) Did the plaintiff and its agents use such care to avert or reduce the damage arising from defendant Steger's breach of his contract for the performance of the second trip of the Portuguese Prince as a person of ordinary care would have

done under the circumstances? Answer Yes or No."

To this question the jury answered, "No."

"(2) Did the plaintiff and its agents in sending the steamer Portuguese Prince on its third voyage to New York and taking cargo of horses to Brest, France, use such care as one of ordinary prudence would have done under the circumstances to avert or reduce the damages arising from the defendant Steger's previous breach of the charter party for that vessel? Answer Yes or No."

To this question the jury answered, "No."

"(3) Did the plaintiff and its agents use such care as above defined to avert or reduce the damages arising from the defendant Steger's breach of the charter party of the Burmese Prince by the failure to furnish cargo of horses on its third voyage and provide security, as one of ordinary care would have done under the circumstances? Answer Yes or No."

To this question the jury answered, "No."

"(4) Did the defendant Steger offer plaintiff's agents cargoes of hay amounting to 24,000 tons at \$15 a ton for the three voyages in controversy, and offer to pay for tearing out the horse fittings? Answer Yes or No."

To this question the jury answered "Yes."

"(5) If you answer interrogatory 4 'No,' you need not answer this one at all; but, if you answer 'Yes,' then state whether the agents of the plaintiff agreed to accept the cargo of hay at the price stated, and release the defendant from the charter parties? Answer Yes or No."

To this question the jury answered, "Yes."

"(6) Were the cargoes of hay referred to in interrogatory 5 ever in fact tendered; that is, offered for loading to the plaintiff or its agents? Answer Yes or No."

To which question the jury answered, "Yes."

"(7) Should plaintiff or its agents, exercising such care as one of ordinary prudence would have exercised at the time and under the circumstances when the cargo of grain was tendered by the Steele Company for loading the Burmese Prince, have accepted the same or not? Answer Yes or No."

To this question the jury answered, "No"

"(8) Could plaintiff have saved all loss and damage by the exercise of ordinary care in obtaining cargoes for the last two voyages of the Portuguese Prince? Answer Yes or No."

To this question the jury answered, "Yes."

"(9) Could plaintiff have saved all loss and damage by the exercise of ordinary care in obtaining cargo for the last voyage of the Burmese Prince? Answer Yes or No."

To this question the jury answered, "Yes."

Upon this verdict, judgment was rendered that plaintiff take nothing by its suit, and that defendant recover of plaintiff the sum of \$24,000 as damages for the breach by plaintiff of the contract to transport defendant's hay, and that defendant also recover the \$20,000 on deposit with Hutchings, Sealy & Co.

Upon motion for new trial the court, as a condition to overruling the motion, required the defendant to remit the \$24,000 damages recovered by him. This remittitur was filed, and appellee's right to recover this amount is not involved in this appeal.

The evidence shows that when the Portuguese Prince reached Galveston on February 7, 1915, to receive her second cargo of horses, appellee Steger, because of inability to obtain their inspection by officers of the French government, to which government he had contracted to sell the horses, could not furnish horses for shipment in accordance with his contract with appellant. This steamer remained in Galveston until March 24th, when it went to New Orleans and took on a cargo of horses for Miller Bros. of Oklahoma, and carried them to Genoa, Italy. This shipment of horses was taken by appellant under a contract made by or through Steger with Miller Bros. This boat did not return to Galveston after its voyage to Genoa with the Miller Bros.' horses, but went to New York, and there obtained a cargo of horses which it transported to Brest, France.

There is evidence showing that the costs and expense of the long delay of the Portuguese Prince at Galveston and waiting for the Miller Bros.' horses, and the difference in net profits received for the transportation of the Miller Bros.' horses and the shipment from New York to Brest, and the profits appellee would have received for transporting two cargoes of horses from Galveston to La Pallice under its contract with appellee Steger amounted to the sums claimed by appellant as damages for the breach of said contract by Steger.

The steamer Burmese Prince arrived in Galveston on February 27, 1915, to take her third cargo of horses under the contract with appellee Steger, but appellee failed to furnish the shipment of horses in accordance with his contract. This steamer remained in Galveston until March 12th and, being unable to obtain the shipment of horses from the appellee or shippers at Galveston, went to New York and secured a shipment of horses from that port to La Pallice, France.

There is evidence that the difference between the net profits to the Burmese Prince for transporting the horses from New York to La Pallice and what it would have made if appellee had furnished the horses for shipment at Galveston and the expense to said steamer caused by the failure of appellee Steger to furnish the shipment of horses in accordance with his contract amounted to the sums claimed by the appellant.

There is no question as to the failure of the appellee Steger to furnish the horses for shipment in accordance with the terms of his contract with appellant, and the trial judge so found, and the correctness of the judgment depends on whether the findings of the jury that appellant could have saved all loss and damage by the exercise of ordinary care to obtain other cargoes in lieu of the three cargoes of horses which appellee Steger failed to furnish are sustained by the evidence.

Under appropriate assignments of error appellant complains of the charge of the court

submitting each of the issues before set out, on the ground that there is no evidence to authorize the submission of such issues.

The first assignment is as follows:

"The court erred in overruling the following objection and exception made by the plaintiff to submission of question No. 1, viz.: 'Objection and exception are made to question No. 1 for this, that it is a submission of the issue therein contained to the jury, and is not warranted by the evidence in the cause, the evidence revealing beyond dispute and beyond reasonable difference in the minds of men that plaintiff used that care and diligence that a person of ordinary care would under similar circumstances to reduce and avert the damages from Steger's breach of the contract for the performance of the second trip of the Portuguese Prince, and the evidence further showing that the vessel Portuguese Prince upon said trip was held in port, not alone for the purpose of securing cargo, but also in response to the continued persistent demands of Steger that the boats be held at said port waiting the arrival of Steger's horses to be transported thereon; that said vessel arrived February 7th, and went on demurrage February 11th and a reasonable time to hold the boat on demurrage rate in the charter party ceased on the 13th day of February, and that thereafter negotiations were had by Steger, resulting in subchartering the boat to Miller Bros. by the charter party in evidence dated March 3d, for delivery of horses March 12th, and that, owing to delay on the part of Miller Bros., acting under Steger's charter party to them, and the interposition of the Texas quarantine, plaintiff and defendant understood the matter alike, and thereafter the Portuguese Prince steamed for New Orleans, and on the arrival of the horses took them for account of E. D. Steger to Genoa, and that the legal effect of the transaction from the testimony herein is such as to forever preclude and prevent defendant Steger from complaining of or availing himself of the defense as to said voyage of the Portuguese Prince that plaintiff did not exercise due diligence to avert or reduce the damage relative to said second voyage of the Portuguese Prince.'"

[1] Under the second, third, fourth, and fifth assignments of error appellant complains of the submission to the jury of the issue of whether appellant could have, by using ordinary care to obtain other cargoes, saved all loss and damage occasioned by the failure of Steger to comply with his contract. The main proposition under each of these assignments is:

"Where the evidence in support of an issue by one having the burden of proof thereon is so slight that reasonable minds could not arrive at a different conclusion with reference thereto, the court should instruct the verdict for the other party."

The trial of the case in the court below consumed two weeks' time. A large number of witnesses testified, and the statement of facts covers many typewritten pages, but the fact issues presented by these assignments of error only require that from the mass of testimony in the record we find sufficient

evidence to sustain the findings of the jury that, by the exercise of ordinary care in obtaining other cargoes, the appellant could have saved all loss and damage resulting from the failure of Steger to furnish the cargoes of horses in accordance with his contract.

The testimony shows that during the months of February and March, 1915, the exports from the city of Galveston included the following:

February, 1915.....	450,798 bales of cotton.
	2,700 round bales.
March, 1915.....	368,332 bales of cotton.
	4,529 round bales.
February, 1915.....	17,716 long tons of oil cake.
March, 1915.....	8,837 long tons of oil cake.
February, 1915.....	6,400 tons of meal.
March, 1915.....	3,460 tons of meal.
February, 1915.....	2,655,368 bushels of wheat.
March, 1915.....	2,931,100 bushels of wheat.

There was a great scarcity of ships to carry these exports, and ocean freight rates advanced rapidly and reached a very high figure. The contracts under which a large portion of these exports were shipped were made while the two ships of appellant before named were at Galveston and appellant had found that appellee Steger was unable to comply with his contract to furnish the cargoes of horses. No effort was made by appellant after it found that Steger could not furnish the horses to obtain any substitute cargoes other than horses.

While the testimony is conflicting upon the question of the expense appellant would have incurred in removing the fixtures placed in his ships to properly fit them for conveying the horses, and the profits appellant would have made by taking cargoes of cotton in lieu of the horses, there is testimony to justify a finding that the cotton cargoes would have netted appellant more than it would have made by carrying Steger's horses under its contract with him.

Steger testified that after the arrival of the Portuguese Prince to receive its second cargo he came to Galveston, and offered appellant cargoes of hay for the two voyages of that ship and the one of the Burmese Prince for which he was unable to furnish the horses. He testified:

"At that time, February 20, 1915, I had a contract for the shipment of 50,000 tons of hay to France, to La Pallice and St. Nazaire, and we were shipping from Galveston or Texas City. I came to Galveston. \* \* \* I told him (David Warriner, the agent of appellant) that the contract was for 50,000 tons, and that we could begin to ship as soon as the vessel—one was then in port, my recollection is—as soon as the vessel could be fitted for it, and proposed to pay for the fitting of the vessel myself for the hay. I offered to pay for dismantling the vessel, and Mr. Warriner got the detail of the ship and figured what hay the ship would carry. I was figuring on using both vessels. Mr. Warriner figured that by taking out the horse fittings and space that had to be reserved for coal and

men he could put into the vessel 8,000 tons. I had his figures for weeks. I gave him the rate I was willing to pay, \$15.00 a ton, and he agreed to carry the hay as a substitute cargo for horses. He agreed that I might use the vessels for the remainder of the trips for hay instead of horses; there were three remaining trips."

A short time after this agreement was made the agent of appellant notified Steger that it would not take the hay in lieu of the horses. Steger further testified:

"I had the hay and could, and would, have loaded both vessels with hay. Of the 24,000 tons that I contemplated carrying on these three vessels, I shipped 4,000 tons at \$16 per ton, 2,000 pounds each. I shipped 80,000 tons of the 50,000. The other 20,000 tons were never shipped, because it was impossible to get vessels at a reasonable price to ship on. \* \* \* I wished always to hold the boats for horses, but when they told me they wouldn't be held for horses I was trying to get something else."

The evidence shows that the two ships were of approximately the same size and carrying capacity.

Mr. Sgitovich, a witness for appellant as to the relative profits to the ship owner from a cargo of horses at \$50 and \$75 per head and a cargo of hay at \$15 per ton, testified as follows:

"4,860 tons of hay at \$15 is \$72,900, long ton. Short ton would be approximately 10 per cent. less. Short tons would stow 5,443; at \$15 per ton would bring it up to \$81,645. I figured on 1,111 horses at \$50 per head, \$55,550. The difference in favor of the hay is about \$26,000. Assuming that 6,857 tons of hay could be carried, on the basis of 70 feet stowage, at \$15, would amount to \$102,750, and the difference between that and \$55,550 would be \$47,200. If there could be 6,857 tons of hay carried, the vessel would receive \$47,200 more than for carrying the 1,111 horses at \$50; 1,111 horses at \$75 would be \$83,325. Taking the figures for the carriage of the hay, \$81,645, leaves a difference in favor of the horses of \$1,680. Assuming that it cost \$15 per head to feed and care for the horses, the cost of feeding and caring for 1,111 horses would be \$16,665. That, deducted from \$83,325, leaves \$66,660 net revenue on the horses, and that, deducted from \$102,750 (freight on 6,857 tons of hay at \$15 on 70 feet basis), leaves a difference in favor of hay of \$36,090. \* \* \*

"Dead weight cargo is cargo such as grain, cotton seed meal, iron, and that class of cargo. We call it dead weight because you can always put the boat down to her full dead weight capacity without occupying her entire cubic capacity. \* \* \* The cost of taking out the horse fittings would be at least \$1,000. \* \* \* I have not in these computations made allowance for all items that ought to be deducted from the gross earnings in order to arrive at net earnings of these cargoes. I have not, for instance, taken into consideration the question of additional time consumed. That is the principal item. I do not know positively whether hay is chartered on the long or short ton. I

know my calculations have always been made on the long ton or English ton."

Steger testified that the hay could have been pressed to a density of 70 cubic feet to the ton, and his agreement to pay \$15 per ton was on that basis. He also testified, as above stated, that he had the hay in Galveston with which to load the ships.

It cannot be reasonably inferred from any of the testimony that the difference in the time that it would have taken to put the hay in the ship and the time it would take to place the horses on board would reduce the gross earnings from the hay cargo as much as \$36,000, the excess of the gross earnings from the hay cargo over the earnings from the horse cargo, as fixed by the witness Sgt.ovich.

We think this evidence is sufficient to sustain the finding that the appellant would not have suffered any loss or damage by reason of Steger's breach of his contract if it had accepted the cargoes of hay offered it by Steger in lieu of the horses.

[2] But, as set out in its first assignment of error, appellant insists that Steger is precluded from claiming that appellant should have accepted the cargoes of hay or used any diligence to procure other cargoes in lieu of the horses for the second voyage of the Portuguese Prince, because the evidence shows that said ship was held in the port of Galveston in response to the persistent demands of Steger that it be kept until the arrival of his horses, and that through Steger's negotiations the ship was subchartered to Miller Bros. on March 3d for horses to be delivered to the ship at New Orleans on March 12th, and the cargo of horses furnished by Miller Bros. was transported by appellant by Steger's procurement and consent.

We do not think Steger's attitude in regard to holding the ship for his horse and his connection with the Miller Bros. charter party is inconsistent with his claim that appellant cannot hold him liable for damages for the breach of his contract which it could have averted by the use of ordinary care to obtain another cargo after it found that Steger could not deliver the horses for shipment under his contract. Steger testified that he was anxious to keep the ships under his contract for transportation of his horses, and in order to do this was willing to pay demurrage demanded by appellant, but if appellant would not do this he wanted appellant to substitute the hay in lieu of the horses, as it had agreed to do. His attitude in regard to the ships obtaining other cargoes is shown by his answer to the following questions propounded to him by counsel for appellant:

"Q. Did you mean to be understood in any of these hay conferences as abandoning your contract rights to the Burmese Prince and Por-

tuguese Prince, did you? A. I never did. If they were going to take them away from me I wanted them to ship my stuff I offered them to ship. I was still expecting at that time to be able to furnish horses for the Burmese Prince when she would come in. I was expecting inspectors, either fresh ones or some of those at work, to be turned over to me. They had a number of inspecting ports in the United States then, and not enough to go around. It would be a matter of comparatively few days after I got hold of the inspectors before I would have been able to deliver horses to shipside.

"Q. Isn't it a fact that, inasmuch as you always expected to get the horses and never notified Mr. Warriner you couldn't get the horses, isn't it a fact that that explains why you did not make any protest by your letters or documents against plaintiff's not moving the hay? Isn't it a fact that, inasmuch as you always expected to get the horses and never notified Mr. Warriner that you could not get the horses, isn't it a fact that that explains why you did not make any protest by your letters or documents against Warriner for not carrying hay? A. I preferred them to wait for horses, but protested most vigorously in Mr. Steele's office in the presence of Mr. Warriner against his not carrying the hay after the boats were taken away from me. I can't recollect as to the date—it was soon after these boats were taken away from me. It was after this trouble had all come up, and bills were being presented to me, or I had been notified bills would be presented to me. It was several months after March. At that time I protested vigorously at their taking the boats away from me and the failure to take hay."

In answer to the question if he did not send a telegram while the Portuguese Prince was at Galveston, offering to pay \$5,000 if ship was held to await his horses, he testified:

"I sent that telegram and made this offer (to pay the \$5,000) because of the fact that I had \$30,000 profit in each trip of this vessel (referring to horse shipments), and I was willing to pay \$5,000 in order to have the vessel or the two vessels preserved for one or more trips or as many as I could use them for, and because of the further reason that it would have embarrassed me very much in my contracting business to have had the ships taken away from me except in an agreeable way. \* \* \* I was under contract to ship these horses on these vessels, and was doing my utmost always to hold them for the horses, but if they were not going to permit me to wait until my inspectors came, then I was trying to agree to any reasonable thing they wanted to do with the vessel and pay whatever amount was reasonable if they used it in any other way. I certainly did want the Portuguese Prince and Burmese Prince in February and March, 1915. I had horses waiting for inspectors. I had horses, but I couldn't deliver them—until the French government was able to give me inspectors to inspect the horses I could not ship them."

The undisputed evidence shows that the ship was not kept at Galveston at Steger's



request. Mr. Warriner, the agent of appellant at Galveston, testified:

"We didn't hold the boat here at anybody's request, but because we were not able to find any profitable business for her earlier. \* \* \* When the Portuguese Prince was detained here nearly six weeks, we used every effort to obtain other employment for her. Mr. Steele and ourselves were using every effort in that direction. That is the only purpose for which she was held here—she was not held at the request of Mr. Steger. Mr. Steger telegraphed to various horse dealers. I did not telegraph to any horse dealers—I telegraphed to our people in New Orleans; they were in communication with New York."

Our conclusion is that the evidence is sufficient to sustain the findings of the jury, and none of the assignments above mentioned can be sustained.

[3] There was no willful breach of his contract to furnish the horses on the part of Steger, and, under well-settled principles of law if appellant could by the exercise of ordinary care have saved itself from loss by reason of Steger's inability to furnish the cargo of horses, it was its duty so to do, and it cannot recover from Steger damages which it could have averted by the use of ordinary care. *Heilbronner v. Hancock*, 83 Tex. 715; *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280; *Railway Co. v. Becht*, 21 S. W. 971; *Steamship Co. v. Card* (D. C.) 59 Fed. 159; *Warren v. Stoddart*, 105 U. S. 225, 26 L. Ed. 1117.

The case is not one which called for a charge upon the burden of proof; and, if a charge upon that issue had been necessary, the charge requested by plaintiff, the refusal to give which is complained of under the sixth assignment of error, clearly misstated the law, and was properly refused.

The seventh and eighth assignments of error complain of the refusal of the court to instruct the jury to return a verdict in favor of plaintiff. It follows from what we have said in discussing the first five assignments that the court did not err in refusing to instruct the jury to find for plaintiff, and these assignments cannot be sustained.

[4] The ninth assignment complains of the action of the court in refusing to instruct the jury to return a verdict for plaintiff against the defendant B. F. Yoakum. As shown in our statement of the pleadings, Yoakum was made a party defendant under allegations that he was interested as a partner of Steger in the contract for the shipment of the horses. He was served with notice in New York, no citation having been served upon him in this state. He filed no answer in the case. In regard to Yoakum's residence Steger testified:

"Benjamin F. Yoakum, I think, claims to live in Texas—he is in New York City—a railroad man. He is a native Texan. Mr. Yoakum's

business address in New York is 71 Broadway. I have known Benjamin F. Yoakum for something over 30 years. I knew him when he lived in Galveston, with the Santa Fé. \* \* \* I have known Mr. Yoakum more or less intimately since I first met him. We were thrown a good deal together. I met him in Texas, in St. Louis—I am not sure, but it seems to me that he went to St. Louis before he went to New York. He has been in New York for a number of years. I do not know that at the time of this transaction and continuously since that time that Mr. Yoakum claimed he was a resident of Texas. I don't know where he claims his residence now. I think I testified yesterday that he claims to be Texan, residing in New York, or something to that effect. I don't remember that I testified that Mr. Yoakum claimed to be a citizen of Texas. So many things enter into where a fellow's residence is—we used to say where he had his washing done, and I don't know."

We think this evidence sustains the court's finding that Yoakum was a resident of New York, and, not having been served with citation in this state, and having filed no answer, the court was without jurisdiction to render a personal judgment against him.

Assignments 10 and 11 complain of the verdict and judgment in favor of Steger for \$24,000 on his cross-action for damages for the failure of appellant to comply with its contract for the shipment of hay. As we have before stated, this judgment was remitted by Steger upon the hearing of plaintiff's motion for a new trial, and the correctness of that verdict and judgment is not in issue on this appeal. The reason for presenting those assignments is not apparent. Any error in that verdict and judgment cannot possibly affect the portion of the judgment involved on this appeal. The assignments are therefore overruled without discussion.

[5] The twelfth and thirteenth assignments assail the verdict and judgment as contrary to the charge of the court and the undisputed evidence, in that the court instructed the jury that J. H. W. Steele Company was the agent of Steger "in negotiations relative to the performance or nonperformance of the charter parties, and Steger was bound by the acts of his agents with respect thereto," and that the Steele Company, by letter of March 3, 1915, promised plaintiff that Steger would be responsible for any damages that plaintiff might sustain in taking the Miller Bros. cargo of horses from New Orleans to Genoa, and the evidence further shows that the Steele Company, as agents of Steger, participated "in all the transactions relative to the moving and taking of cargoes of (both) said vessels and were fully conversant of said movements, and did not protest against the same."

There is no merit in these assignments. As we have previously said, the efforts of

Steger to obtain the Miller Bros.' horses as a substitute cargo for his horses were made for the purpose of keeping alive his charter party contracts, and his offers to appellant were conditional upon, to state it in his words, the ships not being taken away from him; and, when appellant refused to longer recognize any right in him under his charter parties, his conditional promises were no longer binding upon him. The failure of Steele & Co. to protest appellant's acts in taking the ships from Steger could not affect the latter's right to insist that, if appellant would not hold the ships for his horses, it must use ordinary care to obtain such substitute cargoes as would prevent loss by reason of his breach of the contract.

The remaining assignments of error all relate to the judgment in Steger's favor for \$24,000, and, for the reasons before stated, are not material to any issue involved in this appeal.

We are of opinion that the judgment should be affirmed; and it has been so ordered.

Affirmed.

#### On Motion for Rehearing.

After giving full consideration to the very able motion for rehearing filed by counsel for appellant, the majority of the court have reached the conclusion that it should not be granted. Justice GRAVES dissents from this conclusion and will file a written statement of the grounds of his dissent.

The question of whether the trial court erred in submitting to the jury the issue of the exercise of ordinary care on the part of appellant to avert or reduce the damage arising from the failure of appellee Steger to comply with his contract to furnish a cargo of horses for the second voyage of the steamer Portuguese Prince is by no means free from doubt, but the question as presented is one of law, and therefore within the jurisdiction of the Supreme Court, and we feel constrained to follow the general rule of this court and solve the doubt in favor of the judgment of the trial court.

We adhere to the conclusion stated in our main opinion that there is evidence sufficient to sustain the findings of the jury that appellants by the use of ordinary care could have obtained other cargoes in lieu of the horses which appellee Steger failed to furnish in accordance with his contract, and that the profits which appellant would have made from the transportation of the substituted cargoes would have equaled what it would have made if appellee Steger had furnished the cargoes of horses and appellant had transported them under its contract with him. The evidence as a whole upon this issue is contradictory and not satisfying, but we cannot say it does not raise the issue, and that is the only question presented by the assignments.

[6] Appellant's contention in regard to the second voyage of the steamer Portuguese Prince is that the Miller Bros.' horses having been transported under the contract made by Steger with Miller Bros., and for account of Steger, and he having expressly agreed to compensate appellant for any loss it might sustain by transporting the Miller Bros.' horses in lieu of the horses which Steger had contracted to furnish for said voyage, the issue of whether appellant used ordinary care to avert or reduce the damages arising from Steger's failure to comply with his contract was not raised by the evidence as to this second voyage of the Portuguese Prince, and that issue should not have been submitted to the jury. Counsel for appellant presents this contention with much force, but we think that, notwithstanding the facts that the Miller Bros.' horses were transported by appellant under the contract made with them by Steger, and that Steger at one time promised to pay any loss sustained by appellant from the substitution of these horses for the cargo that Steger had contracted to furnish, the issue of whether appellant could have averted or reduced the damages by using ordinary care to obtain some other cargo was in the case, and was properly submitted to the jury. As stated in our main opinion, we think Steger's testimony shows that his agreement to pay the damages that appellant might sustain by taking the Miller Bros.' horses in lieu of the cargo that Steger had failed to furnish was made under the belief that if appellant accepted the Miller Bros.' horses and transported them for his, Steger's, account, and under his agreement to pay any loss it might sustain thereby, the steamer would still remain chartered for the third voyage covered by the contract of charter, and would return to Galveston and transport his horses on said voyage.

We think the evidence further shows that appellant was not induced to take the Miller Bros.' horses by Steger's promise to pay this damage, but took them because that was the only cargo of horses available and it did not care to take any other kind of cargo. The testimony of appellant's agent, Warriner, shows that the steamer was not held at Galveston for Millers Bros.' horses at Steger's request, nor because of any promise of Steger, and it is also shown that appellant made efforts to get other cargoes of horses after Steger's offer of the Miller Bros.' horses was made to it.

In these circumstances we do not think Steger, after appellant, as he expresses it, had taken the boats away from him, should be held estopped as a matter of law from showing, in defense of appellant's claim for damages, that he offered appellant cargoes of hay which at the price he agreed to pay for its transportation would have netted appellant more than it could have made by

transporting his horses, or from showing that appellant by the exercise of ordinary care could have obtained other cargoes at a rate for transportation which would have been just as profitable to appellant as the transportation of Steger's horses.

In our main opinion we say:

"The contracts under which a large portion of these exports [referring to exports of cotton and other articles of commerce exported from Galveston in February and March, 1915] were shipped were made while the two ships of appellant before named were at Galveston and had found that Steger was unable to comply with his contract to furnish the cargoes of horses."

Appellant complains of this statement on the ground that it is not supported by the testimony of any witness. Upon a re-examination of the record we find that no witness testified that a large portion of the exports during the months named were shipped under contracts made during said months. All that is shown by the testimony is that contracts were made by ship brokers with various persons for shipments of said exports which moved during said months. The witness who testified as to these shipments stated that he could not tell how many of them moved in the months of February and March, but he could obtain that information from his books, and stated that he would produce it. The record does not show that the witness produced his books or the promised information. We correct our former statement as above indicated in response to appellant's complaint, and not because we regard our first statement as materially inaccurate.

[7] Appellant insists in its motion that we erred in not sustaining its assignment predicated error upon the refusal of the trial court to instruct the jury that the burden of proof was upon the defendant upon the issue of whether the plaintiff could have averted or reduced the damages by the use of ordinary care. In support of this contention appellant cites a number of cases, announcing the long-established rule that, such plea being an affirmative defense, the burden of proving it was upon the defendant. This rule is unquestionably sound in reason and universally sustained by the authorities, but this does not determine the question of whether the court committed error in not so instructing the jury. The charge given by the court submitted to the jury the question of whether the plaintiff could have, by the use of ordinary care to obtain the cargoes, averted or reduced the damages occasioned by the failure of the defendant to furnish the cargo he had contracted to furnish. It was proper to instruct the jury that they should determine this question in accordance with the preponderance of the evidence, but it was wholly unnecessary to tell them where the burden of proof lay. On the contrary,

it has been expressly held by our Supreme Court that a charge upon the burden of proof is not always necessary or proper. *Blum v. Strong*, 71 Tex. 321, 6 S. W. 187. We cannot see what possible assistance it could have been to the jury in this case in determining the issues presented to them to have been told where the burden of proof rested, and appellant could not possibly have been harmed by the failure of the court to give such instruction. We think the learned counsel for appellant has confused the question of burden of proof with that of the preponderance of the evidence.

[8, 9] Appellant also complains of the construction placed in our main opinion upon assignments Nos. 10 and 11. We say in that opinion that these assignments "complain of the verdict and judgment in favor of Steger for \$24,000 on his cross-action for damages for the failure of appellant to comply with its contract for the shipment of hay," and then say in effect that, the trial court having required a remittitur of that judgment, it is unnecessary to discuss these assignments. These assignments are as follows:

"Tenth Assignment of Error—A Proposition.

"The verdict and judgment against the plaintiff, and the verdict in favor of the defendant Steger for \$24,000, are contrary to the evidence, and are not supported by the evidence, and are not supported by the preponderance of the evidence, nor warranted by the evidence, because the evidence overwhelmingly reveals the facts and establishes the facts that the plaintiff performed all its obligations arising under the charter parties in full, and the defendant Steger breached his obligations arising thereunder by failure to provide horses when required so to do by the contract, and by failure to furnish the bankers' guaranty, or the substituted security therefor, by failure to pay the daily demurrage due under the contracts, and that the plaintiff exercised all the care to avert and reduce damage arising from Steger's breach of his contracts that a person of ordinary care would have done under the circumstances.

"Eleventh Assignment of Error—A Proposition.

"The verdict and judgment against the plaintiff, and the verdict in favor of the defendant Steger for \$24,000, are contrary to the evidence, and are not supported by the evidence, and are not supported by the preponderance of the evidence, and not warranted by the evidence, because the evidence overwhelmingly reveals the facts and establishes the facts that plaintiff could not have saved all loss and damage by the exercise of ordinary care in obtaining cargoes for either of the two voyages involved, the only offers of cargo revealed by the evidence being grain and hay of the defendant Steger, under these issues being bound to produce testimony sufficient to overcome the burden of proof cast upon him on the issue of due care and diligence on the part of the plaintiff to reduce or avert damage from Steger's breach of contracts. The evidence consisted only of general testimony that merchandise was passing through the port of Galveston, and the testimony on behalf of the plaintiff be

ing overwhelmingly that all loss and damage could not have been avoided by the exercise of ordinary care on the part of the plaintiff in obtaining cargo for the last two voyages of the Portuguese Prince and the last voyage of the Burmese Prince."

Appellant contends that these assignments assail the verdict and judgment against plaintiff on the whole case, and the verdict in favor of Steger for \$24,000, and cannot be properly construed as only attacking the verdict and judgment against plaintiff and in favor of Steger on the cross-action for \$24,000.

The assignments are susceptible of the construction appellant places upon them, and we will accept that construction and withdraw our former holding that they only refer to the verdict and judgment for \$24,000.

For the statements under these assignments appellant copies portions of the court's charge, and then refers to the evidence set out on preceding pages 24 to 132 of its brief. A great deal of this evidence, which covers 108 pages of appellant's printed brief, has no bearing upon the issues presented by these assignments. We think it clear that rule 31 for the Courts of Civil Appeals (142 S. W. xlii) does not sanction a statement of this kind, and the assignments are not entitled to consideration because of the insufficiency of their supporting statements. However, the sufficiency of the evidence to sustain the verdict of the jury upon the issue of the exercise by the appellant of ordinary care to avert or reduce the damages has been passed upon under preceding assignments, and if these assignments could be considered they should be overruled.

Other assignments questioning the findings of the jury upon issues raised as to the alleged contract between Steger and appellant for the transportation of hay were not discussed in the main opinion, and will not be here discussed, because Steger's claim for \$24,000 damages for the alleged breach by the appellant of a contract for the transportation of his hay having been eliminated by the remittitur filed by him, the question of whether a binding contract was made by appellant for the transportation of the hay is immaterial.

Upon the issue of ordinary care on the part of appellant to avert or reduce the damages, it was only necessary for Steger to show that by the use of such care it could have obtained substitute cargoes, the transportation of which would have yielded it sufficient profit to offset the loss sustained by the failure of appellee Steger to furnish his cargoes of horses. We think the evidence set out in our main opinion is sufficient to sustain a finding that appellant could have done this by taking the hay which was offered it by Steger, and the question of whether

it bound itself by contract to take the hay cannot be material upon this issue.

Any assignment not discussed in this or our main opinion has been duly considered and overruled.

We are of opinion that the motion for rehearing should be refused; and it has been so ordered.

Refused.

GRAVES, J. (dissenting). After mature reconsideration of this cause on rehearing, I can see no escape for the appellee from liability for such loss and damage as appellant actually sustained upon the second voyage of the Portuguese Prince in carrying the Miller Bros.' horses to Genoa, Italy. Indeed, under the case as made, it seems to me he clearly admitted himself to be so bound as to that shipment and left nothing touching his responsibility for it to go to the jury. Accordingly, I think the court below erred in submitting to them the issue as to whether appellant used ordinary care to avert or reduce the damage flowing from that trip, and that its assignments 1 and 4, attacking that action, should have been sustained. A brief consideration of such parts of the record as bear directly upon the matter will, it is thought, demonstrate the correctness of this view.

With the Portuguese Prince lying in the harbor at Galveston since February 7, 1915, and Steger for many days in default upon his contract to furnish horses for her second voyage, during which period both he, his agents, and those of appellant had unsuccessfully scoured the country for a substitute cargo, on March 3, 1915, an agreement concerning a cargo for that trip was reached between them, and evidenced by the following letter:

"Galveston, Texas, March 3, 1915.

"Messrs. D. & G. Warriner, Agents Prince Line, Galveston, Texas—Gentlemen: This is to advise you that with telegraphic authority in hand and verbal instructions from Mr. E. D. Steger, we have this day relet for E. D. Steger account, the steamer Portuguese Prince with 1,187 head of horses for Genoa, at \$80.00 per head, and will make an effort to secure a total of 1,200 head for this steamer; horses to be delivered in Galveston ready to load by March 12 (demurrage on and after that date at both Galveston and Genoa to be at the rate of 150 L per day if steamer be detained at either port longer than forty-eight hours).

"Mr. Steger has advised us that he will be responsible for any additional damages or losses that might be proven by the Prince Line in handling this line of horses to Italy in lieu of his inability to furnish horses as per original contract.

"Yours very truly,

"The J. H. W. Steele Company,  
Agents for E. D. Steger.

"Dict. Mr. Steele."

Steger himself testified concerning this agreement:

"All the matters set out in the letter of March 3, 1915, to D. & G. Warriner from the J. H. W. Steele Company, agents for E. D. Steger, were matters of detail and were left entirely to Mr. Steele. Steele was my agent all the way through, and as my agent wrote the letter to agents of plaintiff, March 3, 1915, stating we had relet the Portuguese Prince to Miller Bros., and that I would be responsible for any additional damages or losses which might be proven by the plaintiff in handling this line of horses to Italy in lieu of my inability to furnish horses as per original contract. I made the charter party with Miller Bros. March 3, 1915, seven days after I made the verbal contract as to hay, February 24, 1915."

Now, the only excuse offered anywhere in this controversy as to why the appellee should not stand by this arrangement he so pointedly admits his agents made for him with full authority was that he had been relieved of it by the hay contract to which he refers in the last sentence of his quoted testimony. A hiatus appears there, however, in that he himself repeatedly says he did not make the Miller Bros. charter party until 7 days after making the verbal contract as to the hay, whereas the latter was repudiated by the boat owners and abandoned by him within 1 or 2 days after it had been agreed upon. That no possibility of inaccuracy may occur at this point, his own version of it is further quoted:

"The conference of February 24th was not followed up by making any record in black and white, and no confirmations were exchanged between us by telegraph or mail. On the contrary, I was almost immediately notified that it did not suit the Prince Line to convert the boat and carry hay. \* \* \* I received that notice within a very few days—within a day or two, I got the information they would not carry the hay, and did not pursue it further. I had already engaged the boats and had them on my hands, and I was just hoping to put hay on if I could not get horses; and I did not have horses for this boat and wanted to load it. I didn't tender the hay because almost immediately he (Warriner) notified me that his people would not permit the horse fittings to be taken out. He had not made me any promise to find out whether the Prince Line would permit the removal of the horse fittings. He assumed they would permit it, and I assumed that they would. I knew Mr. Warriner was not the principal in the contract; I understood he was acting as agent of the Prince Line."

So that, under his own statement, the so-called hay contract, which had gone up in thin air at least 5 days before, could not have furnished a defense against the undertaking—subsidiary, of course, to his original contract for the Portuguese Prince—the appellee had assumed in his subletting of the boat to Miller Bros.; yet, in submitting the issues of ordinary care upon appellant's part as to the second trip of this vessel, the court permits the jury to regard this discarded hay contract as a complete defense to the claim

for damages arising from this voyage also, along with those pertaining to the other two. There was no difference made in the way the hay defense was submitted between the Miller Bros.' shipment and either of the other two voyages to which it was allowed to apply. The relevant parts of the charge, stripped of recitations immaterial to the question now under consideration and placed in what is considered appropriate sequence, were the following: In paragraph 4, after first saying it was appellee Steger's duty to load the vessels with horses within 48 hours after they were tendered him for that purpose, and to furnish banker's guaranty stipulated in the contract, that instruction concludes:

"Not having done either of these things, he was in default as to the second voyage of the Portuguese Prince and the third voyage of the Burmese Prince, and became thereby liable for all damages proximately caused by such default, unless there was some subsequent agreement releasing him."

Then succeed these general provisions:

"(5) But it was the duty of the plaintiff and its agents to do all that one of ordinary care could have done under the circumstances to prevent the damage altogether or to reduce it."

"(7) The defendant Steger having breached his contract for the steamer Portuguese Prince as above stated on its second voyage, unless it was otherwise agreed between the parties as hereinafter submitted," etc.

"(11) The defendant Steger claims that there was an agreement, between himself and the plaintiff through its agents, entirely releasing him from all damages on account of the failure to furnish horses or other breach of the charter parties, and that it consisted in his offer, on or about the 24th day of February, 1915, to them, in lieu of horses, of 24,000 tons of hay to be transported on the remaining three voyages of the vessels in question, 8,000 tons each trip, at the rate of \$15 per ton, and their acceptance thereof."

As applying the general principles thus laid down, these particular questions were asked:

"(1) Did the plaintiff and its agents use such care to avert or reduce the damage arising from defendant Steger's breach of his contract for the performance of the second trip of the Portuguese Prince as a person of ordinary care would have done under the circumstances? Answer Yes or No."

"(6) Did the defendant Steger offer plaintiff's agents cargoes of hay amounting to 24,000 tons at \$15 a ton, for the three voyages in controversy, and offer to pay for tearing out the horse fittings? Answer Yes or No."

"(7) If you answer interrogatory No. 6 'No,' you need not answer this one at all; but if you answer, 'Yes,' then state whether the agents of the plaintiff agreed to accept the cargoes of hay at the price stated, and release the defendant from the charter parties? Answer Yes or No."

"(8) Were the cargoes of hay referred to in interrogatory 6 ever in fact tendered, that is,

offered for loading, to the plaintiff or its agents? Answer Yes or No."

"(11) Could plaintiff have saved all loss and damage by the exercise of ordinary care in obtaining cargoes for the last two voyages of the Portuguese Prince? Answer Yes or No."

In other words, to state the net result and effect of these instructions as affecting the second voyage of the Portuguese Prince (the Miller Bros.' shipment), the jury were told that Steger was in default, and consequently liable for all damages caused thereby, unless they found that the hay agreement of February 24th, as particularized in succeeding paragraph 11, had been made between the parties, in which event he was entirely released. And the jury in responding found that very thing when they answered question No. 1 "No," and 6, 7, 8, and 11 "Yes." That these proceedings were in the very face of Steger's letter of March 3d of the undisputed testimony of all the witnesses, and of his own previously quoted admission concerning the outcome of the hay offer with reference to the Miller Bros.' transaction does not admit of a single doubt; neither will it do to say that appellant did not both plead and prove the Miller Bros.' subcontract and full performance thereof in every detail, because in paragraph 5 of its second amended petition, and again in paragraph 4 of the second supplemental petition, it was alleged with much detail that at Steger's request, for his use and benefit, and solely by way of minimizing the damages then already due it from him, appellant moved the cargo of horses he had contracted with Miller Bros. for, earned for him \$90,000 thereon, and applied it to his credit. Under these allegations, the court below, without objection from anyone, admitted in evidence Steger's above-copied letter of March 3, 1915, promising to pay all loss and damages flowing therefrom if the Prince Line would recognize his subcharter party with Miller Bros., the subcharter contract itself, and uncontroverted proof that appellant fully performed it by transporting the horses as therein provided for.

And this undisputed, indeed frankly conceded, fact, that it did actually carry the Miller Bros.' horses, under, pursuant to and in compliance with the letter of March 3d as modifying for that trip the general contract for the three voyages of the Portuguese Prince—which, of course, was still subsisting in full force and effect—it seems to me, rendered wholly immaterial the matter of whether or not, up to that time, this vessel had been held in Galveston Harbor at Steger's request. For this reason I am unable to concur in the answer made in the majority opinions to appellant's first assignment, wherein it is said the contention there made rests upon the claim that the boat was held at Steger's request, when the evidence disclosed the con-

trary, part of Mr. Warriner's testimony being quoted to so demonstrate. This answering position is amplified in the opinion on rehearing, where it is stated that Steger's testimony showed his agreement to pay the damages appellant might sustain by taking the Miller Bros.' horses to have been made under the belief that "the steamer would still remain chartered for the third voyage covered by the contract of charter, and would return to Galveston and transport his horses on said voyage." An examination of the assignment referred to will disclose, however, that it was not grounded solely on the mere matter of the steamer's having been held at Steger's request or not—even if Mr. Warriner's statement as a whole shows it was not—but urged the error of the court in submitting at all the issue of ordinary care as to this second voyage of that vessel, the Portuguese Prince, upon the ground that the practically undisputed evidence demonstrated that such care had been used, and that Steger had so solemnly bound himself to relieve appellant of all loss thereon as to preclude him from complaining, or from claiming any lack of such care as to that trip. It therefore does not meet the issue raised by the first assignment to say, as the majority do, that "the undisputed evidence shows that the ship was not kept at Galveston at Steger's request."

But is this court justified in making the finding just quoted from the fact that Mr. Warriner in one part of his evidence so stated? I think not, because he further testified as follows:

"The contract with Miller Bros. is dated March 3d. The vessel was held there after that date, awaiting horses from Miller Bros., the horses we expected to be furnished under the contract between Steger and Miller Bros. The vessel was fixed to load horses for Miller Bros. at Galveston. When the time approached for loading, the horses were not forthcoming. Mr. Steele did all the telegraphing and informed me that there was some trouble had developed with the Texas quarantine law under which they would not be allowed to bring the horses through Texas from Oklahoma, and so it became necessary to load the horses from New Orleans."

Moreover, Steger himself corroborated these last statements of Warriner by repeatedly testifying:

"I wanted the boats held at all times. \* \* \* I repeat that, without seeing the telegram, I could not tell about dates, but that it was my wish always that the boats be held. I communicated that fact to Mr. Steele—always. I knew of the quarantine in the way of shipping the Miller Bros.' horses, and other things; and I tried to help, myself, with the state authorities to get them to haul the horses, let them come through Texas, and did not succeed. \* \* \* I was reasonably well advised about the movement of the Miller Bros.' horses. I made no protest with reference thereto."

So that the evidence of Mr. Warriner quoted by the court that he did not "hold the boat here at anybody's request" must be read as qualified by Mr. Warriner himself, and by the other undisputed evidence, this time including even Steger's, that the Portuguese Prince was in fact held after March 3, 1915, for Steger's benefit and to fulfill his contract with Miller Bros. That is necessarily what Mr. Warriner means when his two apparently inconsistent statements are considered together. If, then, Steger secured that action from appellant, can he yet say, despite the express terms of the agreement contained in his letter, that it was negligent before that in holding the vessel at Galveston? At any rate, if he could say so, he does not; he says under oath:

"I am not complaining of the Prince Line moving the Miller Bros.' horses. I wanted the boats held all the time. I am complaining that they took the boats away too quick."

And if he is not complaining, if he wanted this boat held all the time, what legal difference can it make whether appellant held it there at his request or not? The fact remains that it was held; that he used it in carrying out his contract with the Millers in precise accord with his written agreement with appellant. It does seem to me that the legal effect of all this evidence was such as to place the Miller Bros.' shipment entirely without the pale of the hay defense, and in that instance, at least, to preclude the appellee from availing himself of it; it was demonstrably afterthought, if not confessedly afterthought. *Walker v. Erwin*, 47 Tex. Civ. App. 637, 106 S. W. 164; *Express Co. v. Taylor*, 156 S. W. 617.

Furthermore, if there is a syllable of evidence anywhere in this record justifying any belief upon appellee's part, which the majority upon rehearing say his testimony shows, that as a result of his assuming full responsibility for the Miller Bros.' shipment the Portuguese Prince would return to Galveston and transport his own horses on her third voyage, it has evaded a diligent search, no representative of appellant so assured, agreed with, or had him to believe, as he himself says in the testimony already quoted:

"I had already engaged the boats and had them on my hands, and I was just hoping to put hay on if I could not get horses; and I did not have horses for this boat and wanted to load it."

In other words, his original contract for all three voyages of that boat was still in-

tact, and his intermediate and subsidiary undertaking to pay any losses upon the Miller Bros.' cargo had nothing whatever to do with its remaining so. In all these circumstances, not being in any manner induced by the opposite party, his belief was not only without justification, but wholly immaterial. Being in admitted default upon his still subsisting original contract for three voyages, with the vessel knocking at his gates for a cargo of horses he did not have for only her second one, he simply crossed this one intermediate bridge when he came to it, and closed all issues of liability as to that trip by his letter of March 3d. The trial court should have so held.

It is conceivable that the hay transaction might be held not to have been established with sufficient definiteness, considering the fact that it was pleaded as an unconditional contract, to form the basis of damages in Steger's favor, and yet, though falling short of becoming a mutually binding obligation, be made to serve as a defense to appellant's claims for damages growing out of other voyages than that for Miller Bros. This for the reason that a proper offer of the hay for those trips, all other essentials concurring, without an actual agreement to accept it, might relieve Steger from the consequences of his inability to furnish cargoes of horses for them, upon proof that the hay would have been a more profitable one. In my view, unless a distinction could so be made between the hay arrangement as a contract and as a mere showing that loss could have been averted, the trial court's action in requiring a remittitur of the \$24,000 recovered by Steger, and yet allowing the judgment against appellant to stand would be illogical and inconsistent. But, to reiterate what has before been said, what I cannot understand is how, under the undisputed proof and the appellee's own contracts and admissions, this hay defense can be extended to cover the Miller Bros.' shipment also. While doubt, like a brooding presence, hovers over the entire case, there is none with me as to that feature of it; resolving all others in favor of the judgment, that I cannot yield.

I think the motion should be granted and the judgment reversed as to the claim for damages on the Miller Bros.' shipment, and remanded with instructions to the trial court to determine the amount of loss and damage suffered by appellant in that respect, and then to enter judgment in its favor therefor, together with costs.

## PACE v. MOORE et al. (No. 2092.)

(Court of Civil Appeals of Texas. Texarkana.  
March 6, 1919.)

MUNICIPAL CORPORATIONS—§706(5)—STREETS  
—COLLISION—NEGLIGENCE—EVIDENCE.

In an action for personal injuries resulting from defendant's automobile colliding with plaintiff's wagon on a city street, evidence held insufficient to justify a finding that the driver of the car was negligent in the manner charged.

Error from District Court, Hunt County;  
A. P. Dohoney, Judge.

Action by Clark Pace against A. S. Moore and others to recover for personal injuries. Judgment for defendants, and plaintiff brings error. Affirmed.

Geo. J. Perkins and H. O. Norwood, both of Greenville, for plaintiff in error.

Sherrill & Starnes, B. O. Evans, and Crosby & Harrell, all of Greenville, for defendants in error.

HODGES, J. The plaintiff in error sued the defendant in error A. S. Moore to recover damages resulting from personal injuries. In his amended original petition he alleged, in substance, as follows: On October 20, 1916, he was traveling south on the west or right side of Wright street, in the city of Greenville, driving his horse hitched to a delivery wagon, and when near the middle of the block he met Bryon Stapleton, driving a delivery car belonging to the defendants at a high and reckless rate of speed, going north on the same street and on a mission incident to his employment by the defendants; that Stapleton negligently and carelessly, without fault on the part of the plaintiff, drove the car against plaintiff's hack and horse with great force and violence, causing injuries which he sets out in detail. It is further alleged that the defendant was guilty of negligence in failing to properly equip his car with sufficient headlights, that the driver was running the car at a greater rate of speed than 15 miles per hour in violation of an ordinance of the city of Greenville, and that he was driving on the left side of the street in violation of another ordinance of that city. At the conclusion of the plaintiff's testimony, the court instructed a verdict for the defendant.

Under his averments the plaintiff in error had the burden of proving two facts: (1) That the collision with the car was due to the negligence alleged; and (2) that the car was at the time being operated in the service of the defendant in error. The testimony that the car was being operated in the service of the defendant in error at the time this collision occurred is very unsatisfactory; but, assuming that it was sufficient, the further

question remains: Did the plaintiff in error offer sufficient testimony to show that the defendant in error or his agent was guilty of the negligence charged? By his own witness the plaintiff in error proved, on direct examination, that the car was running at about 6 miles an hour at the time the collision occurred. According to plaintiff's testimony, just a little while before the collision occurred, a large car with very brilliant headlights passed him going in the same direction. He pulled to the right in order to give this car room. He discovered the car in which Stapleton was riding, some distance before it reached him. He thus testifies as to what part of the street he was on at the time the collision occurred.

"The wagon tracks were in the center of the street, and I was west of them. I mean to say that my left wheels were about the left wagon tracks. It is not a fact that as soon as the danger of the car coming behind me was over that I turned back in the road again. I never did pull back in the road; I kept on. I saw the other car (meaning the car that struck him) when it was coming toward me. It was about as far from me as from here across the street when I first saw it. I saw it just as the cars pulled apart. I had not seen that car before; I was looking at the red light at the hind end of the car that had just passed me. But when they pulled apart I saw him and his lights, and knew he was coming. He was not on the side I was on; he was in the center of the street. I do not want to take that back; he was right in the center of the street, where the ruts are and where everybody drives; he was driving in the usual and ordinary place, and I saw him coming. I did not pull out of his way. I was coming meeting him, and I thought he would pull out. I was already out, and he was right in the center of the road, and I thought when he got close enough to me he would pull on this side and pass me. It was very dark, but I do not know about his lights not being good enough to see me. I was already in the left track with my left wheel, and if I had pulled out half an inch further I don't guess he would have hit me. I could see, when he was as close to me as it's from here across the street, that he was traveling in the ordinary place. His lights looked dim to me; I don't know how they looked to him. I staid my ground until he hit me; I thought he was going to pull out. I would have pulled out and give him all the road, if I had thought that he was going to hit me."

In another portion of his testimony the plaintiff in error states that when the collision occurred he heard Stapleton say:

"Whoever that was in the other car, he was the cause of it. He threw his lights in my face and blindfolded me, and I could not see."

Dave Pitts, plaintiff in error's witness, who was riding in the car with Stapleton at the time the collision occurred, testified that they were so blinded by the headlights of this large car that they could not see.



We do not think this testimony is sufficient to justify a finding that the driver of the car was guilty of negligence in the manner charged; and the judgment is affirmed.

# CHANCELOR v. SLAUGHTER. (No. 2090.)

(Court of Civil Appeals of Texas. Texarkana. March 6, 1919.)

## APPEAL AND ERROR $\Leftrightarrow$ 759—BRIEFS—FAILURE TO COPY ASSIGNMENTS—ABANDONMENT.

Under rule 29 for the Courts of Civil Appeals (142 S. W. xii), assignments of error relied upon by appellants, but not copied in their brief, must be regarded as abandoned, and cannot be considered.

Appeal from District Court, Van Zandt County; Joel R. Bond, Judge.

Suit by F. M. Chancellor against R. E. Slaughter. From judgment for defendant, plaintiff appeals. Affirmed.

F. M. Chancellor and his wife owned a lot abutting on a street in Edgewood, on which was a house they used as a home and as a hotel. Appellee, Slaughter, owned the lot adjoining the Chancellor lot on the west. Both the lots were "business lots"; that is, they were in the business part of the town of Edgewood, and were intended for use as sites for business instead of residence houses. The Slaughter lot was vacant, except that Chancellor with Slaughter's consent, had a part of it fenced, which he used as a garden for growing vegetables. The fronts of the houses on lots abutting on the street on each side of the Chancellor house were even with the street line, but the front of the Chancellor house was back 10 feet from said street line. In July, 1916, Slaughter resumed possession of his lot, and, using corrugated iron for the purpose, built a house thereupon for use as a garage. The house was so constructed that its front, like the fronts of the other houses on the street except the Chancellors, was even with the street line. Therefore it obstructed the view west from the Chancellor house, which, as before stated, was back 10 feet from the street line. Alleging that he was entitled to the possession of the Slaughter lot during the year 1916, and that he was damaged in the value of the garden growing thereon (which he alleged to be \$500) when Slaughter took possession thereof; further alleging that by reason of the garage being of corrugated iron and so built as to obstruct the view from his house, his premises were worth \$1,000 less than they otherwise would have been; and further alleging that he was sick during the time Slaughter was engaged in building the garage, and was damag-

ed \$5,000 as the result of mental anguish caused by the noise, etc., made by workmen who constructed the building, and by people operating automobiles, etc., after it was constructed, and was further damaged in the sum of \$126 for medicines, etc., purchased on account of such sickness, Chancellor brought this suit against Slaughter. Chancellor having died after he commenced the suit, his widow and minor child continued the prosecution thereof. It appeared from testimony of Mrs. Chancellor as a witness that she and her husband waived any right they may have had to the possession of the Slaughter lot during the year 1916, and that the real and only ground of their complaint against Slaughter was that they built the garage so that the front thereof was on a line with the street, and therefore obstructed the view from their house, whereas, to avoid that, he had agreed to build it on a line with their house. She testified as follows:

"At the time of the erection of this garage building my husband was living, but he was quite ill; he was mighty feeble in health. Mrs. Slaughter and I had a talk about the erection of the building. In the first place he brought the plot to my home and laid it on the table. He said, 'Mrs. Chancellor, I am going to build a house out on my lot.' I said, 'If you are going to build a house I won't object if you build it back on a line with my main building, but I would rather you would wait until I take care of my garden.' He said he couldn't wait, but he says, 'Well, now, I wouldn't build out on your front at all,' and I said that would be all right, but I said I didn't want my front closed in from town, and he said he wouldn't do it. Well, he went on, and in a little while, about three hours, I noticed he had piles set 10 feet beyond my porch. He built the building north and south. Well, I went to him. I considered Mr. Slaughter a man of his word. I didn't go to him because I was mad or anything of the kind, and I asked him quite nice, 'Mr. Slaughter, you are not building your house according to the contract at all; you told me you would build back of the line.' I asked him who was to rent it; he told me, and I went to see the party. Mr. Slaughter will tell you this. I begged him not to do this. If he had built it as agreed, I would not have opened my mouth. I agreed with Mr. Slaughter about this building—with the front to correspond with my main building—not to close me in with his tin building."

The appeal is from a judgment in Slaughter's favor in accordance with a verdict returned by the jury as directed by the court.

L. Davidson, of Canton, for appellant.

Wynne, Wynne & Gilmore, of Wills Point, for appellee.

WILLSON, O. J. (after stating the facts as above). Neither one of the several assignments of error relied upon by appellants is copied in their brief. As rule 29 (142

S. W. xii) for the government of this court expressly provides that an assignment not so copied "shall be regarded as abandoned," the objection made by appellee to a consideration of the contention made in said brief must be sustained. It has been repeatedly held that the requirement in the rule cannot be ignored. *Martin v. Bank*, 102 S. W. 131; *Gambould v. Railway Co.*, 40 S. W. 834; *Poland v. Porter*, 44 Tex. Civ. App. 334, 98 S. W. 214; *Kirby v. Blake*, 53 Tex. Civ. App. 173, 115 S. W. 674; *Hearn v. Harless*, 154 S. W. 613; *Overton v. Colored K. of P.*, 163 S. W. 1053; *Koch v. Railway Co.*, 46 Tex. Civ. App. 84, 102 S. W. 136.

An examination of the record has not only failed to disclose error "apparent on the face thereof," but has satisfied us that the judgment was a proper one. Therefore it is affirmed.

#### CITY OF FORNEY v. MOUNGER. (No. 2063.)

(Court of Civil Appeals of Texas. Texarkana.  
Feb. 27, 1919.)

#### 1. COURTS ⇨122—ACTIONS FOR DAMAGES FOR ABATEMENT—JURISDICTIONAL AMOUNT.

In an action by a property owner against a city for damages for the destruction as a nuisance of stables, allegations that the improvements destroyed were worth \$500, and that the rental value of the premises was \$15 a month, and praying \$500 vindictive damages, did not show that the amount of damages sought was below the jurisdiction of the district court, notwithstanding that the jury found the value of the premises to be \$175, and the reasonable rental value \$10 per month.

#### 2. MUNICIPAL CORPORATIONS ⇨605, 623(1)—DETERMINATION AND ABATEMENT—POWER OF CITY COUNCIL.

A city council has the power to declare what shall be a nuisance, and to abate the same and to impose fines upon parties who may continue or suffer nuisances to exist.

#### 3. MUNICIPAL CORPORATIONS ⇨739—ABATEMENT OF ALLEGED NUISANCE—ACTION FOR DAMAGES.

If city council, in the exercise of its powers to abate a nuisance, destroys or authorizes the destruction of buildings which in fact are not a nuisance, the municipality is liable for damages sustained by the owner.

#### 4. MUNICIPAL CORPORATIONS ⇨63(1)—DETERMINATION BY CITY COUNCIL—CONCLUSIVENESS.

That a city council declares that buildings are a nuisance in fact is not a final determination of the question, but the owner may have it adjudicated in a suit for damages.

#### 5. MUNICIPAL CORPORATIONS ⇨623(1)—NUISANCES—ABATEMENT—DESTROYING BUILDING.

That the owner of stables permits filth to accumulate therein, so as to constitute a nuisance, does not authorize the municipality to destroy the buildings themselves, such destruction not being necessary to abate the nuisance arising from the filth in view of *Vernon's Sayles' Ann. Civ. St. 1914, arts. 845 and 846*, giving the city the power to compel the cleansing of the premises.

#### 6. MUNICIPAL CORPORATIONS ⇨623(1)—ABATEMENT OF NUISANCE—EXTENT AND NECESSITY.

The abatement of a nuisance by a city must be limited by its necessity, and no unnecessary injury to property must be permitted.

#### 7. INJUNCTION ⇨118(4)—PLEADING—SUFFICIENCY.

In suits for injunction, the pleadings must specifically and clearly state the grounds for the remedy.

#### 8. INJUNCTION ⇨118(1)—PETITION—SUFFICIENCY.

In a suit to enjoin a city from interfering with reconstruction of stables destroyed as constituting a nuisance, allegation of the petition held not sufficient, because failing to show that the building intended to be erected could properly be built under the city ordinances.

Error from District Court, Kaufman County; F. L. Hawkins, Judge.

Action by J. M. Mouser against the City of Forney. Judgment for plaintiff, and defendant brings error. Modified and affirmed.

The defendant in error owned five lots in block 35 in the duly incorporated town of Forney, upon which were situated certain buildings used as a mule barn and sales stables. On July 15, 1915, the buildings were torn down under the direction of the town of Forney. The defendant in error brought this suit in the nature of trespass on his property for damages sustained in tearing down the buildings. The petition also asked for an injunction restraining the town of Forney and its officers from interfering with the defendant in error in rebuilding these sheds on the lots. The plaintiff in error answered by plea to the jurisdiction of the court and general denial, and specially pleaded in defense that the property abutted on a public sidewalk in the town, and that manure from the horses and mules kept on the property and under the buildings was allowed to accumulate and remain in large quantities, creating odors that were offensive and injurious to public health and constituted a nuisance, and that the plaintiff refused to move or remedy the nuisance, and that thereupon the town of Forney passed ordinance declaring the buildings to be a

nuisance, and ordered them taken down and removed.

It appears from the evidence that one of the buildings as constructed was 106 feet long and 15 feet wide, with a galvanized roof resting on posts. It was walled up on three sides and open on one side, and partitioned into stalls. At one end of this building there was a stable 20 by 24 feet. There was another shed, which was 30 feet long and 24 feet wide. The manure from the horses and mules constantly kept there accumulated under the buildings and on the lots, causing offensive odors in the immediate vicinity. On the south side the sheds abutted on a public sidewalk in the town of Forney. The lower edge of the roof of the sheds was 6 feet high at that place, and protruded about 6 inches over and above the edge of the sidewalk. The sidewalk was in a populous part of the town, and was constantly used by the public. The town of Forney passed an ordinance declaring, "The mule sheds now located on lots 1 to 8, inclusive, block 35, on Main street, in the town of Forney, Tex., owned by J. M. Mounger, be, and is hereby, declared to be a public nuisance and a menace to the health of the town," and directing N. A. Hayes, the alderman in charge of streets and alleys, "to tear down said sheds and to stack the lumber on the back side of said lots in an orderly manner, and to clean and purify the said premises as to him may seem necessary and best." The cost of removing the buildings and clearing the lots was declared in the body of the act to be a charge against J. M. Mounger and collectable as a claim against him.

The case was submitted to the jury on special issues, and they made the following findings of fact: (1) That the sheds as erected and maintained were not a nuisance to the public using the sidewalk; (2) that the manner in which the structure was erected and maintained was not of itself a nuisance; but (3) that the premises were so used and kept before and at the time of their destruction as to allow and permit manure to accumulate and remain in quantities under the sheds, causing odors which were offensive and noisome to the public using the sidewalk adjacent to the premises; and (4) that the cleaning out of the manure would remove and do away with the odors and nuisance, and the destruction of the buildings was not necessary to abate the nuisance. The value of the property torn down was, as found by the jury, \$175, and the reasonable rental value, as found by the jury, was \$10 per month. On the verdict of the jury the court entered judgment for the plaintiff for the value of the buildings destroyed, and also awarded an injunction, as prayed for, restraining the defendant from interfering with the plaintiff in the rebuilding of the sheds.

The evidence warrants the findings of the jury, and they are here adopted.

Lee R. Stroud and Wynne & Wynne, all of Kaufman, for plaintiff in error.

Thos. R. Bond, of Terrell, for defendant in error.

LEVY, J. (after stating the facts as above). The first assignment of error complains of the refusal of the court to dismiss the suit for want of jurisdiction in the district court as to the amount in controversy. The petition alleged:

"This plaintiff says that the reasonable value of the improvements aforesaid destroyed by the defendant were reasonably worth the sum of \$500, and that he has been further damaged in the sum of \$15 per month for each and every month since the destruction of the improvements which resulted in this plaintiff being unable to rent his property as theretofore."

[1] There is also a prayer in the petition for vindictive damages in the sum of \$500. The legal damages allowable will be such as result from the injury the plaintiff has suffered; and, as alleged, the wrongs consisted in destroying the improvements on the property, alleged to be \$500 in value, and in impairing the use and occupancy of the premises, alleged to be of the rental value of \$15 per month. The face of the petition therefore does not, it is concluded, show that the amount of damages sought to be recovered is below the jurisdiction of the district court. And we do not think the record warrants the holding that the allegations of value were in point of fact fraudulently made to confer jurisdiction on the district court. The assignment is overruled.

[2-4] It is insisted that the town of Forney had legal authority to do everything charged against it in the petition, and could not be held liable in damages for the act. The city council has the power to declare what shall be a nuisance, and to abate the same and to impose fines upon parties who may create, continue, or suffer nuisances to exist. But if the city council in the exercise of its powers to abate a nuisance destroys or expressly authorizes the destruction of buildings which in fact are not a nuisance, the municipality will be held liable for damages sustained by the owner. *Dillon on Municipal Corporations* (4th Ed.) § 972; *Joyce on Nuisances*, § 350; *City of Dallas v. Allen*, 40 S. W. 24. And the declaration of the city council that the buildings were a nuisance in fact did not finally determine that question. On the contrary, the owner of the buildings is permitted to have adjudicated in a suit the question of whether or not the buildings were in fact a nuisance. *City of San Antonio v. Salvation Army*, 127 S. W. 860; *Ray v. City of Belton*, 162 S. W. 1015. The ordinance as passed.

by the city council had application only to the buildings in evidence. It declared:

"That the mule sheds now located on lots 1 to 8 inclusive, in Block 35, on Main Street in the city of Forney, Texas, owned by J. M. Mounger, be and is hereby declared to be a public nuisance and a menace to the health of the town."

[5, 6] And it is apparent from the evidence that the buildings in their location, manner of construction, and maintenance were not a nuisance. The nuisance the jury found to exist consisted only in the filth permitted to accumulate and remain on the lots and under the sheds, and which nuisance was, as found by the jury, entirely removable and abatable without the necessity of destroying the sheds. And thus under these findings of the jury no inconvenience or danger to public health or welfare existed in the sheds themselves, but arose from a nuisance separable from the sheds, and which could have been obviated by the use of some measure far less drastic than the destruction of the sheds. The fact that the nuisance was permitted under the sheds would not of itself authorize and justify the municipality in destroying the sheds. The destruction of the sheds, in such circumstances, was an unnecessary method of abating the nuisance arising from the filth. A municipality has the power and authority to compel the cleansing of premises. Article 846, Vernon's Sayles' Civil Statutes. And a municipality has the authority to prevent the owner of a stable from so keeping and using the property as to be a nuisance affecting public health and comfort. Article 845, Vernon's Sayles' Statutes; *Burditt v. Swenson*, 17 Tex. 489, 67 Am. Dec. 665; *Ex parte Broussard*, 74 Tex. Cr. R. 333, 169 S. W. 660, L. R. A. 1918B, 1091, Ann. Cas. 1917E, 919. The abatement as a remedy must be limited by its necessity, and no unnecessary injury to property must be permitted. For instance, as said in *State v. Railway Co.*, 78 W. Va. at page 539, 89 S. E. at page 293, L. R. A. 1916F, 1001:

"If the merchant has unlawfully sold or used liquors in his establishment, could his store be shut up and abated as a place of sale of dry goods, furniture, shoes, or clothing, as the case might be? If a man sold liquors in his home, would the court abate the place as a residence and turn his family out in the street?"

In view of the jury finding that the sheds were not a nuisance, the trial court, it is believed, did not err in awarding damages for the destruction of the buildings. The assignment of error is overruled.

[7] By the second assignment of error it is insisted that there was error in awarding an injunction against the plaintiff in error restraining it from any interference with the defendant in error in rebuilding on the lots. The injunction proceeding is a matter

quite separate and independent of, and not merely incident to, the suit for damages for destruction of the sheds. And it is essential that all pleadings should state specifically and clearly the grounds for such remedy. The only allegation in the petition pertaining to the injunction is:

"That the said city of Forney in refusing and denying to this plaintiff the right and privilege of erecting and rebuilding the barn sheds on his said property (which was destroyed as herein complained of), and is threatening to prosecute the plaintiff criminally should he attempt to rebuild his said sheds and barns on his said lots."

[8] That the building intended to be erected was of the kind and character that could properly be erected in that part of the town does not appear from the allegations that the city was wrongfully refusing the "right and privilege" of building on those lots. The privilege of rebuilding might have been denied, for aught that appears, because it was to be a wooden building within the prescribed fire limits. Neither the petition nor the proof is sufficient to sustain the award of the injunction.

The judgment is modified so as to deny the injunction, and as modified is in all things affirmed. The cost of appeal is taxed against the defendant in error.

CUNNINGHAM et al. v. CUNNINGHAM et al. (No. 7637).\*

(Court of Civil Appeals of Texas. Galveston. Dec. 10, 1918. Rehearing Denied Jan. 23, 1919.)

#### 1. APPEAL AND ERROR $\S$ 544(3)—FUNDAMENTAL ERROR—WHAT CONSTITUTES.

Though petition for partition alleged that one of the defendants was a minor without legal guardian, *held* that, though the record showed no appointment of a guardian ad litem, etc., for such defendant, no fundamental error appeared reviewable in absence of bill of exceptions and statement of facts, where the judgment of partition rendered two years later recited that another defendant, a minor, appeared by guardian ad litem and all of the other defendants by attorney.

#### 2. APPEAL AND ERROR $\S$ 544(3)—FUNDAMENTAL ERROR—DECREE—FINDINGS.

Where the jury's findings showed that one who had celebrated an invalid ceremonial marriage with deceased received more in rents out of his personal property than she had paid in securing title to certain lands in which she was given no share, *held*, that final decree of partition did not disclose fundamental error in her favor, reviewable in absence of bill of exceptions and statement of facts.

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Writ of error refused March 19, 1919.

### 3. MARRIAGE §11—VALIDITY—PRIOR COMMON-LAW MARRIAGE.

Where a common-law marriage relation already existed between a man and another woman, a second woman with whom he subsequently celebrated a ceremonial marriage, though she entered into the relation in good faith and in accordance with the statutory law, did not become his wife, and no valid marriage was created.

### 4. APPEAL AND ERROR §544(3)—FUNDAMENTAL ERROR—PARTITION PROCEEDINGS.

A decree and proceedings in partition held not to show fundamental error, reviewable in absence of bill of exceptions and statement of facts, on the theory that the court in its first decree judicially determined that the land was susceptible of partition, and thereafter in conformity to the report of commissioners ordered it sold, and thus violated Rev. St. 1911, § 6101.

Error from District Court, Lavaca County; M. Kennon, Judge.

Action by Antney Cunningham and others against Quincy Cunningham and others. There was a judgment for the former, and the latter bring error. Affirmed.

J. D. Childs, of San Antonio, for plaintiffs in error.

GRAVES, J. This cause is here through writ of error, without a statement of facts or any bills of exception, upon brief and oral argument for plaintiffs in error only, in which contention is made that several such fundamental errors are apparent upon the face of the record as require reversal of the judgment.

[1] The first one asserted is: Since it appears from the petition of plaintiffs below that Quincy Cunningham, Jr., was a minor at the time it was filed, and the subsequent decree ordering partition of the land in which she had an interest did not show her appearance in the cause by guardian ad litem, she was not bound nor her interest disposed of.

Such, however, is not the legal effect of what the record does show. While the original petition does recite that Quincy Cunningham, Jr., was then a minor without legal guardian of either her person or estate, it likewise appears therefrom that this instrument was filed September 25, 1914; whereas, the partition judgment appealed from was not rendered until October 23, 1916, more than two years later. This judgment, after first reciting that the minor defendant, King Cunningham, appeared by his legally appointed guardian, continued: "And all the other defendants appearing in person and by their attorneys announced ready for trial." Quincy Cunningham, Jr., was one of these, and there being nothing elsewhere in the proceedings indicating the contrary, the judgment itself importing verity, the presumption

necessarily is that she had become of age in the interim between the dates of filing the petition and entry of the decree. It follows that no fundamental error in this respect is pointed out.

[2] The next one claimed lies in the alleged failure of the final decree to dispose of such rights and equities in favor of Quincy Cunningham, Sr., in what is assumed to be the community land of herself and John Cunningham as arose from the jury's findings that, before the latter's death and during existence of the marriage relation between them, he had paid \$42.20 on the particular 96 acres involved in the suit, and that she, after his death, had paid one Newhaus \$390.80 upon their community lands generally.

The answer to this suggestion is twofold: First, there is no showing anywhere in the record that Quincy Cunningham, Sr., ever had any interest in the 96 acres, and the court found she had none; second, the extinction of any possible rights or equities she might have had by reason of paying out the \$390.80 is shown by the unquestioned answers of the jury that, after John Cunningham's death, she collected \$306 in rent from the same lands and \$110 from the sale of cattle belonging to him, the two items aggregating an excess against her of \$25.20, by which amount the jury further specifically found her indebted to the estate of herself and John Cunningham.

[3] Plaintiffs in error assume two things not justified by the record before us: First, that John and Quincy Cunningham, Sr., were legally husband and wife; second, that the latter owned an undivided one-half interest in the 96-acre tract of land, which seems to have been the one upon which they lived, and upon these assumptions build their attack on the judgment. The jury, however, in a finding not attacked as being without supporting evidence, found that during the same period of time a common-law marriage existed between John Cunningham and another woman, Ann Cunningham, from which condition it necessarily follows that the relation between him and appellant Quincy Cunningham, notwithstanding the fact that it had in good faith and in accord with statutory law been entered into, could not constitute a valid marriage. *Walton v. Walton*, 206 S. W. 133, and authorities there cited.

Concerning the 96 acres, as above stated, the court found it belonged exclusively to other parties, and there being here no statement of facts and no sort of indication to the contrary, the conclusive presumption is that there was evidence to support it.

Now, the record further shows that out of the property involved in the suit Quincy Cunningham, Sr., was awarded a tract of 141 acres, not including any part of the 96 acres

referred to, and this is complained of for that reason, and also because its value was not given in the report of the commissioners of partition.

Of course, since we must presume, under the court's conclusion, that she had no interest in that tract, the first objection avails nothing; as to the second one, while the commissioners of partition did not state in dollars and cents the value of the 141 acres set apart to her, they did find and report that it constituted a fair and equitable division and partition of her interest in all the lands involved from the interests of all the other joint owners thereof, and the final judgment of the court ratifying and confirming that report contained this recitation:

"And it appearing to the court, after having examined said report carefully, that the partition as made between Quincy Cunningham and the other joint owners hereinbefore named, and as shown by the decree of partition in this cause, has been fairly made according to law, and no exceptions having been taken thereto," etc.

In these circumstances, together with the further fact appearing that the 141 acres awarded her was practically a full one-half in acreage of all the land claimed to have been owned in common between herself and John Cunningham, with nothing whatever to indicate that it did not also constitute a full half of the value thereof, it cannot be said that a showing is made of any injustice done to Quincy Cunningham.

[4] Finally, it is claimed the court fundamentally erred in judicially determining in its decree of October 23, 1916, that all the land in suit was susceptible of partition, having then appointed commissioners for that purpose, and afterwards at a succeeding term, on April 2, 1917, in its judgment confirming their report to that effect, having held a part of the land incapable of partition and ordering it sold; it is said such procedure was in violation of article 6101, Rev. St. 1911, and rendered the judgment of confirmation void.

Here again we think appellants misapprehend the effect of the first decree and assume more than its terms and import justify; there was no determination that any part of the land was susceptible of partition, but the court merely fixed the several undivided interests of all the different parties in the whole of it, and appointed commissioners to make a fair and impartial partition and to report the same in writing under oath to the next term of court; that was done, and at the succeeding term, as appears from the above-quoted one and other recitations in the final judgment, the court then judicially determined the partition contained in such report to have been fairly made according to law, ordered it confirmed, and the

report entered as a part of the judgment. While the court seems to have followed the old procedure before the partition statute was put by amendment in its present form, we cannot see that the course taken, especially as affects those who made no objection to it, in any way rendered the final judgment void.

The court below had jurisdiction of the parties and of the subject-matter; the judgment was one which, under the pleadings and what must now be presumed to have been the evidence, it had the power to render, and appellants not having shown themselves entitled to a reversal, affirmance is ordered. Affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS  
et al. v. BAKER BROS. et al.  
(No. 2082.)

(Court of Civil Appeals of Texas. Texarkana.  
March 14, 1919. Rehearing Denied  
March 20, 1919.)

1. ABATEMENT AND REVIVAL  $\Leftrightarrow$  82—TIME FOR  
PLEA IN ABATEMENT—MISJOINDER OF  
CAUSES.

Where two railway companies filed a joint answer, not complaining of misjoinder of causes of action, and subsequently filed separate answers, pleading misjoinder in abatement, the objection was waived.

2. CARRIERS  $\Leftrightarrow$  173—BILLS OF LADING—CON-  
STRUCTION—THROUGH SHIPMENT.

A bill of lading in which the blanks left for stations named on the railroad company's line were not filled, held a contract for through shipment between points within the state within the meaning of Rev. St. 1911, art. 731, relating to shipment contracts, notwithstanding the bill provided it was not to be treated as a through shipment to a point off company's road.

Error from District Court, Collin County;  
M. H. Garnett, Judge.

Action by the Collin County National Bank against Baker Bros. and others. Judgment for plaintiff, and the defendants Wichita Valley Railway Company and the Missouri, Kansas & Texas Railway Company of Texas jointly bring error. Affirmed.

Wallace Hughston, of McKinney, for plaintiffs in error.

R. C. Merritt, L. J. Truett, and Jno. Dayles, all of McKinney, for defendants in error.

HODGES, J. During the month of January, 1915, Baker Bros. bought 98 bales of cotton with money furnished by the appellee Collin County National Bank. Forty-three bales of that cotton were shipped from Munday, Tex., to Galveston, on a bill of lading

issued by the Wichita Valley Railway Company via Stamford and over the line of the Missouri, Kansas & Texas Railway Company of Texas. This shipment was consigned to the "order of the Munday Trading Company, of Munday, Texas, notify Baker Bros., Galveston, Texas." Twenty-five bales of cotton were shipped from Knox City, Tex., over the Kansas City, Mexico & Orient Railway Company of Texas and the Missouri, Kansas & Texas Railway Company of Texas on a bill of lading issued by the first-named railway company. The cotton was consigned to the "order of G. W. McCarty, destination Galveston, notify Baker Bros., Galveston, Texas." Twenty-five bales were shipped from the same point to the same destination, consigned to the "order of E. R. Harlan, destination Galveston, notify Baker Bros., Galveston, Texas." All of the bills of lading were indorsed in blank by the consignors and delivered to Baker Bros., who immediately attached them to drafts for the purchase price of the cotton, and sent same to the Collin County National Bank, which paid the drafts, amounting in the aggregate to \$3,500. The bank retained possession of the drafts; and on the 3d day of April, 1915, drew its draft for \$3,500 on the Cannon Commission Company of Galveston, Tex., with the three bills of lading attached. The Cannon Commission Company refused to pay the drafts, and they were returned to the bank.

This suit was instituted by the Collin County National Bank against Baker Bros. and the three railway companies named, for the conversion of the cotton; the bank claiming a lien to secure the purchase price advanced to Baker Bros. In a trial before the court a judgment was rendered in favor of the bank against Baker Bros., the Wichita Valley Railway Company, and the Missouri, Kansas & Texas Railway Company of Texas. The suit against the Kansas City, Mexico & Orient Railway Company of Texas had been dismissed. The judgment against the Wichita Valley Railway Company was limited to the value of the cotton for which it had issued a bill of lading, and also gave that company a judgment over against the Missouri, Kansas & Texas Railway Company of Texas for whatever sum it might pay in satisfaction thereof.

The court found as a fact that the Wichita Valley Railway Company delivered the 43 bales of cotton received by it to the Missouri, Kansas & Texas Railway Company of Texas at Stamford, Tex.; that the Kansas City, Mexico & Orient Railway Company of Texas delivered the 50 bales of cotton received by it to the Missouri, Kansas & Texas Railway Company of Texas at a junction point on its line; and that the latter company carried all the cotton to Galveston, the place of destination. The cotton was not reloaded into other cars when received by the Mis-

souri, Kansas & Texas Railway Company of Texas, but was carried through in the original cars. No new bills of lading were issued by the Missouri, Kansas & Texas Railway Company of Texas when it received the cotton, but it was transported under the original bills of lading. On March 15, 1915, the Missouri, Kansas & Texas Railway Company of Texas, while the Collin County National Bank held the bills of lading, without requiring their surrender and without the consent of the bank, delivered the cotton to the Cannon Commission Company. The court further found the value of the cotton, and that the Collin County National Bank at the time of its surrender had a lien on it for the sum of \$3,500; and judgment was rendered accordingly. The court concluded as a matter of law that the 43 bales of cotton originating on the line of the Wichita Valley Railway Company were shipped on a through bill of lading from the point of origin to destination, and that the Missouri, Kansas & Texas Railway Company of Texas recognized and acquiesced in that bill of lading as a through contract of shipment.

This appeal is prosecuted by the Wichita Valley Railway Company and the Missouri, Kansas & Texas Railway Company of Texas jointly.

[1] The first error assigned complains of the refusal of the court to sustain a plea in abatement filed by these two railway companies, in which they claim a misjoinder of causes of action. They insist that the cause of action, if any, against the Wichita Valley Railway Company for the loss of the 43 bales of cotton was distinct and in no way connected with that resulting from the loss of the 50 bales of cotton shipped over the Kansas City, Mexico & Orient Railway Company of Texas. Conceding that proposition to be correct, the record shows that the above-named railway companies originally filed a joint answer, in which no complaint was made of the misjoinder of causes of action. They subsequently filed separate amended original answers, in which for the first time they presented this matter in abatement. The court concluded (and we think correctly so) that the objection was waived. But even if it had not been waived, it is by no means certain that the plea should have been sustained. *Finegan v. Read*, 8 Tex. Civ. App. 33, 27 S. W. 261, and cases cited. The Missouri, Kansas & Texas Railway Company of Texas has no right to complain of the judgment upon that ground, and the Wichita Valley Railway Company was amply protected against any liability other than that for which it could have been held responsible in a separate suit.

[2] Plaintiffs in error also insist that the court erred in finding as a fact that the cotton was shipped from the point of origin to destination in the same cars and upon the

same bills of lading, and also erred in concluding as a matter of law that the bill of lading issued by the Wichita Valley Railway Company was for a through shipment. The material portions of that bill of lading are as follows:

"The Wichita Valley Railway Company. Order Bill of Lading—Original and Only. Agent's B. L. No. 200. For use only between points within the state of Texas. January 15th, 1915. Received from Munday Trading Company at Munday, Texas, the following packages, contents and value unknown, in apparent good order, except as noted, marked and numbered as per margin, to be transported from \_\_\_\_\_ (must be a station on this line) to \_\_\_\_\_ (must be a station on this line) there to be delivered as indicated below, unless destined beyond, and if destined beyond, then the Wichita Valley Railway Co. agrees, as agent for the shipper, to tender the shipment to connecting common carrier, en route to destination.

"Consigned to order of Munday Trading Co. (mail address—not for purpose of delivery), Munday, Texas. Destination, Galveston, state of Texas, county of \_\_\_\_\_. Notify Baker Bros. at Galveston, Texas. Car initial \_\_\_\_\_. Car No. \_\_\_\_\_. Via Stamford, M., K. & T. Ry. No. packages 43. Description of articles and special marks, bales cotton, marked 'B L Through Flat.' Weight subject to correction, 22051. Class or rate subject to correction, \_\_\_\_\_. Corrections made in this B/L by W. F. Sterling, G. F. A., per Dorman, 1/27/18. War revenue stamp affixed before signing. A. B. Reese. 27 bales not sufficiently covered on ends—sample bales open.

"It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed by any carrier shall be subject to all the conditions whether printed or written herein contained, and which are agreed to by the shipper and accepted for himself and his assigns.

"Inspection of property covered by this bill of lading will not be permitted unless provided by law, or unless permission is indorsed on the original bill of lading or given in writing by the shipper.

#### "Conditions.

"Section 1. No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, riots or strikes, or the act of default of the shipper or owner, or for differences in the weights of grains, seed, or other commodities caused by natural shrinkage or discrepancies in weights,

or for any vice or inherent defect in the property shipped.

"Section 2. If shipment is destined to a point off this company's road, it is agreed that this is no contract for through shipment, and this company's liability as a common carrier shall terminate on tender of delivery to a connecting carrier."

The question is, Was this a contract for a through shipment from Munday to Galveston within the meaning of article 731 of the Revised Civil Statutes? In other words, was it a contract under which its connecting carrier, the Missouri, Kansas & Texas Railway Company of Texas, might receive and transport goods without the giving of a new bill of lading? We are of the opinion that it was. That construction was placed upon it by both of the plaintiffs in error. The cotton went through from Munday to Galveston in the same cars. The Wichita Valley Railway Company did not demand a surrender of its bill of lading when the cotton left its line. It is true the bill of lading stipulates that if the cotton be destined to a point off the road of the Wichita Valley Railway Company this was not to be treated as a contract of through shipment. But why insert that clause in a contract for shipment over only one line of railway? If without that clause the bill of lading should be treated as one for a through shipment, that provision should be construed as an attempt to limit the liability of the issuing company in violation of article 731. It is well known that railway companies prepare and have their contracts for bills of lading printed, leaving only the necessary blanks required by the varied shipments received. If the Wichita Valley Railway Company desired to contract for transportation exclusively over its own line, it might have done so by using language that made that purpose plain. There were blanks in this bill of lading left for the names of the stations on the Wichita Valley Railway Company's line, but they were not filled in. The failure to fill them cannot be treated as an accidental omission. That fact and the further fact that the contract contained stipulations expressly for the benefit of connecting carriers justify the construction adopted by the trial court. *St. L. S. W. Ry. Co. v. Hughston*, 186 S. W. 429; *Ft. W. & D. C. Ry. Co. v. Bone*, 195 S. W. 244; *Patterson & Roberts v. Railway Co.*, 195 S. W. 1163.

The judgment will be affirmed.



ST. LOUIS, B. & M. RY. CO. v. VICK.  
(No. 6163.)

(Court of Civil Appeals of Texas. San Antonio.  
Feb. 19, 1919.)

1. APPEAL AND ERROR  $\S$ 544(1)—BILL OF EXCEPTIONS—CONTINUANCE.

In absence of a bill of exceptions relating to refusal of continuance, assignment complaining of such refusal must be overruled.

2. MASTER AND SERVANT  $\S$ 256(5)—PLEADING—AMENDMENT AT TRIAL.

In servant's action for injuries, there was no error in allowing trial amendment alleging that plaintiff stepped on a piece of carbon, instead of carbide, as originally alleged by plaintiff, and admitting testimony relating to carbon; there being no claim of surprise and no request for a continuance or postponement.

3. APPEAL AND ERROR  $\S$ 1060(4)—HARMLESS ERROR—ARGUMENT OF COUNSEL.

Assignment complaining that respondent's counsel, during his argument to the jury, read each special issue and stated the answer which he claimed should be returned to each issue from the evidence, *held* without merit; the jury having failed to return the answers suggested as to two of the three grounds of negligence relied on by respondent.

4. APPEAL AND ERROR  $\S$ 528(1)—BILL OF EXCEPTIONS—TESTIMONY ON MOTION FOR NEW TRIAL.

Testimony taken under the statute authorizing a new trial for misconduct may be perpetuated as part of the record by means of a bill of exceptions.

5. EXCEPTIONS, BILL OF  $\S$ 36(3)—MOTION FOR NEW TRIAL—TIME OF FILING.

Acts 32d Leg. c. 119 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2073), granting 30 days from adjournment to file bills of exceptions, and providing for extension of such time, applies to bills of exceptions containing testimony taken on a motion for new trial under the statute relating to misconduct of the jury.

6. EXCEPTIONS, BILL OF  $\S$ 42—TIME FOR FILING—WAIVER.

Bills of exception, like conclusions of law and fact, not filed in time, cannot become valid parts of the record by any waiver, as by failure to file motion to strike out bill of exceptions within the time prescribed by Court of Appeals rule No. 8 (142 S. W. xi).

7. NEW TRIAL  $\S$ 140(3)—MISCONDUCT OF JURY—CONSIDERATION OF SHARE OF ATTORNEYS IN RECOVERY.

Testimony as to misconduct of the jury in considering what portion of recovery in personal injury action would go to plaintiff's attorneys *held* sufficient to show that new trial should have been granted.

Appeal from District Court, Kleberg County; W. B. Hopkins, Judge.

Action by V. J. Vick against Frank Andrews, as receiver of the St. Louis, Brown-

ville & Mexico Railway Company, in which action the said Railway Company was by amendment made a defendant. From judgment for plaintiff, the Railway Company appeals. Affirmed on condition of remittitur; otherwise reversed and remanded.

E. H. Crenshaw, Jr., of Kingsville, for appellant.

Presley K. Ewing, of Houston, for appellee.

MOURSUND, J. V. J. Vick sued Frank Andrews, as receiver of the St. Louis, Brownsville & Mexico Railway Company, to recover damages for personal injuries which he sustained on February 9, 1914, while engaged as an employe of such receiver in carrying, with five coworkers, a heavy end sill, alleging that while he was so engaged he slipped on a piece of carbon, or other obstructing material, and fell, and that such end sill fell on him. Negligence was charged in the following respects: (1) In failing to cause or permit said end sill to be carried on a push car or cart; (2) in causing or permitting an insufficient number of men to carry such sill; (3) in causing or permitting said carbon or other obstructing material to be and remain in the pathway of such carriage, whereby the place was made not reasonably safe for the work.

The plaintiff on November 7, 1916, amended, and made the St. Louis, Brownsville & Mexico Railway Company a defendant, alleging that since plaintiff's injury the property held by the receiver had been, by order of the court in which the receivership was pending, turned back to said company subject to the assumption by it of all obligations of the receiver.

The defendants answered by general demurrer, general denial, plea of assumed risk, and contributory negligence.

A judgment in favor of plaintiff against both defendants for \$5,000, directing execution against the company alone, was entered upon the verdict returned by the jury in answer to special issues submitted. The company alone appealed.

[1] The assignment complaining of the refusal of the application for a continuance must be overruled for the reason that there is no bill of exceptions in the record relating to such ruling.

[2] It appears that in the petition upon which the cause went to trial it was alleged that plaintiff stepped upon a piece of carbide instead of carbon, and the court permitted the filing of a trial amendment alleging that it was a piece of carbon, and then admitted testimony relating to carbon. There was no claim of surprise and no request for a continuance or postponement. There was no error in permitting the amendment and in the admission of the testimony. Assignments 2, 3, and 5 are overruled.

Complaint is made concerning the admission in evidence of a written statement purporting to be signed by John Brister; the contention being that there was no evidence that the signature was that of Brister. This contention must be overruled. Brister's testimony contained an admission that it was his signature.

The sixth, seventh, and eighth assignments complain of the failure to submit special issues. The statements contain no testimony which would call for the submission of such issues. As briefed, the assignments present no error and are overruled.

[3] It appears from the bill of exceptions on which the ninth assignment is predicated that one of plaintiff's counsel during his argument to the jury read each special issue and stated the answer which he claimed they ought to return to each issue from the evidence; such answers all being, of course, favorable to plaintiff. Although the court stated that the argument was improper, it was continued, and even after the court stated that he had already expressed the opinion that it was improper, but that it was plaintiff's case, and if his counsel wanted to take the risk he could do so, the counsel persisted in continuing such explanation. The remarks of the court indicate that the explanation must have been made in such a manner as, in his opinion, intended to apprise the jury of the effect on the judgment of certain answers, but the bill of exceptions shows nothing further than that counsel told the jury what answers he thought they should return from the evidence. In the argument it is stated that he did not review the testimony relating to such issues no attempt to aid the jury in finding the facts as to such issue, but merely attempted to offer them a guide which they could follow in case of confusion and safely answer the different issues so that plaintiff would receive a verdict. This, however, is not disclosed by the bill of exceptions. The bill of exceptions does not show improper argument. It is impossible to argue the facts relating to special issues without disclosing to a juror of any intelligence what answer will be favorable to the client of the person making the argument, and in a case of this kind the jury would easily comprehend the effect of the answers. In this case the jury failed to return the answers stated by counsel as to two of the three grounds of negligence, and it may safely be assumed that, if the argument was designed to apprise the jury of the consequences which would follow from certain answers, it made no impression on the jury. The assignment is overruled.

A motion has been filed to strike out the bill of exceptions which relates to misconduct of the jury on the ground that it was not filed during term time, and in support of the motion the case of *Smith v. Texas Power & Light Co.*, 206 S. W. 119, is cited, which

sustains the contention, and follows many cases by the Court of Criminal Appeals.

This court has heretofore considered bills of exception of this kind filed after term time, and, although we have given careful consideration to the opinions in the cases relied on, we are still of the opinion that the bill of exceptions should be considered. It is true that neither article 837, Code Cr. Proc., relating to new trials for misconduct in criminal cases, nor Rev. St. 1911, art. 2021, relating to misconduct in civil cases, contains any provision for making the testimony taken on such a hearing a part of the record; so other statutes must be examined to ascertain how such a record is to be made. We respectfully submit that the matter under investigation in all cases has been the construction of statutes relating to bills of exceptions and statements of fact, and that there can be no merit in the suggestion submitted in the *Smith v. Power Case*, to the effect that the enactment of a statute permitting a new trial in civil cases for misconduct carried with it in any way a construction relating to the time for filing bills of exception and statements of fact.

In the case of *Black v. State*, 41 Tex. Cr. R. 185, 53 S. W. 116, the case referred to in all subsequent cases on the subject, it was held that the language in article 1379 (R. S. 1895), referred to in the opinion as article 1377, the number under a previous revision, to the effect that, "after the trial of any case, either party may make out a written statement of the facts given in evidence on the trial," referred "exclusively to the statement of facts adduced on the trial of the case itself," and had no application to issues of fact formed on grounds set up in the motion for a new trial. The case was decided October 25, 1899. At that time there was a statute (article 1381, R. S. 1895) which provided for an order allowing not exceeding 10 days after adjournment in which to file a statement of facts, but there was no provision for filing bills of exception after term time. Article 1365, R. S. 1895, provided that "it shall be the duty of the party taking any bill of exceptions to reduce the same to writing, and present the same to the judge for his allowance and signature during the term and within ten days after the conclusion of the trial." In the case of *Railway v. Joachim*, 58 Tex. 454, it was held that the trial was not concluded under said statute until the motion for new trial was overruled; that "as long as the case stands open for the consideration of the court at the term during which the trial occurs, it cannot be considered as concluded." This decision was approved in *Palmo v. Slayden & Co.*, 100 Tex. 13, 92 S. W. 796. These cases indicate that it could plausibly have been held that testimony taken on a motion for new trial could properly be embraced in "a statement of the facts given in evidence on the trial."

However, in the Black Case the Court of Criminal Appeals gave the word "trial" its ordinary signification, and held that the statute which provided for a statement of facts, in describing it as "a statement of the facts given in evidence on the trial," only authorized the preparation of a statement of the facts shown by the evidence adduced on the trial proper, and the statute allowing the court by an order to extend the time for filing a statement of facts referred only to such a statement of facts. There being no provision in the law for a statement of facts other than that containing evidence taken on the trial proper, the court stated its opinion to the effect that testimony taken on a motion for a new trial should be perpetuated by a bill of exceptions. There being no bill of exceptions in the record on the point, and no law allowing the filing of a bill of exceptions after term time, the court was not called upon to decide, and did not decide, the point at issue in this case. We find that the next case which is most frequently cited is that of *Probest v. State*, 60 Tex. Cr. R. 608, 183 S. W. 284, in which the court stated that the "testimony" taken on the hearing of the motion for new trial was filed after term time; that the statutes relating to preparation and filing of statements of fact applied only to a state of facts adduced upon the merits of the case; and that the court had theretofore held that the facts as to issues on motion for new trial must have been filed during the term. Judge Ramsey, on motion for rehearing, shows there was a bill of exceptions which contained the statement that testimony had been introduced, but which did not include the testimony, and therefore did not show that the court erred in its ruling. The opinion does not disclose whether the bill of exceptions was filed during term time. All the cases cited in that case were cases in which the testimony had been attempted to be perpetuated by means of a statement of facts which had not been filed in term time. Later on the court held that, notwithstanding the passage of an act allowing 30 days after adjournment in which to file bills of exception, a bill of exceptions containing the testimony taken on the hearing of a motion for new trial must be filed in term time. The first cases so holding apparently are those of *Knight v. State*, 64 Tex. Cr. R. 541, 144 S. W. 967, and *Bailey v. State*, 65 Tex. Cr. R. 1, 144 S. W. 996. These cases were decided in 1912. We find that in the *Black Case* the following language from the *Black Case* is quoted:

"These matters must be made of record during the term of court; there is no statute authorizing such matters to be perpetuated in papers filed subsequent to the term."

The fact that such language was used at a time when there was no statute permitting the filing of bills of exception after term time

and in connection with a holding that the proper way to perpetuate the testimony was by bill of exceptions was not commented on, nor explanation offered why it would apply after statutes had been enacted allowing 30 days after term time in which to file bills of exception. In the *Bailey Case* the court quoted from section 7, Acts 31st Leg. c. 39 (1st Ex. Sess.), as follows:

"When an appeal is taken from the judgment rendered in any cause in any district or county court, the parties to the suit shall be entitled to and they are hereby granted 30 days after the day of adjournment of court in which to prepare or cause to be prepared and to file a statement of facts and bills of exception."

The court then said:

"It is thus seen that all which relates to filing bills of exception and statements of fact is in the same section and is upon the same footing."

It then quotes from the *Black Case*. It is evident that the language quoted places "bills of exception" upon the same footing, with respect to time of filing, with the statement of facts containing the evidence taken on the trial proper, and not on the same footing with statements of fact containing evidence not taken on the trial, but on the hearing of a motion for new trial. In all subsequent decisions, so far as we have been able to ascertain, the question is treated as settled in accordance with the holding in said two cases.

Under our liberal practice it has been held that a statement of facts may serve the purpose of a bill of exceptions, but the bill of exceptions cannot serve the purpose of the statement of facts. *Roundtree v. Galveston*, 42 Tex. 623; *Stephens v. Herron*, 99 Tex. 67, 87 S. W. 326. This idea has been embraced in rule 56 for district and county courts (142 S. W. xxi), as to evidence admitted over objection, and it appears that such rule has not been revised since the statute was changed with respect to the time for filing bills of exception.

The theory appears to be that, there being no form prescribed for a bill of exceptions, the authentication incident to approval of a statement of facts includes the verification essential to make a valid bill of exceptions. Our courts, in view of this, have not been disposed to quibble over whether testimony taken on the hearing of a motion for new trial is perpetuated by means of a statement of facts or a bill of exceptions, always bearing in mind, however, that if a statement of facts is to answer the purpose of a bill of exceptions, it must be filed within the time prescribed for filing bills of exception. It is true that at the time the courts established this doctrine and rule 56 was enunciated the statement of facts, like the bills of exception, was copied into the transcript, but the courts have apparently considered this unimportant, and still hold that the statement of facts may embrace bills of exception.

It has been held that, when a motion for new trial is supported by affidavits, it should be made to appear by bill of exceptions or statement of facts that such affidavits were brought to the attention of the court; for otherwise the appellate court could not know upon what evidence the district judge based his ruling. *Frizzell v. Johnson*, 30 Tex. 32; *Colville v. Colville*, 118 S. W. 870.

[4-6] While it appears that the same rule would apply to testimony taken under the statute authorizing a new trial for misconduct, it is unnecessary for the purposes of this case to go further than to hold that it is proper to perpetuate such testimony as part of the record by means of a bill of exceptions, and there can be no doubt that such a holding is supported by the authorities. *Sharp v. State*, 71 Tex. Cr. R. 633, 160 S. W. 373; *T. P. Ry. Co. v. Tucker*, 183 S. W. 1188. There being no statute which provides specially for filing bills of exception of this kind, the statute which refers generally to bills of exception must be held to include them. The caption and emergency clause to the act of May 1, 1909, and the caption to the act of March 31, 1911 (Acts 32d Leg. c. 119), known as the Stenographers' Acts, indicate an intention to provide more time to file bills of exception in general. Article 2073, *Vernon's Statutes*, which is taken from said act of 1911, grants 30 days from adjournment in which to file bills of exception, and provides for extensions of such time. We see no escape from the proposition that the provision applies to bills of exception containing testimony taken on a motion for new trial under the statute relating to misconduct of the jury. The motion to strike out the bill of exceptions was not filed within the time prescribed by rule 8 for the Courts of Civil Appeals (142 S. W. xi), which has been held by some of our courts to constitute a waiver of the objection as to time of filing. This court has not adopted that holding, but has adhered to the view that bills of exception, like conclusions of law and fact, not filed in time, cannot by any waiver become valid parts of the record.

We have therefore deemed it necessary to consider the motion on its merits. We regret that we are unable to agree with the Court of Criminal Appeals and the Court of Civil Appeals of the Seventh District on the question, but, believing that the practice heretofore pursued by this court is correct, it is proper that we should adhere thereto, even though by so doing a conflict in decisions results. The motion to strike out the bill of exceptions is overruled.

[7] It is contended that a new trial should have been granted on account of misconduct of the jury in the matter of considering what portion of the recovery would go to plaintiff's attorneys. The testimony of the jurors discloses that it was stated by one of them that the attorneys would receive about

50 per cent. The statement was made by Juror Foster, who was in favor of allowing plaintiff \$10,000 and he admitted that his purpose was to get the men who were in favor of a low verdict to raise their estimate. Juror Sims first voted to allow plaintiff \$500, and he testified that the discussion concerning attorney's fees influenced him to give more than he would otherwise have given. He also testified that he had come up to \$1,000 when the matter of attorney's fees was mentioned, and that he never intended to go higher than that amount. He also testified on cross-examination that he was prejudiced against excessive attorney's fees, and that he would not give a plaintiff as much if the attorneys were to get a large per cent. as he would if they were to receive a small fee. Juror Mull testified that at first he was in favor of a verdict for defendant; that he would not have agreed to a verdict for \$5,000 had it not been for the attorney's fees. In spite of the most persistent cross-examination, he adhered to his statement that he could not help but think about how much the attorney was going to get out of it and how much would be left for Mr. Vick. He felt that when he brought in the verdict he was bringing it in for Vick and his lawyers. He thought if the matter of attorney's fees had never been mentioned the jury would have given plaintiff less. In the course of the lengthy and able cross-examination he stated first that he would not testify that, if attorney's fees had not been mentioned, he would never have agreed to \$5,000, and finally that he believed he would have agreed to a verdict of \$5,000 even if attorney's fees had not been mentioned. Afterwards his attention was called to such statement, and he admitted that he made it, and, when asked if he wanted to take it back, replied:

"Just like I stated before, you couldn't help but keep that before you, the attorney's fees; at least, it came up with me."

There can be no doubt that the matter of attorney's fees was injected into the minds of the jurors, that it was done deliberately to accomplish a certain purpose, and that the purpose was actually accomplished. The testimony of Sims and Mull creates in our minds a conviction that they were actually influenced by the discussion of attorney's fees to agree to the verdict returned in the case. Mull's statement that he believed he would have agreed to \$5,000 anyway is only important as a circumstance to be considered in connection with his other testimony on the issue whether he was influenced by the improper discussion, and his testimony as a whole leaves no doubt on that issue in our minds. His belief concerning what he would have done had no discussion taken place cannot make the verdict a good one. A new trial should have been granted. We have heretofore had occasion to consider the effect of

discussions of this kind, and the views expressed need not be repeated. See *San Antonio Traction Co. v. Cassanova*, 154 S. W. 1190; *Steele v. Dover*, 170 S. W. 809; *San Antonio Traction Co. v. Mendez*, 199 S. W. 691.

The judgment will be affirmed, provided a remittitur of one-half thereof is filed within 15 days; otherwise it will be reversed, and the cause remanded.

# ROWLES v. HADDEN et al. (No. 932.)

(Court of Civil Appeals of Texas. El Paso. March 6, 1919. On Rehearing, March 27, 1919.)

## 1. CONTRACTS —170(1) — PRACTICAL CONSTRUCTION.

Where a contract is indefinite or ambiguous, but only in that event, acts and conduct of the parties done with knowledge and in view of the contract are to be considered and given weight in construing the contract.

## 2. CONTRACTS —170(1) — CONSTRUCTION — ACTS OF PARTIES—"ACRE FOOT."

A contract providing that purchasers of land should have "fifteen acre feet per annum of its water, or so much water as would be necessary to irrigate fifteen acres of land," etc., held not ambiguous so as to allow consideration of the acts of the parties in construing the contract, the term "acre foot" expressing a technical, definite, and specific volume or quantity of water, 325,850 gallons, or the amount of water which will cover one acre one foot in depth.

## 3. WATERS AND WATER COURSES —158(2)— CONTRACTS—AMOUNT OF WATER TO BE FURNISHED.

The fact that a water company actually and voluntarily delivered more water than was called for in a contract, without extra charge, had no binding effect on water company in favor of a subsequent purchaser of irrigated lands, who had knowledge thereof.

## 4. PLEADING —312—EXHIBITS—VARIANCE.

Where a written instrument is made part of a petition, court will, on demurrer, give to instrument the legal effect to which it is entitled, and legal effect will control when allegations of petition and recitals of instrument as to legal effect are found in conflict.

## 5. WATERS AND WATER COURSES —247(1)— ACTIONS AGAINST WATER COMPANIES — PLEADING—SUFFICIENCY.

A petition against a water company to compel it to furnish water under a contract did not raise issue that it was defendant's duty to supply water sufficient to properly irrigate land, where it was not alleged that defendant was a public service corporation, or that the price asked for water required in excess of that contracted to be delivered was unreasonable.

Appeal from District Court, Pecos County; Jas. Cornell, Judge.

Suit by Dill V. Rowles against W. A. Hadden, trustee, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

R. D. Blaydes, of Ft. Stockton, Starley & Drane, of Pecos, and Burges & Burges, of El Paso, for appellant.

Harkless & Histed, of Kansas City, Mo., W. A. Hadden, of Ft. Stockton, and Blanks, Collins & Jackson, of San Angelo, for appellees.

WALTHALL, J. Dill V. Rowles brought this suit against W. A. Hadden, trustee, John Rooney, John Odom, Dan Bihl, James Rooney, and F. S. Wilson, on what is called in the pleading a permanent water right contract providing for the furnishing of water for purposes of irrigation for lands for farming purposes from an irrigation system owned and operated by appellees.

The trial court sustained a general demurrer to the petition. Appellant declining to amend, judgment was entered dismissing the suit at appellant's cost. Appellant here complains of the ruling of the district judge sustaining the general demurrer. The petition is lengthy but as, in this case, it is both pleading and statement of facts, we copy it in full, and will thereafter make such statement of the exhibits as may be deemed necessary:

"Your petitioner Dill V. Rowles, hereinafter styled petitioner, complaining of Wm. A. Hadden, trustee, John Rooney, John Odom, Dan Bihl, James Rooney, and F. S. Wilson, hereinafter styled defendants, respectfully represent and shows to the court:

"First. That your petitioner is a resident citizen of the county of Pecos and state of Texas.

"Second. That the defendants herein are all resident citizens of the state of Texas and county of Pecos.

"Third. For cause of complaint your petitioner represents and shows to the court that the Ft. Stockton Irrigated Lands Company is a corporation duly and legally incorporated under the laws of the state of Texas, and was engaged in the business of owning, developing, and selling lands and water rights for irrigated farms, and in the business of owning, operating, and maintaining in Pecos county, Texas, irrigation dams, reservoirs, ditches, canals, and laterals, and selling, delivering, and furnishing water by means thereof to farms and lands for purposes of irrigation.

"Fourth. That heretofore petitioner bought of the Ft. Stockton Irrigated Lands Company, a corporation duly and legally incorporated under the laws of the state of Texas, certain lands and water rights appurtenant thereto situated in Pecos county, Texas, and by reason of his several purchases of lands and water rights is entitled to have water delivered to him upon his said farms in accordance with the terms of his several contracts.

"Fifth. That prior to the sale of said lands to this plaintiff the said Ft. Stockton Irrigated Lands Company, as the owner and possessor of a large tract of land in the valley of the Comanche creek in Pecos county, Texas, had platted and subdivided said lands so owned and possessed by it into farm units, and which farm units were by it designated by lot and block numbers, and had filed and recorded in the office of the county clerk of said Pecos county, Texas, a map and plat of said lands, with irrigation canals, ditches, and laterals delineated thereon, and with the said farm units marked and designated thereon by lot and block numbers, and that all sales of farm units made, and contracted to be made, by said Ft. Stockton Irrigated Lands Company, were by lot and block numbers, as marked and designated on said recorded map, to which reference was made in the deeds of conveyance delivered, and contracted to be delivered, for description of the tracts of land and farm units sold and intended to be conveyed by the deeds executed, and contracted to be executed and delivered.

"Sixth. Your petitioner further represents and shows to the court that in offering said lands and farm units for sale to this plaintiff, and as an inducement to him to purchase said lands and water rights, said Ft. Stockton Irrigated Lands Company made certain representations to petitioner of the class and character of farm, garden, and fruit crops said land would produce, and specifically represented to him, both orally and in written and printed matter, that said water right guaranteed sufficient water to irrigate said land, and that a foot of water (meaning thereby an amount of water sufficient to cover said tracts of land one foot in depth) upon the land during the irrigation season was sufficient for any and all crops adapted to said land; that this plaintiff was not, by experience or otherwise, acquainted with the measurement of water, the character of soil on said lands, or the climatic conditions of the country wherein the same are situated with reference to the amount of moisture required and necessary to produce crops thereon, but that the said Ft. Stockton Irrigated Lands Company, and its officers, servants, and agents, were, or should have been, acquainted with all such matters, and that plaintiff had a right to and did rely upon the truth of such representations, and that relying upon the truth of the matters so represented to him by the Ft. Stockton Irrigated Lands Company through written and printed matter, and the oral representations made in its behalf by its officers, servants, and agents, James W. Oldham, William B. Burget, and others, this plaintiff bought lands of said company.

"Seventh. Your petitioner further represents and shows to the court that he now owns and holds farm units so sold, or contracted to be sold and conveyed, by the said Ft. Stockton Irrigated Lands Company or its vendees, and that the perpetual water right and right of water service upon the several farm units is in all instances and cases appurtenant to the lands described in his deeds, a form showing the terms of which is hereto attached marked 'Exhibit A' and made a part hereof.

"Eighth. Your petitioner, relying upon the truth of such representations so made to him, bought of said company those certain farm units known and described on the map and plat so

filed for record by said company as tracts numbered fifty-three and fifty-four (53 and 54) in section No. eight (8), and through the purchase of another contract tract No. fifty-eight (58) in block No. one (1), and section No. six (6), all in block No. 1 of the Ft. Stockton Irrigated Lands Company, all of which will more fully appear from the deeds hereto attached, marked Exhibits — and made a part hereof.

"Ninth. That by the terms of the contract of sale for said lands, and the form of deed for a perpetual water right thereto attached, as a part and parcel of said contract, a copy of the form of which contract and deed of perpetual water right is attached hereto marked Exhibit A and made a part hereof, the said Ft. Stockton Irrigated Lands Company sold and conveyed to this petitioner, with land sold to him, a perpetual water right for the irrigation of said lands, conveying 'an amount of water sufficient to cover said tracts of land one foot in depth,' and such an amount of water as should be 'required to properly irrigate said land,' and obligated itself to deliver said water through its irrigation canals, laterals, and ditches during each and every irrigation season thereafter, said amount of water being by it, its officers, servants, and agents, represented to be a sufficient supply of water for all crops and purposes, and which said representations plaintiff had a right to and did rely upon, and was to be delivered by it at the expense to petitioner of the pro rata cost of maintenance, not more than \$1.50 per acre of land per annum as set out in said deeds and contracts, and the amount of actual cost of maintenance to be paid in three equal installments on the first days of March, June, and September of each year, and your petitioner alleges that he has placed himself, in all and every way, in position to make beneficial use of said water and water rights, as in said contract and deed provided, and that he has so taken and used the water allotted to him and his said land each and every year since the execution of said contract and deed, and has paid said charges, in an amount and at the time specified in said contract, and he further alleges that he is now, and has at all times been, ready, willing, and anxious to continue to pay for said water service as in said contract provided for.

"Tenth. Your petitioner further represents and shows to the court that said lands so bought by him were put in a high state of cultivation, and orchards, vineyards, farms, and gardens established thereon, and said lands planted in fruit trees, vines, vegetables, and farm crops of alfalfa and grains, for which they had been by said Ft. Stockton Irrigated Lands Company recommended and represented to be especially adapted, and for the production of which crops in that soil it had been by said company represented that the amount of water as defined in said deeds and contracts was a sufficient supply for an irrigation season, and for some two or three years subsequent to the execution of said contract and deeds said Ft. Stockton Irrigated Lands Company, in compliance with the true spirit of the covenants and agreement in its contract and deed, and which were by it agreed to be kept and performed, did supply to this plaintiff on said lands sufficient water whereby your petitioner was enabled to produce crops and reap the benefits of his contracts of purchase of lands and water rights.

"Eleventh. That thereafter, and prior to the commencement of these proceedings, said Ft. Stockton Irrigated Lands Company sold or otherwise disposed of the remainder of its lands and irrigation plant and works, including irrigation diversion dams, canals, ditches, and laterals, and all of its rights, easements, privileges, and benefits under its contracts, to James W. Oldham and William B. Burget, as will more fully appear from the copies of a mortgage and deed of trust and trustee's deed hereto attached, marked 'Exhibits Nos. ———,' and made a part hereof, and who on their part, and as in part consideration for the properties, rights, easements, and privileges and as acquired by them, undertook, agreed, contracted, and became liable and bound in law to said company and its vendees, including this petitioner, to carry out the terms and conditions of said company's contract and deed, and became promised, bound, and obligated in law to furnish and deliver, in accordance with the terms of the contracts, deeds and practice of the said Ft. Stockton Irrigated Lands Company, water to this petitioner, on the lands so purchased by him, sufficient to produce and mature crops, and did, in fact, in the crop season and year 1915, undertake to furnish to the occupant and users of said land, water as in said contract provided, and as said company had previously done, under its said written contract and oral undertaking and agreements to furnish sufficient water to produce and mature crops, save and except that for additional water furnished in excess of one acre foot, as measured by said Oldham and Burget, the said Oldham and Burget did undertake to levy an additional assessment of \$1.50 per acre foot of water furnished, and which additional charge for water this petitioner says was not warranted by the terms of said contract, nor any subsequent or supplemental contract or agreement between him, as a holder of said farm units, and said Ft. Stockton Irrigated Lands Company, nor its successors in interest, said Oldham and Burget; but that the same was and is contrary to the written contracts and verbal agreements of said Irrigated Lands Company, and its officers, servants, and agents, James W. Oldham and William B. Burget, and others, and the successors in title and interest of said company, to furnish water sufficient to produce and mature crops.

"Twelfth. That thereafter, and prior to the commencement of this proceeding, said James W. Oldham and William B. Burget sold the remainder of their lands and their irrigation plant and works, including irrigation dams, canals, ditches, and laterals, and all of their rights, easements, privileges, and benefits under their contracts to the defendants in this cause who, on their part and as in part consideration for the properties, rights, easements, and privileges so acquired by them, undertook, agreed, contracted, and became liable and bound in law to said company and its vendees, the owners of farm units, and among them this plaintiff, to carry out the terms and conditions of said company's contract and deed, as will more fully appear from the copy of the deed of conveyance executed by said Oldham and Burget to said defendants, hereto attached, marked 'Exhibit No. ———,' and made a part hereof, and did in fact in the crop seasons and years 1917 and 1918 undertake to furnish to the occupants and users of said land water as in said contract provided,

and as said company had previously done under oral understandings and agreements to furnish sufficient water to produce and mature crops, save and except that for water furnished, alleged to be in excess of one acre foot, the said defendants did levy an additional assessment of seventy-five cents per acre foot of water furnished, and which additional charge for water this petitioner says is not warranted by the terms of said contract, nor any subsequent or supplemental agreement or contract between him, as holder of said farm units, and said defendants, nor their successors in interest, said irrigated lands company, and Oldham and Burget, but that the same is contrary to and in violation of the written agreements and the custom and practice of the parties in interest, and the arbitrary assessment of seventy-five cents per acre foot of water by said owners of said works is violative of the laws of the state of Texas, and the duty and obligation of said company and its successors in interest, under the laws of the state of Texas, to furnish water at a reasonable compensation for such service.

"Thirteenth. Your petitioner further represents and shows to the court that said contract and deed for water purports to be and is a perpetual water right issued in accordance with the laws of the state of Texas; that the plaintiff paid to the said grantor therein approximately eighty dollars per acre for said water right, which was its full agreed value; that the plaintiff relied upon his rights thereunder as fixed and provided by the laws of the state of Texas, and relied upon the terms and provisions and representations made in the wording of said instrument, as follows: 'That in consideration of the sum of \$800 paid by said party of the second part (D. V. Rowles) to the said party of the first part for this water right deed and for a deed to real estate coincidentally executed, receipt whereof is hereby acknowledged, and in further consideration of the stipulations and agreements herein entered into and on the part of the party of the second part as hereinafter set forth, the said party of the first part does hereby sell and convey unto the said party of the second part ten acre feet per annum of its water, said water being a perpetual right to have delivered through the canals, flumes, and laterals of the party of the first part from the waters of Comanche creek or other sources in Pecos county, Texas, or so much water as may be necessary to irrigate ten acres of land, not exceeding, however, at the point of delivery during any one year, an amount of water sufficient to cover said tract of land one foot in depth, or so much of said one foot as may be required to properly irrigate said land. The said party of the second part agrees that he will take and use said water from said first party during each irrigation season, and that he, his heirs and assigns, will pay therefor to the first party, its successors or assigns, for the maintenance, operation, and repair of the said canal, flumes, main laterals, reservoirs, and other works constructed and operated in connection with the system of delivering water from Comanche creek and other sources of water supply, whatever they are or may be, owned or controlled by first party, its successors or assigns, for the delivery of water to the foregoing and other lands in Pecos county, Texas, annual pro rata assessments to be fixed by first party not to exceed

one dollar and fifty cents per acre per annum, payable in three equal installments, the first of which shall become due and payable on March first of each year, and the others respectively on the first days of June and September in each year.'

"The said Ft. Stockton Irrigated Lands Company, its officers and agents, wrote the said deed and water right upon regular printed forms used and prescribed by them, and represented to the plaintiff that the amount of water to be furnished, and contracted to be furnished, in said water right was a sufficient amount of water to properly irrigate said lands throughout the year, and that the first payment was the purchase price of said water right, and that the annual payments to be made thereafter were simply to cover the actual operating expenses, guaranteed not to exceed one dollar and fifty cents per acre per annum, relying upon the representations so made and the laws of the state of Texas, and the terms and wording of said water right, that the amount of water to be so furnished was an amount 'so much water as may be necessary to irrigate' said land, and that the total amount charged was not to exceed \$1.50, and said plaintiff bought and paid for same. At the time he so bought and paid for said land the said grantor therein had sold other similar contracts and water rights to other parties, and was furnishing such other parties at said time not one acre foot, but water sufficient to irrigate the lands, and did continue for several years thereafter to so furnish such water in such quantities, and did not make, or attempt to make, any extra charge whatever therefor. That the plaintiff knew nothing of the conditions pertaining to irrigation of the land in question, or what amount of water was required to grow crops on said land, but relied upon the representations made by said parties. That the plaintiff bought his said lands and water rights, and the said grantor did in fact for several years thereafter furnish him water sufficient to grow crops thereon, and did not in any manner or form charge, or attempt to charge, him in excess of \$1.50 per acre per annum for the delivery of said water. That thereafter, and after selling nearly all of its said lands and water, the said owners of said canals undertook to change the meaning and interpretation of said water right, and claimed that they had not sold to the landowners water sufficient to irrigate said lands, but had only sold an acre foot of water to each acre of land; said acre foot to be measured, not in terms of an amount of water sufficient to cover said land one foot deep, but an acre foot of water measured by flow at the point of delivery at the canal; which amount of water was only sufficient to supply such land with one, or, at most, two, irrigations, and totally insufficient to grow crops on said land. They then notified said landowners that when they had used said amount of water on their said lands they would be required to pay to the canal owners an additional \$1.50 per acre for each additional acre foot of water up to the amount required to irrigate their said lands; that if the same was not paid in advance their water would be cut off. This practice was commenced in 1915, and since that time there has been a continual fight and controversy between said canal owners and said landowners as to the meaning of said water right and the charges

that could be made for the delivery of water to said lands.

"Fourteenth. That the terms and provisions of said water right are the same in two different instruments issued by said parties; that is, when a party purchased a tract of land on deferred payments a contract for same was issued, and an agreement to issue said water right in the terms above set out was included in said contract. When the said land was paid for by said deferred payments having been met, then a deed was executed, and said water right was executed and delivered. Such contract was made with plaintiff in 1911. The said canal owners, after the plaintiff had made such contract written upon printed forms prescribed by them, was compelled to accept such deed and water right in the form prepared by the said parties, and did not have any option as to the wording of same, or the provisions in same, but was forced to accept same in the form issued by them. They took up said original contract, and have same in their possession. The said forms were so prepared that said representations as to the supplying of sufficient water to irrigate said lands and the limitation of the charges to be collected annually were seemingly provided therein. The plaintiff herein relied upon said representations made to induce him to buy and pay for same, and relied upon the terms of said instruments providing for the delivery of sufficient water to irrigate said land, and upon the clause therein limiting the amount of the annual charge therefor. The plaintiff did not know how to measure water and did not measure same, and had no occasion to measure same because the said owners of said canals furnished him the water required to irrigate his lands without extra charge for several years and until some time in 1915. He had then paid such an amount on his said contracts that he could not afford to abandon same. Since 1915 the said canal owners have tried in every way to intimidate the plaintiff and force him to sign contracts to pay extra amounts for water, and have continuously threatened to cut off his water supply, and have cut off same, to his great distress and damage. By their said acts they have greatly reduced the value of his land and his water rights, to his great damage in the sum of ten thousand dollars.

"Fifteenth. On or about the — day of May, 1918, the said canal owners sent to the plaintiff through the mail a card to be signed and returned, which was a form agreeing to pay for all water furnished on said land after June 17, 1918, at the rate of seventy-five cents per acre foot of water for the balance of the year 1918, and agreeing that they had the water to deliver, and would deliver same if said card was signed and returned, and that if said card with said agreements was not so signed and returned by said date that no further water could be furnished to the plaintiff during said year. The plaintiff, relying upon his said water right so bought and paid for, did not sign said card, and thereafter received a written notice from said canal owners that he would not receive any more water during this year, and they have failed and refused to deliver such water to him on said tracts 53 and 54, above described. The plaintiff's lands are planted in crops that are now suffering for water thereon; the said water



in said canals is delivered in rotation to the several water users, and the time for plaintiff to use same has just passed, and the said canal owners refused to deliver same to him, and his crops are dying and being greatly injured, to his great distress, in the sum of five thousand dollars, and unless said water is delivered to him within a few days he will suffer further and irreparable damage because of the want of said water. There is no other water supply from which plaintiff can secure water.

"Sixteenth. The plaintiff purchased from the said canal owners a water supply for the irrigation of his lands, and agreed to pay an annual carrying charge therefor, as above alleged. The said canal owners now have his said water running in their said canals, and refuse to allow the plaintiff to take same out of said canals and use same, and, as a result thereof, his crops on said lands are dying for the want of water. The said canal owners have demanded of him that he sign certain contracts changing his rights, and without giving him the right to say anything as to the form or terms thereof, but that he shall sign whatever they demand or let his crops die. The said canal owners have continually harrassed and worried said plaintiff, and their said acts have been malicious and continued, for the purpose of injuring him and depressing the value of his said land and water rights, and done with the malicious purpose of injuring and harrassing him, for which he sues for fifteen thousand dollars as exemplary damages.

"Seventeenth. That the said water right contract or deed provides that plaintiff shall only be charged his pro rata part of the necessary expenses of operating said canal system, not to exceed one dollar and fifty cents per acre per annum. Said contract does not provide anywhere or in any way that he will pay that amount for each foot of water used, but only not to exceed that amount per acre per annum. The said canal owners have arbitrarily undertaken to interpret said contract to mean that he shall pay that amount per acre foot of water delivered, and have never followed the method of making charges therein provided, and therefore cannot enforce any charges made against him. Under the terms of said contract they are required to prorate the actual expense of operating said canal, and notify him of the amount thereof, before he is required to make payment therefor. They have never done this, and have never prorated said expense, and have never given him notice thereof, but have, without right, demanded payment of \$1.50 per acre foot of water measured by them by flow at the point of delivery. The said interpretation of said terms of said contract is such as to deprive the plaintiff of the value of his said water right, for such an amount of water is totally insufficient to grow crops on said land, but only sufficient to start said crops in the spring, after which time the plaintiff is at the mercy of said canal owners as to the amount of water to be furnished and the charge to be made therefor, and the value of what he bought is entirely destroyed. Water, if delivered on and covering said land one foot deep during the year, would be sufficient for the irrigation thereof. But to measure one acre foot of water by flow at the point of delivery does not in fact cover all said

land as much as four inches deep. This distinction was unknown to the plaintiff at the time he bought said land and water right, and the said canal owners represented to him that sufficient water was to be delivered to cover said land one foot deep, same to be furnished at several different times for the several required irrigations thereof. The said canal owners, in addition to said representations, wrote in said water right the provision, 'So much water as may be required to irrigate said land, and an amount of water sufficient to cover said tract of land one foot in depth,' thereby causing the plaintiff to think that he was buying a sufficient amount of water to irrigate said land, and at least an amount sufficient to furnish several irrigations for said land, while, as said parties now attempt to interpret said contract, the amount to be furnished will hardly irrigate same two times, and same is totally insufficient to grow crops thereon. To cover said land one foot in depth all over requires much more than one acre foot, measured by flow at the point of delivery, because of the fact that to cover said land the water must be spread over the land, and in this process much of it is lost by seepage. To allow such an interpretation of such contract works a great fraud upon this plaintiff.

"Eighteenth. This plaintiff depends upon the crops grown upon his land to support himself and family, and to meet his taxes, water maintenance, and other expenses and charges. The said water to which he is entitled is flowing in said canals, and will go to waste unless he is permitted to use same. He is engaged in growing feed and other crops, of which the country at this time is in great need. The amount of damage that may be suffered is problematical in any farm products, but with water for use for the irrigation of said lands the plaintiff will grow much valuable crops. For all such damages the plaintiff has no adequate remedy at law. If he sits by and depends upon a suit at law to recover the damage he will suffer, he will be required to abandon his home, and seek work to make expenses and support his family while the water that belongs to him goes to waste. He will be unable to comply with the urgent need of the country that each farmer raise all possible feed and food crops, and for all of which he has no adequate remedy at law, but is compelled to appeal to a court of equity for relief.

"Nineteenth. Your petitioner further represents and shows to the court that in accordance with the custom and practice of the parties, and in compliance with the true meaning of the contract and deed for perpetual water rights, as hereinbefore alleged, and in compliance with oral agreements with owners of farm units, said Irrigated Lands Company and Oldham and Burget and defendants did furnish water to farmers on said lands sufficient to produce and mature crops thereon, as it had been represented could be done, but that in so doing said defendants assert that more than one acre foot of water was furnished, for which additional water said defendants have assessed against said water users on said lands a sum and sums of money in addition to the \$1.50 by water users contracted to be paid, and have arbitrarily and without authority of law, and in violation of the express terms and conditions of the contract

and deed for a perpetual water right aforesaid, sufficient to produce and mature crops, made the payment of such assessment for alleged additional water a condition precedent to furnishing any water, in any quantity, for any purpose, during the balance of the irrigation and crop season of 1918.

"Twentieth. Your petitioner further represents and shows to the court that he has paid the amount due for water for the season of 1918, as same matured and the money thus tendered was by defendants in all instances accepted, but your petitioner was told by said defendants and their servants and agents that his water rights for the season of 1918 had been exhausted, and that all further water necessary to produce and mature his crops would be cut off until said assessment of seventy-five cents per acre foot for additional water to be furnished and used during the season of 1918 had been paid, or until a binding contract to pay same had been executed and delivered by the plaintiff to the defendants.

"Twenty-First. Plaintiff further represents and shows to the court that the section of the state wherein said lands are situated is arid, and subjected to long and protracted drouths, and he represents and shows to the court that if defendants continue, or are permitted to continue, to withhold from your petitioner the water in said contract provided to be delivered to him, in an amount sufficient to produce and mature crops, that the fruit trees, vines, alfalfa, and other vegetation planted by him on the lands aforesaid will die and become a total loss to petitioner, and will work upon your petitioner a great and irreparable loss, injury, and damage.

"Twenty-Second. Your petitioner further represents to the court, and alleges the fact to be, that the one acre foot of water in said written contract provided to be delivered, as measured by defendants, upon being put into practice, was found to be insufficient to produce and mature crops on said lands, and that thereupon it became the duty of defendants, under the written contracts and oral understandings and agreements with the petitioner, as the owner of farm units, to furnish additional water to produce and mature crops; and petitioner avers that such additional water is necessary to preserve the growth and life of the trees, vines, vegetables, and farm products so planted by your petitioner, and that, unless such additional water is so furnished, said trees, vines, and crops will perish and become a total and irreparable loss, injury, and damage to your petitioner.

"Twenty-Third. Plaintiff represents and shows to the court that there is an ample and abundant supply of water furnished by the Comanche springs and creek, and the irrigation canals of defendants are in good repair, as are also all individual ditches of this plaintiff; that said system of irrigation works, dams, canals, laterals, and ditches is a gravity system, the expense of operating the same small, and that no reason exists why or because of which defendants are or can be hindered or prevented from delivering water as in their contract and oral agreements provided, and at the price of not to exceed \$1.50 per acre per irrigation season, as in said contract provided; and he says that the only reason defendants fail and refuse to deliver water,

as in their contract and deed and oral agreements provided for, is because of the nonpayment of illegal and extortionate assessments alleged to be due to defendants.

"Wherefore, premises considered, your petitioner prays the court to issue its restraining order, directed to the said defendants, Wm. A. Hadden, trustee, John Rooney, Dan Bihl, James Rooney, and F. S. Wilson, and their servants and agents, directing and commanding them that upon the payment or tender of the payment of the annual water charge in installments as in said contract provided, not to exceed \$1.50 per acre per annum, that they and each of them desist and refrain from refusing to deliver to petitioner upon said lands water as in said contract and oral agreements and understandings provided, sufficient for the irrigation of said land in regular rotation throughout the year, and that they desist and refrain from interfering in any manner whatever with the use by plaintiff of water, and that they be restrained from requiring plaintiff to make additional payments or asking additional cards or agreements in order to secure such water; that they be restrained from enforcing the collection of any amount for such water service except by the manner provided in said water rights—that is, the pro rata part of the actual cost of maintenance, not to exceed \$1.50 per acre per annum; for general and equitable relief.

"Your petitioner further prays that defendants be cited in terms of law to answer herein, and that upon final trial the temporary orders here now prayed for be made permanent, for judgment for his damages as herein alleged, and for such other general and special relief as he may show himself entitled to."

Attached to the petition, and made a part thereof, are the various exhibits referred to.

Appellant presents four assignments of error, with several propositions thereunder, all, however, stressing different portions of the petition or some one of the exhibits. It is the one contention of appellant, and to which the others are but corollary, that the petition and its exhibits sufficiently show that the permanent water right contract declared upon provides for the furnishing of water sufficient to irrigate for farming purposes the several units or tracts of land described, and being parts and parcels of said irrigation system, and for which water right contracts had been purchased by appellant of appellee's grantors, and made appurtenant to said tracts of land, and at an annual charge, prorated with other units or tracts of land in said system, and at a price not to exceed \$1.50 per acre per annum. It is claimed that the water right contracts were purchased by appellant for the purpose stated, upon representations made by the then owner of the entire irrigation system, including both the land and water, the Ft. Stockton Irrigated Lands Company; that the water right contract was a contract to furnish, for the consideration stated, the amount of water needed for the irrigation of said land; that appellees are the successors of said corporation by purchase, and by agreement and contract

assumed and became bound in law, both to the said corporation and its vendees of its farm units and water right contracts, to carry out and perform the terms of said corporation's water contracts and deeds as appear in the several exhibits; and that said corporation did in fact, in previous crop seasons and for said consideration of \$1.50 per acre, undertake to furnish to the water users under said water contracts sufficient water to produce crops; that at the time of the purchase of said system by appellees the said previous owners were so operating said system and furnishing water in accordance with said understanding, representations, and interpretation of said water contract, and of which appellees had notice.

The several water right contracts issued by the Ft. Stockton Irrigated Lands Company to appellant, and upon which this suit is brought, except as to the quantity of land, contain the following statement: After reciting the consideration paid by appellant to the Ft. Stockton Irrigated Lands Company for the water right deed and for the deed to the real estate coincidentally executed, the writing recites:

"The said party of the first part (the Ft. Stockton Irrigated Lands Company) does hereby sell and convey unto the said party of the second part (appellant) fifteen acre feet per annum of its water, said water being a perpetual right, to have carried and delivered through the canals, flumes, and laterals of the party of the first part from the waters of Comanche creek, or other sources in Pecos county, Texas, or so much water as may be necessary to irrigate 15 acres of land, not exceeding, however, at the point of delivery, during any one year, an amount of water sufficient to cover said tract of land one foot in depth, or so much of one foot as may be required to properly irrigate said land, said water to be beneficially used under the direction and authority of the water superintendent of the said party of the first part; the delivery and measurement of said water to be made from said canal and its laterals by and in such manner as said party of the first part may prescribe, from time to time, for measuring said water, the said water to be used for irrigation purposes and domestic uses only, and only upon the land situated," etc.,

—describing the land on which the water may be used. After reciting certain terms and conditions set forth, not brought in question, the writing proceeds:

"(4) The said party of the second part agrees that he will take and use said water from the said first party during each irrigation season, and that he, his heirs or assigns, will pay therefor to said first party, its successors or assigns, for the maintenance, operation, and repair of said canal, flumes, main laterals, reservoirs, and other works, constructed and operated in connection with the system of delivering water, \* \* \* annual pro rata assessments to be fixed by first party, not to exceed one dollar and fifty cents (\$1.50) per acre per annum, payable in three equal installments," etc.

210 S.W.—17

The contract suggests no further or other consideration than above to be paid for the water service.

Another exhibit set out at length recites a deed of trust executed by the Ft. Stockton Irrigated Lands Company to Charles Charplot, trustee, in trust to secure a recited indebtedness on large bodies of land described, including all ditches, dams, flumes, laterals, and appurtenances belonging to the Ft. Stockton Irrigated Lands Company, then or thereafter constructed, upon any of the described lands, together with all water rights, privileges, and easements of every kind, etc., together with all tolls, incomes, etc., growing out of said land or water, or the said irrigation system or plant.

Another exhibit set out at length is a trustee's deed, made under the authority of the foregoing deed of trust, reciting default in the terms of the deed of trust, and sale of said properties to James W. Oldham and Wm. B. Burget. The properties embraced in the deed of trust and trustee's deed fully described and include the irrigation system here involved, and all rights attached or incident to same.

Another exhibit is a warranty deed from said Oldham and Burget conveying all of said properties, embracing and including the said irrigation system, to W. A. Hadden, trustee. Section 8 of said exhibit, under "Exceptions and Reservations," reads:

"This conveyance is made expressly subject to all outstanding deeds of water rights and contracts for water rights appurtenant to lands in either blocks 1 or 2, Ft. Stockton Irrigated Lands Company, or block A, and whether said water right deed or contracts for water rights were executed by the Ft. Stockton Irrigated Lands Company or by the grantors herein, and the said grantee hereto expressly assumes and agrees to carry out and perform all and singular the terms and conditions of said several water deeds or contracts to be kept and performed by either the said Ft. Stockton Irrigated Lands Company or the said grantors therein."

[1] It is insisted by appellees that it is manifest from the petition that they are in no way connected with the alleged fraud and deceitful practices and artifices disclosed by the petition, but had met and complied with every requirement made of them under the terms of the water contracts and deeds which measure their obligations to appellant; that the language of the water right contract is clear and unambiguous, and that it is manifest from the averments of the petition that appellees had not breached their agreements, covenants, and obligations with reference thereto, but had complied therewith. As stated, the real issue in the case evidently hinges upon the proper construction to be given the water right contracts themselves, in connection with the deed simultaneously executed, to the lands upon which the water was to be applied, in a proper cultivation of

them for farming purposes. If the meaning of the water contract is indefinite or ambiguous, and only in that event, and it further appears from the petition that the parties to the contract, by the acts and conduct of both parties, done with knowledge and in view of the purpose, consistent with that to which said acts and conduct are sought to be applied, such acts and conduct are entitled to be considered and have weight in construing the contract. Under such circumstances (that is, indefiniteness or ambiguity in the terms of the contract), the practical interpretation of the contract by the parties to it by their acts and conduct acting under the contract, and of which appellees had knowledge, as alleged, seems to give a practical construction of its terms, and is of controlling influence in ascertaining their understanding of its terms.

[2] The lands are situated in the arid portion of the state, and the parties to the land deeds and water contracts evidently contemplated that use of water on the land was necessary to its cultivation, and contracted with reference thereto. It is clear to us, also, that they contracted with reference to such quantity of water applied on the lands as would be necessary to a proper cultivation of the lands for crop-producing purposes. To accomplish the purposes stated, what did the party, owning both land and water, sell? The allegation in the thirteenth paragraph of the petition is that the Ft. Stockton Irrigated Lands Company "represented to plaintiff that the amount of water to be furnished, and contracted to be furnished, in said water right contract was a sufficient amount of water to properly irrigate said lands, \* \* \*" guaranteed not to exceed \$1.50 per acre per annum. The contract pleaded recites:

"Fifteen acre feet per annum of its water, \* \* \* or so much water as may be necessary to irrigate fifteen acres of land, not exceeding, however, at the point of delivery, during any one year, an amount of water sufficient to cover said tract of land one foot in depth, or so much of said one foot as may be required to properly irrigate said land."

Does the expression "fifteen acre feet per annum of its water," as used in the water contract, mean to state a definite, technical, volume or quantity of water to the acre, and that volume or quantity to be the maximum volume or quantity of water sold and delivered per annum? The "acre foot" is a well-known and well-defined expression used for stating volume or quantity of water for uses of irrigation. Mr. Wiel, on Water Rights in the Western States, says: "The acre foot is the usual storage unit." Under some systems of irrigation, different water measurements are used, and hence different expressions for volume or quantity. Some use measurements of flow rather than volume. The unit of volume is either one

cubic foot, as in Colorado, or one acre foot, as used in many of the Western states, where irrigation is beneficial for farming purposes. But, when used, the acre foot expresses a technical, definite, and specific volume or quantity of water, the amount easily ascertained, and stated to be 325,850 gallons. Kinney on Irrigation, vol. 2, p. 1582, says:

"This [the acre foot] is a definite quantity of water, equal to one foot in depth, \* \* \* or the amount of water which will cover one acre one foot in depth."

Is "fifteen acre feet" the maximum volume of water sold in the water contract? It would not be, as claimed, if we take the further expression, "or so much water as may be necessary to irrigate fifteen acres of land not exceeding, however, \* \* \* an amount of water sufficient to cover said tract one foot in depth," as expressing a larger quantity of water than "fifteen acre feet." But as seen from the authorities cited, the use made of the word acre foot is the same in quantity as "one foot in depth." The "acre foot" and "one foot in depth" expressing the same quantity of water, the contract clearly states the amount of water sold, the maximum being fifteen acre feet, if that quantity is needed; if not, so much of it as may be necessary to irrigate fifteen acres. We think the contract is not indefinite or ambiguous, as claimed by appellant.

[3] It is alleged in the sixth paragraph of the petition (to which we refer for a full statement) and subsequent paragraphs, substantially, that the Ft. Stockton Irrigated Lands Company, as an inducement to appellant to purchase, represented to him orally, and in written and printed matter, that the water right (which we understand to mean the water right contract exhibited) guaranteed sufficient water to irrigate said land, and that the quantity stated was sufficient for any and all crops adapted to said land, and that appellant, relying thereon, bought the land; that the amount of water stated in said contract is not sufficient, etc.; that appellees are now demanding of appellant more money for the delivery of such quantity of water as is necessary to properly irrigate said lands, and, if not paid, water additional to the fifteen acre feet will not be delivered. The remedy asked is a restraining order directing that, upon the payment of the price agreed upon for the fifteen acre feet of water, appellees be required to desist from refusing to deliver sufficient water for irrigation of said lands, and refrain from requiring additional payments, etc.

Now, the parties to the contracts for land and water, it is shown, were dealing with each other "at arm's length." The suit is not brought to set aside the contracts for deceit or fraud, or misrepresentations of material facts, nor does the petition allege nor is it claimed that a mutual mistake was made

in entering into said contract, as to the quantity of water necessary to properly irrigate said lands, but rather to construe said water right contract, as made in connection with alleged written and verbal representations, and having reference to said contract, as providing for sufficient quantity of water to irrigate said lands for growing crops. The petition discloses no specific verbal representations other than that the water contract by its terms provides for a sufficient quantity of water to irrigate the lands, and the only printed or written representations disclosed are those in deeds and water right contracts themselves. True, it is alleged that the Ft. Stockton Irrigated Lands Company for some years actually delivered more water than is called for in the contract, and that appellees had knowledge of such fact. The petition, however, does not show that a controversy between appellant and the Ft. Stockton Irrigated Lands Company arose as to the construction to be placed on said contract as to the quantity of water provided for in the contract, and that the controversy resulted in the delivery of more water than the company claimed the contract provides for, and as the construction to be placed upon the contract, and that appellees had knowledge of such controversy and construction by the company, and assumed to carry out said contract as so construed. The fact that the company actually and voluntarily delivered more water than was called for in the contract, we think, would not bind appellees to deliver a like quantity.

[4] We have read the authorities to which we are referred by appellant. The cases are based upon a supposed conflict between different portions of a contract, or upon ambiguous contracts. In the case at bar we have concluded that no conflict appears in the deeds or water right contracts, or in the different terms of either, and that the water right contract is not ambiguous. All the instruments referred to in the pleading, as stating and representing the facts pleaded, are made exhibits and parts of the petition. The petition alleges that oral representations were made as to the quantity of water agreed to be furnished, but such representations have reference to the amount of water defined in the deeds and contracts. The deeds to the land and the water right contracts do not, in our opinion, bear out or sustain the allegation as to representations made, or as to the quantity of water sold. The deeds and the water right contracts having been made parts of the petition and the cause of action based thereon, and the question being not one of variance, but of construction, the court will give to the instrument pleaded the legal effect to which it is entitled, and the legal effect will control when the allegations of the petition and the recitals of the instrument as to legal effect are found in con-

flict. *Beal's Adm'r v. Alexander*, 6 Tex. 531; *Pyron v. Grinder*, 25 Tex. Supp. 160; *Beham v. Ghio*, 75 Tex. 89, 12 S. W. 996; *Cockrell v. Houston Pack. Co.*, 133 S. W. 697.

[5] While a writ of error was granted in the last-cited case, and the case reversed, the holding of Judge McMeans on the point stated above we think was not changed. 105 Tex. 283, 147 S. W. 1145. We find no fact alleged and supported by the exhibit referred to that would or could vary, or in any way modify or change, the contract as agreed to by the parties themselves. The water contract and all allegations in the petition have reference to the water contract and simply call for a construction of the contract by the court. If appellant under his fourth assignment, as suggested in his argument thereunder, means to assert that, by reason of the law, it is appellees' duty to supply such additional quantity of water as is sufficient to properly irrigate his said lands, we think the petition is not sufficient to raise such issue, the petition being based upon the contract pleaded, and not upon any supposed statutory right, independent of contract, by reason of the alleged fact that appellees are a public service corporation or the assignees of such corporation, and therefore charged with such duties. Complaint is also made that a large amount of water delivered, by seepage and otherwise, is lost and is not delivered on the land. The contract specifically provides that the delivery and measurement of the water is to be made from the canals and laterals of appellees. It is not alleged or claimed that the fifteen acre feet of water are not delivered, or not delivered as contracted, but complaint is made that that quantity, when it reaches the lands from the place of delivery and measurement, is far short of the quantity agreed to be delivered, and far short of a sufficient quantity to grow crops.

We have concluded that the court was not in error in sustaining the general demurrer. The case is affirmed.

#### On Rehearing.

HARPER, C. J. The appellant, upon motion for rehearing, urges that we were in error in holding that the petition did not contain the required allegations to charge the defendants with the duty to furnish water under the law applicable to the regulation of quasi public corporations independent of contract.

True, he has charged the appellees with being a quasi public corporation, or, as assignees of one, are charged with the duties and obligations of one; but, as held in the opinion, they have based their whole cause of action upon the contract, and the court is asked, first, to construe it to mean that appellees have bound themselves thereby to

furnish a sufficient amount of water to irrigate the lands described for the entire crop year at the price named, to wit, \$1.50 per acre; and, second, that if the writing as executed is not susceptible of that construction, then he alleges that, if by reason of certain representations made at the time of entering into the contract, he was led to believe that the amount of water therein provided for was sufficient, and by reason of the further fact that the corporation for a time did furnish water sufficient to irrigate for a whole crop year more than the amount specified in the contract; that these matters should be read into their contract, and defendants compelled by injunction to so furnish it at the price fixed in the contract.

He nowhere alleges that the sum of \$1.50 is a reasonable charge for the amount of water specified in the contract, together with such additional amount as is required for full irrigation; nor does he ask the court after inquiry as to the amount necessary, and after determining the additional amount, to fix a reasonable charge therefor, but bottoms his cause of action squarely upon the contract, and clearly admits that the defendants have not refused to furnish the amount specified in the contract for the consideration named, and that defendants offer to furnish an additional amount, but for a definite additional charge. It therefore follows that the petition states no cause of action, and it further follows that, if plaintiff has any rights, independent of his contract of which he is being denied, it is incumbent upon him to allege and prove that the defendants are in law a quasi public corporation subject to regulation by the courts; that he is entitled to more water than is now being delivered to him, the amount, and what is a reasonable charge therefor; for his contract is the charter of his rights as between him and private parties or private corporations. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.*, 208 S. W. 904. Motion overruled.

**FARMERS' & MERCHANTS' NAT. BANK  
OF COMANCHE v. LILLARD MILL-  
ING CO. (No. 9042.)**

(Court of Civil Appeals of Texas. Ft. Worth.  
March 1, 1919.)

**1. VENUE —40—CHANGE—SUIT IN COUNTY  
OF DOMICILE.**

Where obligee's action against guarantor and principal was brought in the county in which principal agreed to make payment, and where there was no allegation that guarantor had guaranteed that payment would be made

in such county, and neither guarantor nor principal were domiciled therein, guarantor, in view of *Vernon's Sayles' Ann. Civ. St. 1914, art. 1830, §§ 4, 5*, was entitled to have place of trial changed to the county of its domicile.

**2. PRINCIPAL AND SURETY —6—DISTINCTION  
BETWEEN "SURETY" AND "GUARANTOR."**

While a surety is usually bound with his principal in one and the same instrument, executed at the same time and on the same consideration, a guarantor's obligation is his separate undertaking on which he is not liable until the default and liability of the principal creditor has been established.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Guarantor*; *Surety*.]

Appeal from Wise County Court; J. W. Walker, Judge.

Action by the Lillard Milling Company against the Farmers' & Merchants' National Bank of Comanche, Tex., and others. From the judgment rendered, the named defendant appeals. Affirmed in part, and reversed and remanded in part.

Merton L. Harris, of Comanche, for appellant.

R. M. Carswell, of Decatur, for appellee.

BUCK, J. This is a suit for debt filed by the Lillard Milling Company against Joe Catter, as principal, and the Farmers' & Merchants' National Bank of Comanche, Tex., as guarantor. Plaintiff alleged that on February 28, 1917, it sold to Catter a carload of mill products, aggregating the sum of \$504.60, payments on which had been made by Catter in the sum of \$181.60, leaving a balance of \$323. The plaintiff further averred:

"That before delivery of said products to said Catter under and by virtue of the said purchase, and as a condition thereto, defendant the Farmers' & Merchants' National Bank guaranteed in writing that said Catter would pay said bill when due."

It was also alleged that Catter agreed in writing to pay the purchase price of said goods at Decatur, Tex. Defendant bank filed its duly verified plea of privilege to be sued in Comanche county, Tex., its domicile. In answer to said plea, plaintiff filed its controverting affidavit and pleading, alleging that on March 5, 1917, before the plaintiff accepted the written offer of said Catter to purchase said products, it wrote the following letter to said Catter:

"We are writing you to ask that you have your bank wire us collect, stating that they will guarantee payment of the car flour bought by you from us. Our regular terms are draft B/L attached; but, after talking the matter over with Mr. Killough, we have decided to give

you 30 days on flour. This car is ready to be loaded; we are only waiting for your bank to guarantee payment of this shipment; kindly have your bank notify us promptly and we will ship at once. Thanking you for your prompt attention, we are,

"Yours truly."

That on March 6th plaintiff received from said bank the following telegram, to wit:

"Lillard Milling Company, Decatur, Texas.

"Joe Catter will pay for flour when amount is due.

"Farmers' & Merchants' Nat. Bank."

That upon the receipt of said telegram on March 7th plaintiff wrote defendant bank a letter as follows:

"Gentlemen: We are in receipt of your wire, in which you guarantee payment of the car flour sold to Joe Catter when due, and we are to-day shipping this car to him, based accordingly. Thanking you for this favor, we beg to remain,

"Yours truly."

That said defendant bank failed to reply to said letter, and said car of flour was delivered to said Catter upon his said original offer to purchase, and upon the terms therein contained, and upon said guaranty of defendant bank.

The defendant bank filed its answer, subject to its plea of privilege, containing a general demurrer and a special denial of the allegation in plaintiff's petition with reference to the guaranty asserted to have been made to the plaintiff by the defendant bank. It further pleaded that, if any guaranty was made to pay said bill of flour for Catter when due, said guaranty was an ultra vires act under the banking laws of the state of Texas and under the federal laws, and that the stockholders and directors of the bank did not authorize said act and were not bound by it. It further pleaded that, if its cashier did send said telegram to plaintiff, it was done without the authority and knowledge of the directors of the bank, and that said act was beyond the scope of his authority. In its supplemental petition plaintiff alleged that the guaranty was made on behalf of the bank by W. J. Cunningham, then cashier of the bank, and its duly authorized agent. It further pleaded facts tending to establish the defense of an estoppel, and averred that, if it were true that said Cunningham, as cashier of said bank, had no authority to bind said bank by sending said telegram and writing the letters in the name of the bank to plaintiff, that said acts constituted a fraud on Cunningham's part; wherefore the plaintiff prayed that Cunningham be made a party defendant.

By their first amended answer defendants bank and Cunningham specially denied that the telegram in question could be held to constitute a guaranty of Catter's debt to plaintiff; that, if it should be so construed,

the plaintiff well knew that a national bank was not authorized under the law to make such a guaranty.

The cause was tried before the court, and evidence introduced, first on the plea of privilege, and then on the merits of the case, and judgment was rendered overruling defendant bank's plea of privilege, and awarding judgment for plaintiff against the bank. It was further adjudged that plaintiff take nothing as to defendant Cunningham. The defendant bank has appealed.

[1] We are of the opinion that the court erred in not sustaining the defendant bank's plea of privilege to be sued in Comanche county. Article 1830, V. S. Tex. Civ. Stats., provides that no person who is an inhabitant of this state shall be sued out of the county in which he has his domicile, except in certain specified cases. Section 4 of said article provides that, where there are two or more defendants residing in different counties, suit may be brought in any county where any one of the defendants resides. Section 5 of said article provides that, where a person has contracted in writing to perform an obligation in any particular county, suit may be brought in such county or in the county where defendant has his domicile. Waiving for the moment the question of whether or not the telegram may reasonably be construed as a guaranty of the debt of Catter, and the question of whether such guaranty was an act ultra vires on the part of defendant bank, it is plain that venue of the suit as to defendant bank is not maintainable in Wise county by virtue of either section 4 or section 5. Neither of the defendants resided in Wise county, nor did the bank undertake to guarantee the payment of the debt in Wise county. We know of no exception to the general rule of venue which would authorize suit to be maintained against the bank, under the circumstances shown, in any county other than Comanche county. It is true that, if the bank had guaranteed Catter's obligation according to the terms and conditions set forth in Catter's contract of purchase, in which he agreed to make payment in Wise county, and waiving the question of the bank's authority to make such a guaranty, it would likewise be bound by that part of the agreement in Catter's contract to make payment at Decatur; but no such facts were alleged or proved.

[2] Therefore we conclude that the trial court erred in not sustaining the defendant bank's plea of privilege, and that for this error the judgment must be reversed and the cause remanded. This conclusion is strengthened by our recognition of the rule that while a surety is usually bound with his principal, in one and the same instrument, executed at the same time and on the same consideration, a guarantor's obligation is his

separate undertaking, and that ordinarily a guarantor is not subject to suit until the default and liability of the principal creditor has been established. *Garrett et al. v. Moblle Life Ins. Co.*, 1 White & W. Civ. Cas. Ct. App. § 937; Page v. Sewing Machine Co., 12 Tex. Civ. App. 327, 34 S. W. 988; *Brandt on Suretyship and Guaranty*, § 1; *Burge on Sureties*, § 157; 12 R. C. L. pp. 1056, 1057; 20 Cyc. under heading "Guaranty," p. 1400. While there are several serious questions involved in the determination of the case on the merits, yet, as the pleadings and proof may be different upon another trial in the county of the bank's domicile, we do not deem it necessary or proper to determine, or even discuss, such questions at this time.

The judgment is undisturbed as to the issue between plaintiff and the defendant Catter, and as to the issues between plaintiff and the defendants bank and Cunningham the judgment is reversed, and the cause remanded, with instructions to the trial court to transfer the cause to Comanche county.

Judgment undisturbed in part, and reversed and remanded in part.

#### HUDMON v. FOSTER et al. (No. 5970.)

(Court of Civil Appeals of Texas. Austin. Nov. 13, 1918. On Motion for Rehearing, Feb. 5, 1919. Further Rehearing Denied March 19, 1919.)

#### 1. PLEADING §64(1)—MULTIFARIOUSNESS—DISCRETION OF COURT.

Whether or not a petition is multifarious is largely for the discretion of the court.

#### 2. USURY §16—NATURE AND CHARACTER—INTENT.

If the amount paid by the borrower to the lender in excess of legal interest was intended as compensation for the use of money loaned, it is usury, regardless of what manner or form or under what pretense cloaked.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Usury.]

#### 3. USURY §119—NATURE OF CONTRACT—QUESTIONS OF FACT.

Where a contract is not usurious on its face, whether or not it is in fact usurious is a question for the jury.

On Motion for Rehearing.

#### 4. APPEAL AND ERROR §1008(1)—REVIEW—AFFIRMANCE.

In the absence of material error in the conduct of a case, an appellate court should affirm the judgment of the trial court, if it can do so upon any theory presented by the pleadings and sustained by the evidence.

#### 5. APPEAL AND ERROR §1008(1)—REVIEW—QUESTIONS OF FACT—FINDINGS OF COURT.

The finding of a court trying a case without a jury is entitled to the same weight as the finding of a jury.

#### 6. USURY §57—ENFORCEMENT OF CONTRACTS—COMPENSATION FOR OBTAINING MONEY.

Where one party to a written contract agreed to give \$5,000 in stock of a corporation to be organized by him, for services to be rendered by the other party in finding some person who would make him a loan of \$17,500, or a part thereof, and, if part, then to advance the remainder, such contract will be enforced as against a claim of usury; no fraud, accident, or mistake being alleged.

#### 7. USURY §57—NATURE AND ELEMENTS—COMMISSIONS.

Where defendants did not loan or advance to the borrower any money but secured other parties to do so, the amount paid them was not for the use or detention of money belonging to them, and was therefore not interest, so as to be usurious.

#### 8. USURY §142(4)—ACTIONS TO RECOVER PENALTIES—EVIDENCE—SUFFICIENCY.

In an action to recover statutory penalties for extorting usurious interest, under a contract whereby defendants were to obtain \$5,000 worth of stock for themselves for providing, or finding others willing to provide, a loan of \$17,500, evidence held to support a finding that the contract was not usurious.

Appeal from District Court, McLennan County; Geo. N. Denton, Judge.

Action by W. Earle Hudmon against W. M. Foster and others. Judgment for defendants, and plaintiff appeals. Affirmed.

H. C. Lindsey, of Waco, for appellant.

Allan D. Sanford, of Waco, for appellees.

#### Findings of Fact.

JENKINS, J. Prior to 1911, the appellant and his brother owned and operated a cotton seed oil mill in the town of Hamilton, Tex. The enterprise was not successful, and the mill had been sold out under deed of trust, and bought in by the creditors, who were the bank at Hamilton and the Van Winkle Machine Company. The title was in J. T. James, president of the Hamilton Bank, and R. E. L. Knight, as trustees for the owners. They offered to reconvey the property to appellant for the sum of \$17,500. Appellant applied to Early & Foster for a loan of this amount. Mr. Foster, with whom he transacted the business, stated to him that they did not have the money, but might be able to get it for him. With this end in view, appellant went with Foster to Galveston; but Foster failed to make satisfactory arrangements for the money. On their return trip, Foster spoke to Mr. H. H. Shear, of Waco, with reference to the matter. Soon afterwards Mr. Shear sent his business associate,



Mr. Rowe, over to Hamilton to examine the property. Appellant came to Waco in a few days, and talked with Mr. Shear about the matter, telling him what he had in view, but did not try to borrow money from him. Appellant's plan for obtaining the \$17,500 was this: There was another oil mill at Hamilton, and the business men and farmers there desired that appellant's mill should be operated also, in order to create competition. Appellant had secured subscriptions from various parties in and around Hamilton for capital stock to the amount of \$30,000 in a corporation to be organized to take over the mill theretofore operated by appellant and his brother. The capital stock of the proposed corporation was to be \$60,000, of which appellant was to take \$35,000. This was all explained to Mr. Foster. Foster proposed to appellant that he would loan him a part of the money, and undertake to secure the remainder for him, and, if he succeeded, he was to receive \$5,000 paid-up stock in the proposed corporation.

When these matters were first discussed between appellant and Foster, Foster consulted Mr. Carrington, an attorney, to know if he could make such a contract in a way to avoid usury, and Mr. Carrington informed him that he could not. The following contract was subsequently drawn up and signed by the parties:

"The State of Texas, County of McLennan.

"This contract, entered into on this the 6th day of August, A. D. 1911, by and between Eugene Early and W. M. Foster, hereinafter called Early & Foster, of McLennan county, Texas, of the one part, and W. Earle Hudmon, hereinafter called Hudmon of Hamilton county, Texas, of the other part, witnesseth:

"(1) That Hudmon is in need of cash money with which to meet immediate pressing demands upon him, and to secure the said cash money desires to negotiate a loan; that the amount of cash money absolutely required by Hudmon is \$17,500.00; that Hudmon has applied to Early & Foster to make him a loan of the said amount; that Early & Foster have not themselves the cash money necessary to make the said loan, but have a part thereof, which they are willing to place in such loan as part thereof, if properly secured, and are willing to attempt to find some person or persons who will advance the balance necessary above what Early & Foster can furnish to make said loan of \$17,500.00; that Early & Foster, at the request of Hudmon, agree to try to find such other person or persons; that in the event they are able to find such other person or persons, and succeed in making the said loan of \$17,500.00 by themselves and such other person or persons to Hudmon, then Hudmon shall, as compensation to Early & Foster for finding such other person or persons and inducing them to aid in making the said loan, transfer, assign, and deliver, or cause to be so done, capital stock of a corporation to be hereafter formed, with its domicile at Hamilton, Texas, to be named Hudmon Cotton Oil Company, and its purpose being the manufacture of cotton seed products, to the amount of

\$5,000.00 par value, said stock to be fully paid up and nonassessable; that the said loan shall be evidenced by the three promissory notes of Hudmon, payable to the order of Early & Foster, to be held by them for the benefit of themselves and said other person or persons, bearing 10 per cent. interest from date, to bear the date when the money on the said loan is actually advanced to Hudmon, payable at Waco, Texas, providing that failure to pay any one of said notes shall at the option of the holder or holders of them or either of them mature all of them, and with the usual 10 per cent. attorney's fee clause, one of said notes for the sum of \$4,500.00, due May 1, 1912, one for the sum of \$500.00, due May 1, 1912, and the other for the sum of \$12,500.00, due May 1, 1913; that contemporaneously with the execution of the said notes Hudmon shall, for the purpose of securing the payment of the same, hypothecate and deposit with and to Early & Foster shares of stock in the said corporation, evidenced by proper certificates, to the amount of \$30,000.00, and shall execute and deliver to Early & Foster an hypothecation contract providing in effect that, upon failure to pay the said notes or either of them when due, Early & Foster shall have the authority to sell the said stock, either at public or private sale, after giving Hudmon ten days' notice in writing by letter addressed to Hudmon at his then address, if known to Early & Foster, and if his then address be not known to them, to his post office address last known to them, and deposited in the United States mail, said hypothecation contract to be in such form as to create a lien in favor of Early & Foster upon the said stock to secure the said loan and to give authority to foreclose to the effect as above stated; that it is contemplated between the parties that the said corporation will be formed and the said loan negotiated and all of the other things named herein done and performed within about fifteen days from this date, and in less than fifteen days if possible.

"Witness the hands of the parties in duplicate, both of which are hereby declared to be originals, the day and date first above written.

"Eugene Early.

"W. M. Foster.

"W. Earle Hudmon.

"Witness: Allan D. Sanford."

The following letter and reply thereto were read in evidence:

"September 2, 1911.

"Mr. W. Earle Hudmon, Hamilton, Texas—Dear Sir: Referring to securing \$17,500.00 loan for you, we find that we can do so for \$5,000.00 paid-up stock in the Hudmon Cotton Oil Company; this stock to be delivered to us made out in our name. This to be done when the \$17,500 is paid.

"You understand we have no money to lend, and only act as agent in securing this money for you.

"Yours very respectfully,

"Early-Foster Company,

"WMF:LW

Per W. M. Foster."

"Early-Foster Company, Waco, Texas—Gentlemen: Referring to the above letter and the proposed arrangement as to securing \$17,500.00 loan for us, such arrangement is satisfac-

tory, and when the \$17,500.00 is paid to us we will deliver to you the \$5,000.00 paid-up stock in the above-named oil company.

"Yours respectfully, W. Earle Hudmon."

This letter was written in the office of Early-Foster Company, in the presence of appellant, and handed to appellant, and appellant dictated the reply in the presence of Mr. Foster.

Foster made a contract with Mr. Shear to sell him two notes, one for \$12,500, and one for \$5,000, executed by appellant in accordance with said contract, and secured by \$20,000 of the stock of the Hudmon Cotton Oil Company of Hamilton, Tex., a corporation which had been organized in accordance with the agreement between appellant and Mr. Foster, for which Shear paid Foster \$10,000. Appellant executed his note for \$4,500, which, together with the \$10,000 of the corporate stock of the Hudmon Cotton Oil Company, was delivered to Foster. With this note and collateral, and other collaterals furnished by Foster and Early, they obtained in Galveston \$7,500. The \$10,000 obtained from Shear and the \$7,500 obtained in Galveston, under agreement with appellant, was paid to Mr. Chesley, upon the order of James and Knight, trustees, who executed the deed to appellant in accordance with the agreement as above referred to.

Subsequently the property of the Hudmon Cotton Oil Company was sold, and appellant paid his notes in full, with 10 per cent. interest thereon. The stock of the Hudmon Cotton Oil Company, which was given to Early-Foster Company, was worth \$5,000 at the time it was delivered to them. This suit was brought to recover double the sum of \$5,000 and the 10 per cent. interest paid on said notes, all of which appellant alleged was usurious interest on the money loaned him.

Appellees' contention was that the \$5,000 stock in the Hudmon Cotton Oil Company was paid them for their services in securing the loan for appellant. The case was tried before the court without a jury, and judgment was rendered for appellees.

#### Opinion.

In addition to the facts above stated, this suit was instituted to recover \$2,500, alleged to have been paid by appellant to appellees under duress at the time the mill at Hamilton was sold.

[1] Appellees excepted to appellant's petition as being multifarious, and the court sustained the exception. Appellant has assigned this action of the court as error. The question of multifariousness in a petition is one largely for the discretion of the court.

If it be conceded that appellees' exception should not have been sustained, we do not think appellant shows such injury thereby as would call for reversal of this case, if the judgment of the court should be sustained on

the issue that was tried, namely, the question of usury. *Clegg v. Varnell*, 18 Tex. 304.

[2] The law as applicable to the facts of this case may be briefly stated as follows:

If the amount paid by the borrower to the lender in excess of the legal interest was as compensation for the use of the money loaned, it is usury, whatever may be the guise under which the transaction is clothed. In such case "the court should penetrate beneath the lawful appearance, and reach the unlawful transaction." *Lawrence v. Griffen*, 30 Tex. 401.

"It is quite immaterial in what manner or form, or under what pretense it is cloaked, if the intention was to reserve a greater rate of interest than the law allows for the use of money, it will vitiate the contract with the taint of usury." *Mitchell v. Napier*, 22 Tex. 129; *Building & Loan Ass'n v. Robinson*, 78 Tex. 169, 14 S. W. 227, 9 L. R. A. 292, 22 Am. St. Rep. 36.

On the other hand, a bona fide charge by the lender in connection with the loan will not render it usurious. *Bomar v. Smith*, 195 S. W. 965; *Huddleston v. Kempner*, 1 Tex. Civ. App. 211, 21 S. W. 947; 39 Cyc. 981-983.

The difficulty in this, as in many other instances, lies, not in ascertaining the abstract principles of law, but in applying them to the facts of the case.

[3] Where a contract is not usurious on its face, whether or not it is in fact usurious is a question for the jury, or for the court, if tried without a jury. *Bomar v. Smith*, supra; *Slaughter v. Eller*, 196 S. W. 708.

We are loath to disturb the judgment of a trial court on an issue of fact, and if such finding depended on the credibility of witnesses, or the weight to be given to their testimony, we would not do so. In the instant case there is no material conflict in the testimony of the witnesses. The judgment of the trial court is so against the overwhelming weight of the testimony that we are unwilling to let it stand; for which reason the judgment of the trial court is reversed, and this cause is remanded for another trial.

Reversed and remanded.

#### On Motion for Rehearing.

On a former day of the present term of this court we reversed and remanded this cause, upon the ground that the judgment of the trial court was not supported by the evidence. After mature consideration, we have concluded that we were in error in so holding.

[4, 5] In the absence of material error in the conduct of a case, an appellate court should affirm the judgment of the trial court, if it can do so upon any theory presented by the pleadings and sustained by the evidence. The pleadings and the evidence in the instant case presented the issue that the \$5,000

of stock in the Hudmon Oil Mill corporation was not given to appellees for the use of money loaned or advanced by them to appellant, but in payment for their services in finding a party or parties who would make such loan or advancement in whole or in part to appellant. The court found in favor of appellees, and, if that finding was correct, the proper judgment was entered. The finding of a court upon an issue of fact, trying a case without a jury, is entitled to the same weight as the finding of a jury.

[8] We were impressed with the idea that no sane man would pay \$5,000 for services rendered in finding some one who would loan him \$17,500 at 10 per cent. interest, and that the payment of this amount was really intended as interest on the loan. The written contract plainly specified that appellant agreed to give \$5,000 of stock in the corporation to be organized by him, for services to be rendered by appellees in finding some person who would make him such loan, or a part thereof, and, if only a part, the remainder to be advanced by appellees. If such was the real agreement, a court will enforce the contract; no fraud, accident, or mistake being alleged or shown. Courts are not called upon to pass upon the wisdom of contracts made by parties, where the party complaining has not been overreached.

As to \$5,000 being an extravagant price for appellant to pay for finding some one who would loan him \$17,500, it appears from the record that he might well have considered such a loan of great value to him. His mill property had been sold, and he could redeem the same for \$17,500. If he could redeem this property, he could organize a corporation for \$60,000, of which \$30,000 would be cash for operating expenses, and the other \$30,000 was to be issued to him, presumably for the mill property, which would cost him but \$17,500. Such being the facts, if he could do no better, or thought that he could not, he might well have considered it good business to pay \$5,000 of his \$30,000 stock to some one who would find a party who would make him the loan. At least, the trial court might have reasonably so found.

We stated in our original opinion herein that the stock was worth par. No stock was being bought or sold at that time, except that subscribed by business men of Hamilton, who, the evidence shows, took said stock in order that they might secure competition in the oil mill business at that place. The trial court might well have found that the stock at the time of the transaction here under consideration was of uncertain value.

[7] Appellees insist that they did not loan or advance to appellant any money, but secured other parties to do so. If so, the amount paid them was not "for the use or detention of money" belonging to them, and

was therefore not interest, and, if not interest, it could not be usury.

The record is not clear as to the \$7,500 obtained in Galveston, but the undisputed evidence shows that the \$10,000 obtained from Shear was advanced or loaned by Shear as the result of the efforts of appellee Foster, and for this they were entitled to the \$5,000 stock under the contract.

[8] The trial court might well have found that the contract was a subterfuge to cover usurious interest, but, having found to the contrary, we have concluded that we ought not to set such finding aside as being wholly unsupported by the evidence.

For the reasons stated, appellees' motion is granted, our former judgment herein, reversing and remanding the cause, is set aside, and the judgment of the trial court is here affirmed.

Motion granted, and judgment affirmed.

#### AMERICAN ROADS MACHINERY CO. v. CITY OF BALLINGER. (No. 6049.)

(Court of Civil Appeals of Texas. Austin.  
Feb. 12, 1919. Rehearing Denied  
March 19, 1919.)

#### 1. MUNICIPAL CORPORATIONS $\S$ 905—SUIT ON WARRANT—PETITION—SUFFICIENCY.

In suit on warrants issued by defendant city, plaintiff's petition held insufficient to show a compliance with Const. art. 11, §§ 5, 7, as to making provision for interest and sinking fund when debt is created, or that debt was to be satisfied out of current revenues for the year, or some fund within the immediate control of the city, so that the warrants were valid without compliance with said constitutional requirement.

#### 2. PLEADING $\S$ 8(6)—CONCLUSIONS.

In suit on warrants issued by defendant city, allegation in petition that warrants were given in lieu and substitution of other valid warrants was a mere conclusion, insufficient to show that warrants were valid.

#### 3. MUNICIPAL CORPORATIONS $\S$ 898 — ISSUANCE OF WARRANTS — PROVISION FOR PAYMENT.

Provision of statutes with relation to issuance of city bonds, which specifically requires the city to provide a fund to pay interest and create a sinking fund, has no application to a case where no bonds were issued, but the debt simply evidenced by city warrants.

Appeal from District Court, Runnels County; J. O. Woodward, Judge.

Suit by the American Roads Machinery Company against the City of Ballinger. Judgment for defendant, and plaintiff appeals. Affirmed.

H. N. Hickman and C. G. Whitten, both of Abilene, for appellant.

A. K. Doss and C. P. Shepherd, both of Ballinger, for appellee.

BRADY, J. Appellant sued appellee upon six certain warrants executed at various dates during the years 1912 and 1913, and aggregating the principal sum of \$3,751, being renewals of other warrants issued by appellee in 1907 to the Good Roads Machinery Company, as part of the purchase price for certain road machinery; appellant alleging that it became the owner of the renewal warrants as an innocent holder for value without notice and before maturity. The court sustained appellee's general demurrer to the petition, and, appellant having declined to amend, the court rendered judgment for appellee, from which this appeal is taken.

The material allegations of plaintiff's petition, omitting the formal parts, are: That appellee executed and delivered the warrants in suit to Good Roads Machinery Company in payment for street machinery purchased by appellee from said company on July 26, 1907, and that they were substitutes for certain original warrants issued during the year of the contract, and that all of the warrants on their face recited that they were payable out of the street and bridge fund. That the warrants bear 6 per cent. interest from date thereof, and were due and payable at future dates, varying from six months from date to three years from date. That the warrants bear the seal of the city of Ballinger, and were executed and delivered to Good Roads Machinery Company in renewal and extension of certain valid warrants, and delivered to the company by defendant during the year 1907 for street machinery purchased from the company, the same being purely an interstate commerce transaction. That the warrants were executed and delivered in accordance with the contract adopted by the city council July 26, 1907, as shown by the minutes of its proceedings. That the original and renewal warrants were in part payment for the machinery described in the contract, and were executed and delivered by order and authority of the city council, and were payable out of the street and bridge fund of said city, and were a legal and proper charge against said fund. That the machinery was duly delivered by the company to the defendant city and duly accepted. That prior to the date of the contract and the issuance of the warrants, and prior to the delivery of the machinery and its acceptance by the city, to wit, on May 17, 1907, by ordinance duly passed, as shown on the minutes, the city council had levied a tax of 15 cents on the \$100 valuation of taxable property within the city for street and bridge purposes for the year 1907, moneys derived from said levy to constitute the street and bridge fund of the city.

That the taxable value of the property within the city for the year 1907 was about \$1,619,998, and that the tax in the sum of 15 cents on the \$100 valuation of such property has been levied each succeeding year since 1907. That the tax which had theretofore been levied in 1907 and the tax of 15 cents thereafter levied each year for street and bridge purposes was ample and more than sufficient to pay all interest on said warrants as the same accrued, and to pay off and discharge said warrants at their maturity, and provided more than sufficient funds to pay the interest thereon and provide a sinking fund of 2 per cent. on the principal. That the money derived and to be derived from that fund amounts to several thousand dollars annually, and greatly in excess of the amounts stipulated in the warrants. That appellant became the purchaser of the warrants from Good Roads Machinery Company before their maturity for a valuable consideration, and that appellant is an innocent holder for value without notice of any defense to the warrants, if there be any. That the city had refused to pay the same, although duly presented to it for payment at their maturity. That under the law the city is and was authorized to levy an annual tax of 15 cents on the \$100 valuation of property within its limits for the improvement of the roads, bridges, and streets; and, the city having purchased the machinery, and having issued warrants against the street and bridge fund, the same was an appropriation of a sufficient amount of said fund to pay off the warrants to such purpose, and the city, having failed and refused to pay the same, is liable to appellant in the amount of the warrants. Appellant prayed for judgment for the amount of the warrants, with interest thereon, for costs, and general relief.

Appellant contends that the petition stated a good cause of action, and that the trial court erred in sustaining the general demurrer, especially because it had pleaded that the warrants in suit were executed in renewal of "certain valid warrants" issued by the city during the year 1907, and that an appropriation for the payment of the original warrants was sufficiently alleged as against the general demurrer; and because it was alleged that the warrants were payable out of a special fund, to wit, the street and bridge fund, and that at the time the original warrants were issued the tax of 15 cents on the \$100 valuation for the street and bridge fund had already been levied by the city, and a similar levy was made in each succeeding year after 1907.

Appellee contends that the obligations sued upon, as well as the original obligations, were void, because it is not alleged that at the time they were issued the city had made any provision to assess and collect annually a sufficient sum to pay the in-

terest thereon and create a sinking fund of at least 2 per cent. thereon, as required by sections 5 and 7 of article 11 of the Constitution; and that the allegations of the petition show that the warrants were for a debt not payable out of the current revenues for the particular year, to bear interest, and payable at future dates of more than one year; and that there are no allegations in the petition showing a compliance with the constitutional provision requiring provision to be made for the payment of interest and the creation of a sinking fund to retire the warrants.

In determining which of these conflicting theories are correct, we will examine the constitutional provisions on the subject, as well as some authorities which have construed and applied these sections of the Constitution.

The applicable parts of the constitutional provisions relied upon by appellee are as follows (article 11, § 5):

"No debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent. thereon."

#### Section 7 of the same article:

"But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent. as a sinking fund."

In the case of *City of Terrell v. Deasaint*, 71 Tex. 770, 9 S. W. 593, the Supreme Court considered the effect of these constitutional inhibitions, in a suit brought upon a promissory note given for waterworks supplies purchased by the city of Terrell, the note being payable two years after date, with interest at 7 per cent. from date, and the note recited on its face that it was "payable out of the tax of  $\frac{1}{4}$  of one per cent. collected annually for general purposes." The court below held that the note was given for current expenses, and gave judgment against the city. The Supreme Court, however, assumed the correctness of the trial court's finding that the note was given for current expenses of the city, and yet held that the transaction for which the note was given created a debt against the city, within the meaning of the Constitution; and that no provision having been made for the payment of interest and for sinking fund, as required by the Constitution, the obligation was void, and judgment was rendered for the city. We quote the following language from the opinion of Associate Justice Gaines in that case:

"We freely concede that debts for the ordinary running expenses of a city, payable within a year out of the incoming revenues of the year, and with other indebtedness not clearly

in excess of the yearly income for general purposes, can be created by a city. But we think that a debt for current expenses in order to be valid without a compliance with the constitutional and statutory requirements to which we have referred, must run concurrently with the current resources for such purposes, and that such a debt cannot be created without such compliance, which matures at such a time as would make it a charge upon the future resources of the city. It may not be easy to define accurately what are the current expenses of a municipality. But we may ask, if a city can create a debt of \$1,500 for materials to extend its waterworks, and make it payable with interest one and two years after date, why may it not create an indebtedness for a larger sum for any public improvement, which it has the power to construct, and make it payable at a longer period? It is clear to us that if this were permitted the provisions of our Constitution and statutes which limit the power and regulate the manner of the creation of municipal indebtedness would be entirely nugatory."

*McNeal v. City of Waco*, 89 Tex. 83, 33 S. W. 322, is a leading case upon this question. The suit there was to recover from the city of Waco the contract price for materials and the building of certain underground cisterns for the fire protection of the city. Judgment was rendered by the trial court for the plaintiff, but upon appeal this court held that the trial court should have sustained the general demurrer to the petition, and upon writ of error the Supreme Court held that this court correctly decided that the general demurrer should have been sustained, and reversed and rendered the case for the city.

The Supreme Court in that case held that the constitutional provisions have no application to pecuniary obligations in good faith intended to be and lawfully payable out of either the current revenues for the year of the contract, or any other fund within the immediate control of the corporation, and that a warrant drawn against the current revenues of the year for one of the ordinary expenses of the corporation for such year, when all the claims for ordinary expenses for that year do not exhaust such revenues, there being funds within its immediate control lawfully applicable thereto, sufficient and in good faith contemplated by the contracting parties to be used in payment thereof when due, is not a debt within the meaning of the constitutional provisions requiring the creation of an interest and sinking fund. But Associate Justice Denman in the opinion further stated that:

"On the other hand, an obligation binding the city to pay for a matter relating to its ordinary expenses, such payment being, in contemplation of the parties, not intended to be made out of the current funds of the year in which the expenditure is made or in funds lawfully applicable thereto, would be a debt within the meaning of the Constitution."

And he sums up the holding in that case with this statement of the law:

"We conclude that the word 'debt,' as used in the constitutional provisions above quoted, means any pecuniary obligation imposed by contract, except such as were at the date of the contract, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year or out of some fund then within the immediate control of the corporation."

In the case of Mineralized Rubber Co. v. City of Cleburne, 22 Tex. Civ. App. 621, 56 S. W. 220, the appellant sued the city of Cleburne for the possession of certain rubber fire hose, purchased by the city through a contract in which the city agreed to pay the sum of \$750, payable in three years, the city reserving the right to pay the purchase price before the expiration of 12 months without interest. There was no provision made by the city for the payment of the debt, nor was it contemplated at the time of the transaction that the indebtedness was to be satisfied out of the current resources of that year, or out of any fund within the immediate control of the city. It was held that the contract was void, because of the failure to make provision, at the time of creating the indebtedness, for the payment of interest and sinking fund.

Other authorities to the same effect might be cited, but we think the above cases sufficient to indicate the principles upon which this case must turn. We believe they announce the settled law of this state, and we will seek to apply those principles to the instant case.

[1] It does not appear from the averments of plaintiff's petition that the obligations sued upon were given for current expenses of the city, or that it was within the reasonable contemplation of the parties that the indebtedness should be paid out of the current revenues for the year in which it was contracted. The petition does not allege what were the terms of the original warrants, but the warrants sued upon were executed on various dates in 1912 and 1913, and were due and payable at dates varying from six months to three years after date. The indebtedness was created in the year 1907, and while it is alleged that the same was payable out of the street and bridge fund of the city of Ballinger, as recited in the warrants sued on, it is not alleged that there was in such fund sufficient money to meet said indebtedness, even exclusive of the ordinary expenses for street and bridge purposes of the city. Nor is it alleged that any portion of said fund was set apart to meet said debt. The mere recital in the warrants that they were payable out of the street and bridge fund, and the mere averment that the original indebtedness was to be paid out of such fund, does not show that provision was made at the time of the contract for the pay-

ment of this indebtedness out of any fund "within the immediate control of the corporation," as is stated in the above decisions is necessary to except the indebtedness out of the constitutional inhibitions.

If the salutary constitutional safeguards against municipal extravagance and oppressive burdens on the taxpayers could be circumvented by a mere reference to or designation of a particular fund as the source of payment of the contract or obligation, this device would be often resorted to and the Constitution in effect nullified. We cannot give our sanction to such a suggestion. In *Terrell v. Dessaint*, *supra*, the obligation on its face recited that it was payable out of the general fund of the city, and this circumstance was held unavailing to meet the constitutional requirements, and it must be so in the instant case.

Appellant nowhere alleges that there was in the street and bridge fund for the year 1907 sufficient money to meet these obligations; nor that there was a levy of a tax sufficient to provide a sum necessary to discharge the same in the year in which they were contracted, and the Constitution requires that provision for the payment of interest and sinking fund must be made at the time the debt is created. It is true that appellant alleges that the taxable value of the property within the city limits for the year 1907 was about \$1,619,998, and that the tax of 15 cents on the \$100 valuation was levied in said year and each succeeding year, and that, "said tax which had theretofore been levied in 1907, and said tax of 15 cents thereafter levied each year for street and bridge purposes, was ample and more than sufficient to pay all interest on said warrants as the same accrued, and to pay off and discharge said warrants at their maturity, and provide more than sufficient funds to pay the interest on said warrants, and provide a sinking fund of 2 per cent. on the principal; that the money derived and to be derived from said fund amounts to several thousand dollars annually, and greatly in excess of the amount stipulated in said warrants;" but these averments do not amount to an allegation that a sufficient tax was levied in the year 1907 for these purposes. The allegation is that the tax levied for said year and for succeeding years sufficed to provide a sum in excess of the amount of the warrants, which cannot in any event, take the place of the constitutional requirement that provision must be made at the very time the debt is created. Furthermore, there is no averment that even the total levies for all these years were sufficient to pay interest and discharge the warrants at their maturity, over and above the current expenses of the city for street and bridge purposes. The failure to make substantially these averments was fatal to the petition, in our opinion.

Furthermore, it appears from the allega-

tions of the petition itself that upon the basis of the taxable values therein set forth, and the rate of tax levied for the year 1907, the amount which could be raised thereby in that year was wholly inadequate to discharge the contract and the indebtedness sued upon, even excluding all current expenses of the city for street and bridge purposes for said year.

[2] But it is further contended by appellant that in its petition it alleged that the warrants sued upon were given in lieu and substitution of other valid warrants, and that this averment made the petition good as against the general demurrer. We think that this allegation is a mere conclusion of the pleader, and does not suffice to take the place of necessary facts to show that the warrants were valid and legal obligations of the city. It must be taken in connection with all the averments of the petition, which are insufficient, even as against general demurrer, to show a compliance with the constitutional provisions, or to except the indebtedness sued upon from the constitutional requirements.

We have examined the authorities cited by appellant, but we do not regard any of them as in point in this case. Among other cases it cites *Mitchell County v. Bank*, 91 Tex. 361, 43 S. W. 880, and *Wade v. Travis County*, 174 U. S. 504, 19 Sup. Ct. 715, 43 L. Ed. 1060. These cases both involved county bond issues, and the holding in each case was to the effect that, where the statutes under which the bonds were issued in express terms require that provision be made for the payment of interest and creation of a sinking fund at the time of the issuance of the bonds, this was a substantial compliance with the constitutional provisions we have been discussing; that in such a case the law makes the provision required by the Constitution, and that it is a purely ministerial duty on the part of the county officers to create the fund; and that a mandamus would lie to compel the performance of that duty, if the officers should fail to discharge it. We know of no statute, and we have been cited to none, which authorizes the issuance of city warrants or the creation of an indebtedness such as is here sued upon, and which also makes provision for the levy of a tax by the city officers to provide for payment of the interest and sinking fund required by the Constitution, and which it would be their ministerial duty to provide. We see no apparent conflict between these two decisions and the cases we have cited. Certainly these cases are not applicable to this case, in our opinion. All the other cases cited by appellant seem to be to the same effect.

[3] There is a provision in our statutes with relation to the issuance of city bonds, which specifically requires the city to provide a fund to pay interest and create a sinking

fund, which is cited by appellant, but it has no application to this case, where no bonds were issued, but the debt was simply evidenced by city warrants.

We are of the opinion that the trial court properly sustained the general demurrer, and, that being the only question in the case, the judgment of the court below will be affirmed.

Affirmed.

# GULF, C. & S. F. RY. CO. v. SCRIPTURE et al. (No. 8908.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Jan. 18, 1919. On Motion for Rehearing,  
March 8, 1919.)

## 1. INDEMNITY — CONSTRUCTION OF CONTRACT—NEGLIGENCE.

Where railroad and sleeping car company make an agreement whereby latter agrees to indemnify former against all liability for injuries from the acts or omissions, whether negligent or wrongful or otherwise, of the employés of the latter, the former was entitled to recover over against the latter for judgment recovered against it because of omissions of employés of latter, regardless of whether such omissions constituted negligence.

## 2. APPEAL AND ERROR — 1062(1)—REVIEW — HARMLESS ERROR—SUBMISSION OF ISSUE.

In action for injury to alighting passenger, submission of issue without evidence to sustain it whether grounds were sufficiently lighted to render it reasonably safe to alight from train was harmless, where there was undisputed evidence that railroad was negligent in starting train without first ascertaining if passenger had safely alighted.

## 3. APPEAL AND ERROR — 1062(1)—REVIEW — HARMLESS ERROR—SUBMISSION OF ISSUE.

In action for injuries to alighting passenger, the submission of question whether railroad was negligent in failing to provide a reasonably safe place for the passenger to alight, without evidence sufficient to make question issuable, was harmless, where railroad's negligence in starting train without ascertaining if passenger had safely alighted was established without controversy.

## 4. DAMAGES — 145 — PERSONAL INJURY — PLEADING—DIMINISHED EARNING CAPACITY.

In personal injury action, petition, describing injuries and alleging that, "By reason thereof the plaintiff has been rendered unable to follow his said business, and permanently injuries," to his damages, etc., held to justify recovery of damages for diminished earning capacity; the word "injuries" being a typographical error which was not misleading.

## 5. APPEAL AND ERROR — 1173(1)—DISPOSITION—REVERSAL IN PART.

In action against railroad and sleeping car company, in which the railroad asks for judgment over against sleeping car company in case

judgment is recovered against it, where there was judgment for plaintiff against railroad and for sleeping car company as to railroad's plea over, court on appeal therefrom by railroad, where the only errors disclosed are those affecting issue between railroad and sleeping car company, will affirm the judgment in favor of plaintiff against railroad and reverse and remand the judgment as to the issue between railroad and sleeping car company, in view of rule 62a (149 S. W. x).

Appeal from District Court, Denton County; C. F. Spencer, Judge.

Suit by John B. Scripture against the Gulf, Colorado & Santa Fé Railway Company and the Pullman Company, in which the defendant Gulf, Colorado & Santa Fé Railway Company pleaded that, if judgment should be recovered against it, it have judgment over against defendant Pullman Company. Judgment for plaintiff against the Railway Company and for the Pullman Company as to the Railway's plea over, and the defendant Railway Company appeals. Affirmed in part and reversed and remanded in part.

Lee, Lomax & Smith, of Ft. Worth, Terry, Cavin & Mills, of Galveston, and H. R. Wilson, of Denton, for appellant.

Etheredge, McCormick & Bromberg, of Dallas, for appellee Pullman Co.

Owsley & Alcom, of Denton, for appellee Scripture.

BUCK, J. John B. Scripture sued the appellant Railway Company and the Pullman Company for alleged injuries sustained at Krum, Tex., on the night of April 24, 1916, while plaintiff, a passenger upon the Pullman car, was disembarking. Plaintiff charged negligence on the part of both defendants in failing to give him a reasonable opportunity to alight safely from said car; in failing to have sufficient light on the platform of said car; in failing to stop the train at Krum a sufficient length of time to enable plaintiff to safely disembark; in failing to have sufficient light on the ground or platform upon which plaintiff landed; in failing to assist plaintiff to alight; in failing to place the box upon which plaintiff was to step securely fixed on the ground; in failing to have the ground where the box was placed reasonably level and smooth, so that the box placed thereon would not overturn, etc. Defendant railway company set up various defenses, and further pleaded that if any judgment should be recovered against it that it have judgment over against the Pullman Company.

Before or during the trial plaintiff dismissed his action against the Pullman Company, and judgment was recovered for him against the Railway Company in the sum of \$5,000 damages for personal injuries, and \$325 for doctor and drug bills, and in favor

of the Pullman Company as to the defendant's plea over. The Railway Company has appealed.

The appellant has presented a brief containing 20 assignments of error, some directed to alleged errors affecting issues between it and the plaintiff, and others complaining of alleged errors as to the issues between the defendant and the Pullman Company. As the appellant has devoted most of its brief to the latter group of assignments, we will first consider them.

The defendant Railway Company pleaded that there was a contract existing between it and the Pullman Company by virtue of which the Pullman Company was to provide its own employes and servants for the collection of fares charged for the sleeper, and for the services of receiving and discharging passengers from said cars, and that by the terms of said contract the Pullman Company had agreed to indemnify and save harmless the Railway Company against all liability and claims for injuries to persons arising from the acts or omissions, whether negligent or wrongful or otherwise, of the employes of the Pullman Company in the line of their employment. It further alleged that, if it were true that plaintiff sustained the injuries alleged by him as the result of the failure to afford him a reasonable opportunity to safely alight from said sleeping car and train at Krum, or because of insufficient light on the platform or at the place he attempted to get off the car, or because a sufficient time was not allowed him to alight from the car, etc., said acts of negligence, if any, were the acts of the Pullman Company's employes, and that the Railway Company was entitled to a judgment against the Pullman Company for any recovery had against it. The evidence tends to establish the following state of facts: Plaintiff boarded appellant's train at Ft. Worth on the night of April 24th, for the purpose of going to Krum, having purchased a ticket before boarding the train, and paying the Pullman fare on the train. The train stopped at Krum one minute, as testified to by the railway conductor. When it reached the station, and after it had stopped, the Pullman porter notified the plaintiff, who was in the smoker of the Pullman or in the aisle of the car and walking towards the door opening onto the platform from which he was to alight. Before the plaintiff descended the steps, or as he was doing so, the conductor cried, "All aboard." The railway porter and the brakeman on the ground near the steps of the parlor car answered, "All right here." The train started with a slight jerk as plaintiff's foot reached the last step and as he was preparing to step onto the box which had been placed under and in front of the Pullman car steps. As he stepped onto the box it turned over, and plaintiff fell prone on the ground and on



top of the box, with his arm on the rail under the car. The Pullman porter jerked him out from under the car and raised him to a standing position, and then ran to overtake the train, which was moving. The conductor and brakeman of the train did not know that any accident had happened until the train had gotten some distance from Krum. When plaintiff attempted to stand, his leg gave way, and he fell again to the ground. Persons at the station ran to his assistance, placed him on a door, and carried him to a nearby drug store, where he received medical attention.

The evidence was that his injuries were serious, consisting, in part, of a fracture of the patella of his left leg and the bruising and injuring of his left hip and shoulder. Appellant's conductor, Wyman, testified: That he knew at the time, or before the train stopped, that there was a passenger in the Pullman car for Krum; that the train conductor is supposed to stop the train at the station, and if the passenger on the Pullman car has not gotten off when the warning, "All aboard," is given by the conductor, it is the duty of the Pullman employes to notify the train conductor to "Wait a minute." If all the Pullman passengers are off the cars the Pullman porter makes no reply. That on the night in question he did not hear the Pullman porter make any announcement that the passenger had not alighted, or any request to wait. That it was a dark night, and, while he could see the porter standing near the steps of the Pullman car, he did not see the passenger. That the brakeman was between him and the Pullman car, and the latter was there to discharge his duty as a railway brakeman, but that he was not in charge of the Pullman car. That he supposed if the brakeman had noticed that the passenger had not gotten off the train, he would have informed the witness of that fact, and asked him to wait. That when the brakeman and the Pullman porter answered, "All right here," he gave the signal for the train to start.

Section 12 of the contract between the Railway Company and the Pullman Company provides:

"The Pullman Company agrees to indemnify and save harmless the Railway Company against all liabilities and claims for loss or damage to or destruction of property and for injuries to persons or death as follows. \* \* \* All claims and liabilities arising from the acts or omissions whether negligent or wrongful or otherwise, of employes of the Pullman Company in the line of their employment."

[1] The court, in charging upon the issues between the appellant and the Pullman Company, instructed the jury, in effect, that, if they should find that the injuries to plaintiff were caused by the negligent failure of the Pullman employes, and that such negligence was the proximate cause of plaintiff's in-

juries, the Railway Company would be entitled to judgment over against the Pullman Company for whatever sum they should find against the Railway Company. The Railway Company objected to this paragraph of the charge, on the ground that under it the jury were instructed that before they could find against the Pullman Company, as to appellant's plea over, they were required to find that said porter's acts or omissions, causing or contributing to cause the injuries, constituted negligence, while under the contract between the two companies the Pullman Company would be liable in the way of indemnification to the Railway Company if the plaintiff's injuries were caused by any acts or omissions in the line of the employment of the Pullman Company's employes, whether such acts or omissions were negligent or not. The appellant's fifteenth assignment is directed to this alleged error, and in its sixteenth assignment it complains of the failure of the court to submit a requested charge, in substance, that if the jury should find that plaintiff was injured, but that such injury was due to and proximately caused by the failure of the Pullman Company's porter to properly and safely place the foot box, or the failure, if any, of the Pullman Company to furnish sufficient light in the vestibule of its sleeping car from which plaintiff was alighting, or the failure, if any, of the said Pullman Company's employes in charge of such car to stop or request the stopping of, defendant's train until plaintiff could alight therefrom, the jury would find in favor of the Railway Company against said Pullman Company, whether said acts or omissions of the Pullman Company's employes were found to be negligent or wrongful or otherwise. We have come to the conclusion that this requested charge should have been given. The railway conductor testified:

"The negro porter never does say anything hardly; he had not given me any signal on this night. When I holloed, 'All aboard,' it was his duty to notify me if the passenger was not off. \* \* \* It is the duty of the Pullman employes to notify me when their passengers are not off; they never do notify me when they are all off."

None of the Pullman employes testified, nor is there any explanation given in the record as to why they did not testify. The evidence seems uncontradicted that the Pullman porter, at the time or before the train started, gave no notice to the train conductor that the plaintiff had not alighted. It is further in evidence that when plaintiff's foot stepped on the box it turned over, though the plaintiff testified that he thought the turning of the box was caused by the movement of the train and the pressure of his foot. There is a statement of the plaintiff in the record that the box was placed too

far under the steps. There is further evidence that at the landing place where plaintiff alighted there were large rocks, but that at the same time there was sufficient smooth ground for the box to be placed thereon in a secure position. It may be that if the charge requested had been given the jury would have found that the acts or omissions of the porter in the respects indicated, inducing and concurring with the negligence of appellant in starting the train at the time it did, caused, or contributed to cause, plaintiff's injuries, though they were unwilling to find that such acts or omissions were negligent. The Pullman Company had contracted with the Railway Company to indemnify it for any liability arising out of the acts or omissions of the former's employees in the line of their employment, irrespective of whether such acts or omissions were negligent or not. Judge Richard Coke said in *Menard v. Sydnor*, 29 Tex. 257, 262:

"As men bind themselves, so must they stand bound. When the terms of a contract are free from ambiguity, and not such as are against the policy of the law to enforce, they establish the rights of the parties in the subject-matter, which will be protected and enforced by the courts."

Therefore we sustain the sixteenth assignment, which will necessitate a reversal of the judgment as between the appellant and the Pullman Company.

There are objections urged by the Pullman Company to the consideration of various assignments, but we do not think such objections are well taken. We do not think that the court would have been justified in instructing the jury to peremptorily find in favor of appellant and over against the Pullman Company for any judgment obtained by plaintiff, and hence overrule the first and second assignments.

[2] We think the negligence of the appellant in starting the train at the time it did, without first learning whether the Pullman passenger had alighted, was established without controversy, and, therefore, the third and fourth assignments, complaining of the seventh paragraph of the court's charge, wherein the jury were permitted to find, under the conditions there stated, that the defendant was liable for and on account of the failure to have the premises and grounds sufficiently lighted to render it reasonably safe to so alight, are overruled, without the determination of whether there was sufficient testimony to make issuable the question of the defendant's negligence in respect to having the grounds lighted.

[3] For the same reason we overrule the fifth and sixth assignments, directed to the alleged error of the court in submitting to the jury the question of whether the defendant was guilty of negligence in failing to provide a reasonably safe place for plaintiff to alight.

[4] The ninth assignment complains of the submission in the charge of the question of plaintiff's diminished capacity to labor and earn money in the future because, as claimed, there was no basis in the petition for the recovery of damages of this character. The petition alleged that—

Prior to the injuries "plaintiff was an able-bodied, healthy, young man, of the age of 25 years, and was engaged in the stock and cattle business, and was able to earn \$1,000 per year, but that by reason of the carelessness and negligence of the defendants, as aforesaid, the injuries above mentioned were inflicted upon him, a portion of said injuries being the breaking of the patella, or kneecap, and by reason thereof the plaintiff has been rendered unable to follow his said business, and permanently injuries," to his damage, etc.

Evidently the word "injuries" was a typographical error, and the word "injured" was intended, and no one reading the paragraph could be misled as to the intention of the pleader to allege that permanent injuries were inflicted, and that in the future plaintiff would suffer from the breaking of his patella or kneecap. The character of the injuries alleged is such that more or less incapacity to labor, considering plaintiff's occupation, would follow. Though the allegations upon this issue are not as specific and detailed as they might properly be, yet we think they are sufficient to justify the admission of the testimony as to future injuries, and the submission of a charge thereon, if such testimony was introduced, which the record discloses to be the case.

Without attempting to discuss each of the other assignments separately, it is sufficient to say that we have carefully considered them and find no reversible error, and that they are therefore overruled.

[5] As we have concluded that the issues between the appellant and the Pullman Company on the one hand and the appellant and the plaintiff on the other are separable, and that no injustice will be done any party involved by a reversal and remanding as to that part of the case affecting appellant and the Pullman Company and the affirmance of the judgment below in favor of the plaintiff, and that the error disclosed affects only the issues between the two companies, it is the judgment of this court that the judgment below be affirmed, in so far as the issue between the plaintiff and the Railway Company are concerned, and that the judgment be reversed and remanded as to the issue between the Pullman Company and the Railway Company. See rule 62a (149 S. W. 2d).

Affirmed in part and reversed and remanded in part.

#### On Motion for Rehearing.

The appellant, Gulf, Colorado & Santa Fe Railway Company, and the appellee Pullman Company have each filed a motion for re-

hearing. We have carefully examined appellant's motion, and do not find any reason to change the conclusions heretofore reached as to the issues between it and the plaintiff; therefore we overrule appellant's motion for rehearing.

In appellee Pullman Company's motion it is urged that the trial court was authorized to refuse the special charge requested, to the refusal of which the sixteenth assignment is leveled. A portion of the requested instruction is as follows:

"Now, therefore, if you believe that plaintiff was injured, but that such injury was due to and proximately caused by the failure, if any, of the Pullman Company's porter to properly and safely place the foot box, or the failure, if any, of the Pullman Company to furnish sufficient light in the vestibule of its sleeping car from which plaintiff was alighting, or failure, if any, of said Pullman Company's employes in charge of such car to stop or request the stopping of defendant's train until plaintiff could alight therefrom; and if you further believe that the omissions, if any, of said Pullman Company employes in the respects here stated were in line of their employment—you will find in favor of said Gulf, Colorado & Santa Fé Railway Company against said Pullman Company for the amount of the verdict, if any, you may return in plaintiff's favor and against said Railway Company."

It is urged that the uncontradicted evidence establishes the sufficiency of the light in the vestibule of the Pullman Company's car to enable the plaintiff, as a passenger, to alight from said car with safety; that, therefore, the trial court was authorized to decline to give to the jury an instruction submitting an issue which the evidence failed to raise. In *Olds Motor Works v. Churchill*, 175 S. W. 787, in discussing the sufficiency of an assignment to call the attention of the trial court to an error in the charge given, whether such error be one of mere omission or a positive misapplication of law, it is said:

"With reference to this matter, we believe the rule to be that when the court fails to charge on a material issue, and a special charge is requested, though incorrect, but sufficient to call the court's attention to the omission, the court should submit a proper instruction on that issue; and, if proper exception is taken to such failure of the court, and a separate assignment is presented, both in the motion for new trial in the court below and in appellant's brief, he may successfully urge the error of omission in the appellate court. But when the court has submitted a correct general presentation of the issue, if either party desires a fuller charge on that issue, he must tender to the court a correct charge, and, upon his failure to do so, he cannot avail himself of the \* \* \* omission"—citing authorities.

But can it be reasonably said that the charge given in the instant case, and to the

giving of which the fifteenth assignment is directed, is correct as far as it goes, and that any error is merely one of omission? If defendant Railway Company was entitled to the presentation of the defense of the terms of that provision in the contract between it and the Pullman Company, such defense did not in any sense depend on the question of negligence of the Pullman Company's employes in causing, or contributing to cause, the injury to plaintiff, but was entirely independent of the question of negligence. If the Railway Company had the right to enforce the contract of indemnity according to its terms—and no question is here raised as to such right—we are of the opinion that it was positive error to limit such right to indemnity to a showing of negligence on the part of the Pullman Company.

The court in its main charge, and following the instruction challenged in the fifteenth assignment, instructed the jury that the burden of proof was on the Railway Company, as between it and the Pullman Company, to show facts by a preponderance of evidence which entitled the Railway Company to have a judgment over against the Pullman Company, and if it had failed so to do the jury would find in favor of the Pullman Company upon that issue. This instruction placed the burden of proof on the Railway Company, before it would be entitled to a judgment over against the Pullman Company to establish negligence on the part of the Pullman Company's employes proximately causing, or contributing to cause, the injury to plaintiff. This last instruction, taken in connection with the former instruction, makes the charge, as a whole, an affirmative error against appellant. Hence we overrule appellee Pullman Company's motion for rehearing.

#### GEORGIA CASUALTY CO. v. GRIESENBECK et ux. (No. 6042.)

(Court of Civil Appeals of Texas. Austin.  
March 12, 1919.)

#### 1. MASTER AND SERVANT §417(1)—WORKMEN'S COMPENSATION ACT—SUIT TO CANCEL AND ANNUL ORDER AND AWARD.

A suit by insurer under Vernon's Ann. Civ. St. Supp. 1918, art. 5246-44, to annul and cancel an award of the Industrial Accident Board made under article 5246-14, is not, strictly speaking, an appeal, and the trial is de novo; the effect being similar to that of an appeal from the justice court judgment.

#### 2. MASTER AND SERVANT §396 — WORKMEN'S COMPENSATION ACT—ACTION TO SET ASIDE AWARD—AMOUNT—JURISDICTION.

Where an insurer brings a suit to set aside the findings and award of the Industrial Acci-

dent Board under Vernon's Ann. Civ. St. Supp. 1918, art. 5246—44, the issue to be tried is, not the collection of the sum of weekly payments due under the award, but the determination of the full amount of insurer's liability that might be recovered under article 5246—14, and, where such amount is in excess of \$500, the district court has jurisdiction.

Appeal from District Court, Bastrop County; R. J. Alexander, Judge.

Proceeding by A. Griesenbeck and wife for an award for the death of their son, A. C. Griesenbeck, while an employé of the Bastrop Water, Light & Ice Company, before the Industrial Accident Board in which an award was made against the insurer Georgia Casualty Company, which filed an original petition in the district court to cancel and annul the order. From a judgment dismissing the suit for want of jurisdiction, plaintiff appeals. Reversed and remanded for new trial.

Orgain, Butler & Bollinger and Y. D. Carroll, all of Beaumont, for appellant.

Maynard & Maynard, of Bastrop, for appellees.

#### Nature and Result of the Suit.

JENKINS, J. We copy from appellant's brief, as follows:

"On August 25, 1917, the Georgia Casualty Company filed its first original petition, alleging that it was a corporation, organized under the laws of the state of Georgia, that it had a permit to do business in the state of Texas, that the defendants resided in Bastrop county, alleging, among other things, that on the 28th day of March, 1917, A. C. Griesenbeck, the son of the appellees here, was killed in the town of Bastrop, Tex.; that he was employed by the Bastrop Water, Light & Ice Company; that said company was a subscriber under the terms of the Employers' Liability Act of the State of Texas [Acts 33d Leg. c. 179 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h—5246zzzz)]; that the mother and father of the said A. C. Griesenbeck filed a claim with the Industrial Accident Board for compensatory insurance; that on the 27th of July, 1917, said board entered an order to the effect that the legal beneficiaries of A. C. Griesenbeck, deceased, were entitled to receive of and from the Georgia Casualty Company compensation for the death of said A. C. Griesenbeck at the rate of \$6.92 per week for a period of 360 weeks from the date of accident. The said Georgia Casualty Company, in its petition, prayed that said order be canceled and annulled.

"Thereafter defendant, on February 4, 1918, filed its original answer, and, among other pleas, filed a plea to the jurisdiction of the district court, alleging that it appeared from plaintiff's petition that the amount of the controversy, exclusive of interest, amounted to less than five hundred dollars (\$500.00); and the court, on a hearing of the plea to the jurisdiction, in all things sustained same, and dismissed plaintiff's suit. The plaintiff then and

there excepted, the same being entered February 5, 1918. Thereafter plaintiff's motion for a new trial, filed February 7, 1918, was overruled February 7, 1918. Plaintiff then and there excepted, giving notice in open court of appeal to the Court of Civil Appeals of the Third Supreme Judicial District of Texas. In due time plaintiff filed an appeal bond, February 28, 1918; and this cause is now duly and properly before this court."

#### Opinion.

There may be some question whether this case arose under the original Workmen's Compensation Act, or under the amended act. Appellees, in their brief, state that the same is immaterial, and we will accept that view of the case.

As will be seen from the foregoing statement of the nature and result of this case, but one question is here involved, and that is as to the jurisdiction of the district court to try this case. It is the contention of the appellees that the district court had no jurisdiction, for the reason that the weekly amounts allowed by the board did not at the time of the trial aggregate as much as \$500. In support of their contention, they cite articles 5246—14, 5246—44, Revised Statutes of 1918; Roach v. Employers' Ass'n, 195 S. W. 328; Tex. Employers' Ass'n v. Bryan, 198 S. W. 342; Surety Co. v. Stubbs, 199 S. W. 343; Jones v. Dodd, 192 S. W. 1134; Ins. Co. v. English, 70 S. W. 440.

In the cases against Employers' Association above cited, it was held that the amount in controversy was the aggregate amount of the weekly payments due at the time of the trial, under the award made by the board. These cases involved the same principle decided in Jones v. Dodd and Insurance Co. v. English, supra.

In the case of Insurance Co. v. English, a policy had been issued payable in annual installments. Some of these installments were past due and unpaid when the suit was tried. The court properly held that the amount of the unpaid installments was the amount in controversy, for the reason that the suit was upon a contract, and the insurance company was not liable for any breach of the contract that had not occurred. There was no breach of the contract in failing to pay installments that were not due.

To the same effect is Jones v. Dodd, supra. The employers' liability cases above cited were correctly decided, for the reason that they were based upon that principle of law. The difference between those cases and the instant case is that in those cases no appeal had been taken from the award of the board. The liability had been fixed, and the insurance association had become liable therefor as the same accrued, which was by weekly payments. It was not liable to pay future allowances which had not yet accrued.

In the instant case there was an appeal

from the award of the board. The statute with reference to objecting to the finding of the board is as follows:

"Any interested party, who is not willing and does not consent to abide by the final ruling and decision of said board, shall within twenty days after the rendition of said final ruling and decision by said board give notice to the adverse party and to the board that he will not abide by said final ruling and decision. And he shall within twenty days after giving such notice bring suit in some court of competent jurisdiction in the county where the injury occurred to set aside said final ruling and decision and said board shall proceed no further toward the adjustment of said claim, other than as herein-after provided." Revised Statutes 1918, art. 5246—44.

Both the old and the new statute provide that when suit is brought the rights and liabilities of the parties thereto shall be determined by the provisions of the Employers' Liability Act, that is to say, if the beneficiary recovers in case of death, as in the instant case, he shall be entitled to judgment equal to 60 per cent. of the average weekly wages of the deceased, but not more than \$15, nor less than \$5 a week, for a period of 360 weeks from the date of the injuries.

[1] Bringing suit, as provided in article 5246—44, supra, though in the nature of an appeal from the action of the board, is not, strictly speaking, an appeal. The article last above cited further provides:

"If the final order of the board is against the association, then the association and not the employer shall bring suit to set aside said final ruling and decision of the board, if it so desires, and the court shall in either event determine the issues in such cause instead of the board upon trial de novo."

The effect of bringing the suit is similar to that of appealing from a judgment of a justice court. The trial is de novo; that is to say, it is to proceed as though no former trial had been had. If the statute had not provided for an investigation by the board, but only that suit might be brought by the insurance company to have it declared that it was not liable under the policy, the amount involved would have been the total amount of the policy, even though payments were to be made weekly. In other words, it would have involved the liability of the insurance association for the full amount of the policy. This statute clearly indicates that the association may bring suit in any court of competent jurisdiction to have its liability determined. The language of the statute is:

"Shall bring such suit in some court of competent jurisdiction in the county where the injury occurred, to set aside the final ruling and decision (of the board)."

[2] The filing of such suit, in effect, does set aside such decision, and, the trial being de novo, the amount involved is the total amount to which the beneficiary would be entitled under the provisions of the act, if liability be shown, which in this case exceeds \$2,000.

Appellees seek to apply the principle involved in the cases hereinabove cited, by reason of the following language in said article 5246—44:

"And the court shall in either event, determine the issues in such cause instead of the board upon trial de novo and the burden of proof shall be upon the party claiming compensation."

It is appellees' contention that, by the association filing suit, it thereby compels the beneficiary to become plaintiff in the cause. This may be granted, but the burden upon the beneficiary in such case is to establish liability on the part of the association, not for the weekly indemnity already accrued, but for the entire amount to be paid weekly. Should the beneficiary recover in such suit, the judgment should be for the entire amount found due under the policy to be paid weekly, for which he would be entitled to execution from time to time as such amounts become due.

If the contention of the appellees should be sustained it would amount to this: The board had adjudicated the claim, and had found that appellant was liable to appellees in a sum exceeding \$2,000, to be paid in weekly installments. If the appellant did not appeal from such decision, or bring suit to set it aside, its liability was fixed for the full amount, and thereafter it could not contest the same. In such case, if it failed to pay the weekly indemnities as they accrued, the beneficiary could not have execution on the amounts due, because the board has no power to issue execution. Such being the case, the remedy of the beneficiary would be to bring suit in some court of competent jurisdiction on the amounts that had accrued. Such was the case in the Roach and Bryan Cases, supra.

We think it is clear that where the association brings suit to set aside the finding of the board, as provided by the statute, the issue to be tried by the court is as to its liability for the full amount that might be recovered under the statute; and, as in the instant case that amount was over \$2,000, the district court had jurisdiction to try the case.

For the reasons stated, the judgment of the district court is reversed, and this cause is remanded for a new trial.

Reversed and remanded.

**NABORS v. COLORADO & S. RY. CO.**  
(No. 1503.)

(Court of Civil Appeals of Texas, Amarillo.  
March 12, 1919.)

**1. TRIAL ⇨284—INSTRUCTIONS—FAILURE TO OBJECT—WAIVER.**

Under Vernon's Sayles' Ann. Civ. St. 1914, § 1971, plaintiff's failure, in a suit against a carrier for damages to an interstate shipment, to object to a charge submitting the issue of negligence, waived any errors committed in such submission.

**2. CARRIERS ⇨108—DAMAGE TO GOODS—LIABILITY—CARMACK AMENDMENT.**

Under the Carmack Amendment (U. S. Comp. St. § 8604a), the common-law rule of liability attaches to a carrier, and it is not liable as an insurer.

**3. CARRIERS ⇨131—INTERSTATE SHIPMENT—INJURY—PLEADING.**

It is not necessary for the plaintiff, in an action for damages to an interstate shipment resulting from defective refrigerator cars, to either allege or prove negligence of the carrier.

**4. APPEAL AND ERROR ⇨882(14)—REVIEW—INVITED ERROR—INSTRUCTIONS.**

A party cannot complain of a charge submitting the issue of negligence to the jury, where he invited the error by pleading negligence, offering proof thereon, and impliedly assenting to the charge by failing to object to it.

Appeal from Wichita County Court; Harvey Harris, Judge.

Action by W. A. Nabors against the Colorado & Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Chauncey & Davenport, of Wichita Falls, for appellant.

F. S. Jones, of Wichita Falls, and Thompson, Barwise, Wharton & Hiner, of Ft. Worth, for appellee.

HALL, J. Appellant sued appellee railway company to recover damages alleged to have resulted to a shipment of vegetables from Denver, Colo., to Wichita Falls, Tex. It is alleged that the damages resulted from the fact that the car was in bad condition at the time the vegetables were loaded or because defendant permitted it to get in bad condition in transit; that it was a refrigerator car, and the drain pipes for carrying away the water from the melting ice became or were permitted by defendant to become clogged and stopped up, thereby causing the water to flood the car, and continues:

"That the acts above complained of constituted negligence on the part of defendants and were the direct and proximate cause of the damage to said vegetables. That, if the defendants had exercised ordinary care and diligence in the operation of said car and in the handling of

same, said damage would not have been sustained."

Appellee met the allegation of negligence by general denial. Appellant sought to prove negligence by the testimony of several witnesses. Defendant rebutted this evidence by the testimony of its witnesses, sharply contesting the issue of negligence. The only paragraph of the charge was one defining negligence. This is followed by special issue No. 1, requesting the jury to bear in mind the definition of negligence given, and to find whether or not the defendant was guilty of negligence in the manner in which it transported the vegetables from Denver to Wichita Falls. To this issue the jury answered: "No."

**Special Issue No. 2 is:**

"If you have answered special issue No. 1, 'Yes,' then find whether or not said negligence was the direct and proximate cause of said damage, if any."

By the third special issue, the jury is requested to find upon the question of market value, and by the fourth special issue the matter of attorney's fees is submitted. Having found that there was no negligence as submitted by the first special issue, no answers were made to the remaining issues. Appellant made no objection whatever to the charge of the court.

By his first assignment of error, it is insisted that the verdict is not sufficient to support a judgment for the defendants because only the first special issue was submitted, "and which issue was not the issue in the case, and the only issue in the case that should have been submitted was as to whether or not said vegetables were damaged in shipment and the extent of such damage," etc. The proposition urged under this assignment is in substance, that a common carrier is an insurer and is liable except where the loss results from the act of God, the public enemy, the acts of the shipper, or through the inherent vice of the thing shipped, and where no such defenses are set up the carrier is liable for the loss sustained.

The second assignment, in substance, is that the judgment is contrary to the law, in this: The uncontroverted evidence showed that the vegetables were in good condition when received by the carrier and in bad condition when delivered to plaintiff, and therefore, as a question of law, plaintiff was entitled to recover unless the carrier could show it was released under the common-law rule of liability.

[1, 2] The first assignment is disposed of upon the ground that the appellant failed to object to the charge of the court which submitted the issue of negligence. It is provided by Vernon's Sayles' Civil Statutes, art. 1971, that a failure to so object waives errors in instructions. This being an interstate ship-

ment, the rights of the parties are controlled by the provisions of the Carmack Amendment; section 8604a, U. S. Comp. Stat. (24 Stat. 386; 34 Stat. 595; 38 Stat. 1196; 39 Stat. 441), amending Act February 4, 1887, § 20, as amended; Act June 29, 1906, § 7; Act March 4, 1915, c. 176, § 1; and Act August 9, 1916, c. 301; and the decisions of the federal courts construing it. Appellant is not correct in asserting that appellee is an insurer. It is liable for a default in its common-law duty, and not as an insurer under the provisions of the Carmack Amendment. *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 814, 44 L. R. A. (N. S.) 257.

[3] It was not necessary for appellant to either allege or prove negligence on the part of the carrier in order to recover. *Cudahy Packing Co. v. A., T. & S. F. Ry. Co.*, 193 Mo. App. 572, 187 S. W. 149, 151, and authorities cited. As held by the Supreme Court of the United States in *Galveston, H. & S. A. Ry. Co. v. Wallace*, 233 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 516, proof of delay of an interstate shipment to the initial carrier and of failure to deliver the same to the consignee raises a presumption of negligence so as to give rise to the liability imposed by the Carmack Amendment, and cast upon the carrier the burden of proving that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract. Under the federal decisions, a carrier is not liable for loss or damage arising from the act of God, the common enemy, the owner of the property, or resulting from the nature of inherent vice of the property itself. *Hall v. Railroad Cos.*, 18 Wall. 367, 20 L. Ed. 594; *Railroad Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909; *Nelson v. Woodruff*, 1 Black, 156, 17 L. Ed. 97; *The Niagara v. Cordes*, 21 How. 7, 16 L. Ed. 41.

[4] The attitude assumed by appellant in the lower court will require an affirmance of the judgment. The error committed by the trial judge in submitting the case to the jury upon the issue of negligence was invited by appellant, by pleading negligence, by offering proof upon the issue, and by impliedly assenting to the charge in failing to file his objections under the statute.

"The alleged negligence of defendant's servants, in bumping against the rear end of the train on which plaintiff was at work, was in striking it with great and unusual force. Plaintiff cannot complain of the court submitting the issue as he made it in his pleading, and in refusing to submit it in any other manner." *Rea v. St. Louis Southwestern Ry. Co. of Texas*, 78 S. W. 555.

"The objections to the charge embodied in the proposition under the seventh and eighth assignments of error are based on the theory that they are not supported by the pleadings; but, as above indicated, the pleadings of appellants raised the issue of reasonable value of improvements, and they introduced testimony on that

issue. They certainly cannot reasonably object to the submission of an issue raised by them in their pleadings and testimony." *Banks v. House*, 50 S. W. 1022, affirmed in 93 Tex. 58, 53 S. W. 338; *Paris & G. N. Railroad Co. v. Flanders*, 107 Tex. 328, 179 S. W. 263; *M., K. & T. Ry. Co. of Texas v. Maxwell*, 130 S. W. 722; *Hildebrand v. Head*, 88 S. W. 438.

The judgment is affirmed.

AUSTIN, Com'r of Insurance and Banking, v. CAMPBELL et al. (No. 2042.)

(Court of Civil Appeals of Texas, Texarkana. Feb. 28, 1919. On Motion for Rehearing, March 21, 1919.)

1. BANKS AND BANKING ~~§ 48(1)~~—INSOLVENT BANK—LIABILITY OF STOCKHOLDERS—STATUTE—"EACH STOCKHOLDER OF SUCH CORPORATION."

Rev. St. 1911, art. 552, does not extend the liability of a former stockholder of an insolvent banking corporation beyond the limits fixed by Const. art. 16, § 16; the words "each stockholder of such corporation," occurring in the article of the statute, meaning stockholders owning and holding shares at time of default.

2. CONSTITUTIONAL LAW, ~~§ 34~~—CONSTITUTION—SELF-EXECUTING PROVISION.

Const. art. 16, § 16, defining liability incident to ownership of stock in banking corporations, is self-executing.

3. BANKS AND BANKING ~~§ 48(1)~~—INSOLVENT STATE BANK—LIABILITY OF FORMER STOCKHOLDER.

Under Const. art. 16, § 16, and Rev. St. 1911, art. 552, the liability of a stockholder, who transferred his stock within less than one year prior to date on which bank made default in payment of its debt, was not secondary but the same, as to debts existing at the time of transfer, as that of present stockholders.

4. BANKS AND BANKING ~~§ 47(2)~~—SUIT AGAINST STOCKHOLDER—CONDITION PRECEDENT.

Where the commissioner of insurance and banking, after having determined that it was necessary in order to settle debts of insolvent state bank to levy a 100 per cent. assessment against the stockholders, sent notice thereof to defendant, who had transferred his stock less than a year prior to date of bank's default, with demand for payment, no further proceedings were necessary as a condition precedent to suit.

5. BANKS AND BANKING ~~§ 49(7)~~—INSOLVENT STATE BANK—SUIT AGAINST FORMER STOCKHOLDER—PLEADING.

In suit by commissioner of insurance and banking to enforce liability of present and former stockholder of an insolvent state bank, held, that pleadings filed were sufficient to authorize judgment against the former stockholder for full amount sued for.

## On Motion for Rehearing.

**6. BANKS AND BANKING** ¶48(1)—**INSOLVENT BANK—AUTHORITY OF COMMISSIONER—STATUTE.**

Rev. St. 1911, art. 459, when construed with articles, 453, 456-458, is broad enough to confer on the commissioner of insurance and banking authority to enforce the liability of a former stockholder who has transferred his stock less than one year before date on which bank made default in payment of debts.

**7. BANKS AND BANKING** ¶48(1)—**ENFORCEMENT OF LIABILITY OF FORMER STOCKHOLDER—PROCEDURE.**

That the commissioner of insurance and banking proceeded against defendant, who had transferred his stock less than one year before default of bank, in the same manner that he proceeded against the then holder of the stock, held not to deprive defendant of any valid defense.

Appeal from District Court, Gregg County; Daniel Walker, Judge.

Suit by C. O. Austin, Commissioner of Insurance and Banking, against T. D. Campbell and another. From that part of the judgment denying relief against defendant named, plaintiff appeals. Judgment in favor of named defendant set aside, and judgment rendered for plaintiff.

F. H. Prendergast, of Marshall, and Edwin Lacy, of Longview, for appellant.

Marsh & McIlwaine, of Tyler, and F. J. McCord and Young & Stinchcomb, all of Longview, for appellees.

**HODGES, J.** On June 29, 1917, C. O. Austin, commissioner of insurance and banking, filed this suit against G. A. Bodenheim, as a stockholder of the People's State Bank of Longview, and T. D. Campbell, as a former stockholder of the same institution. The purpose of the suit was to enforce the liability of Bodenheim and Campbell for the unpaid debts of the People's State Bank, whose affairs had been taken over by the commissioner of insurance and banking as provided by law in case of insolvency. In a trial before the court a judgment was rendered in favor of the commissioner against Bodenheim for the full amount sued for, but denying relief against Campbell upon grounds that will be hereinafter stated. The appeal is from that portion of the judgment in favor of Campbell.

The following are, in substance, the findings of fact filed by the trial judge and which appear to be the only record of what was proven in the court below: The People's State Bank of Longview was a banking corporation incorporated under the laws of Texas, and prior to the dates hereinafter mentioned was doing a general banking business. Its capital stock amounted to \$60,000,

divided into 600 shares of the par value of \$100 each. On August 18, 1916, the bank became insolvent and was placed in the hands of the commissioner of insurance and banking in accordance with the provisions of the statute. On December 20, 1915, Campbell owned shares of stock in the bank of the face value of \$6,000. On that date he sold and transferred his stock to Bodenheim, who continued to own and hold it till the bank was placed in the hands of the commissioner on August 18, 1916. At the time of the transfer from Campbell to Bodenheim, the bank owed debts to the amount of \$12,000, which remained unpaid when its affairs were taken over by the commissioner on the date above mentioned. On October 17, 1916, the commissioner levied an assessment against the stockholders of the insolvent bank and sent out to each of them the following notice:

"Department of Insurance and Banking, State of Texas, Austin.

"October 17th, 1916.

"Notice to Stockholders of the People's State Bank of Longview, of Record on August 18th, 1916, and to Stockholders Who Transferred Their Stock within Twelve Months Previous to August 18th, 1916.

"Article 552, Revised Statutes, State of Texas (section 186, State Banking Law, Digest of 1913), provides as follows:

"If default shall be made in the payment of any debt or liability contracted by any bank, trust company, surety and guaranty company, or savings bank, each stockholder of such corporation, as long as he owns shares therein, and for twelve months after the date of a transfer thereof, shall be personally liable for all debts of such corporation existing at the date of such transfer, or at the date of such default, to an amount additional to the par value of such shares so owned and transferred."

"You are further advised that article 459, Revised Statutes, State of Texas, read as follows:

"The commissioner may, if necessary, to pay the debts of such state bank, enforce the individual liability of the stockholders."

"The general rule is that the stockholders' liability continues up to the time of the transfer on the books of the corporation and a transfer of stock is not released from statutory liability until one year after the transfer is entered on the books of the corporation. The stockholders of the above bank will note, by reading article 552, Revised Statutes, quoted above, that their liability for an amount equal to the stock owned begins to run immediately when default has been made by the bank in the payment of any debt or liability contracted by it.

"The stockholders are further advised that on August 18, 1916, the People's State Bank of Longview was found unable to meet its debts and liabilities, and therefore, acting under the authority vested in me by law, notice is hereby given that a 100 per cent. assessment is levied upon the stockholders of the above bank, and the stockholders are instructed to send to Jno.



L. Douglas, special agent, Longview, Texas,  
the amount of the assessment thus levied.

"Respectfully, Chas. O. Austin,  
"Commissioner of Insurance and Banking of  
the State of Texas."

In addition to the general conclusion that Campbell was not liable, the court, at the request of the parties, stated his reasons for so holding, which are as follows: (1) That the notice sent out by the commissioner to the stockholders was not sufficient as an assessment against Campbell as a former stockholder; (2) there being no evidence that Bodenheim was insolvent, either on the 20th of December, 1915, or the 18th of August, 1916, or on the date when this suit was instituted, or at the time of the trial, and there being no evidence that the commissioner cannot recover from him the full amount sued for with interest, the plaintiff was not entitled to recover from Campbell, even though the assessment made by the commissioner might otherwise be binding upon him; (3) there being no evidence that the commissioner, by exhausting the 100 per cent. liability against the stockholders of the bank as it existed on August 18, 1916, cannot realize an amount sufficient to satisfy the claims against the bank existing on the 20th of December, 1915, the plaintiff could not recover from Campbell, even though the assessment and notice were sufficient. These are the reasons assigned by the honorable trial judge for holding that Campbell, a former stockholder, was not liable in a proceeding where both the pleadings and the evidence were considered sufficient to justify a judgment against Bodenheim, a present stockholder. In this appeal the attack is made only upon the conclusions of law announced by the court.

The question before us is: Were the pleadings and the facts sufficient to require a judgment against Campbell, who had transferred his stock within less than one year prior to the date on which the bank made default in the payment of its debts? Section 16 of article 16 of the Constitution contains this provision:

"The Legislature shall, by general laws, authorize the incorporation of corporate bodies with banking and discounting privileges, and shall provide for a system of state supervision, regulation and control of such bodies which will adequately protect and secure the depositors and creditors thereof. Each shareholder of such corporate body incorporated in this state, so long as he owns shares therein, and for twelve months after the date of any bona fide transfer thereof, shall be personally liable for all debts of such corporate body existing at the date of such transfer, to an amount additional to the par value of such shares so owned or transferred, equal to the par value of such shares so owned or transferred."

[1-3] The statute, which seems to be a substantial repetition of the foregoing, will be found quoted in the findings of the court.

While it is worded differently, it does, not, in our opinion, extend the liability of former stockholders beyond the limits fixed in the Constitution. The phrase, "each stockholder of such corporation," which occurs in the first sentence of the article of the statute, should be construed to mean stockholders owning and holding shares at the time the default is made. When thus construed, there is no material difference between the language of the statute and that of the Constitution; but even if it were otherwise, we think that provision of the Constitution which defines the liability incident to the ownership of shares of stock in banking corporations is self-executing and sufficiently broad to cover this case. The terms of the constitutional provision are very specific:

"Each shareholder, so long as he owns shares, and for twelve months after" he transfers them, "shall be personally liable for all the debts of such corporate body existing at the date of such transfer to an amount," etc.

Section 5151 of the federal statute (Rev. St.), which deals with the liability of stockholders in national banks, is worded somewhat differently. It provides that the shareholders of national banking associations shall be held "individually responsible, equally and ratably, and not one for another, for all contracts, debts," etc. At the time our constitutional amendment was formulated, its authors must have been familiar with this federal statute, which had been in force since 1864; and the failure to employ terms of similar import in framing the amendment is too significant to be overlooked. The variance from the language of the federal law was evidently the result of a design to fortify the protection of the depositors and creditors of state banks by enlarging beyond the limits of the federal statute the individual liability of each shareholder in those banks. They not only made each shareholder liable to the extent of the par value of his stock, but extended that liability for one year from the date of any bona fide transfer for all debts existing upon that date. As to debts then existing, a former stockholder is subject to the same liability as that of a present stockholder.

[4] The next question is: How shall the liability of shareholders be enforced? No formal method has been provided by our statute. Article 459, which is the only provision in any way bearing upon that subject, merely says:

"The commissioner may, if necessary to pay the debts of such state bank, enforce the individual liability of the stockholders."

It would be an unwarranted limitation of the meaning of this article to say that it does not authorize the commissioner to collect from all whose liability depends upon owning, or having owned, shares of stock

in the banking corporation—former shareholders as well as present shareholders. By the banking law the commissioner is made the liquidating agent whose duty it is to collect and assemble for distribution among the creditors of an insolvent bank all the funds available for the payment of its debts. During his administration of the bank's affairs is both the time and the occasion for the exercise of that authority. It devolves upon him to determine when it is necessary to enforce the individual liability of the shareholders and how much each shall pay. A similar authority conferred upon the United States Comptroller of the Currency is considered as a quasi judicial function, and his decision is treated with the same sanctity usually accorded to judicial decrees. *Collier v. Smith*, 169 S. W. 1108, and cases cited. When the commissioner has determined that it is necessary, to settle the bank's debts, that the stockholders shall pay all or a part of that for which they are made liable, and fixes the amount each shall contribute, the debt of each shareholder becomes due and payable. Notice of the amount thus assessed and demanded of him is all that any shareholder may claim as a condition precedent to the filing of a suit against him to compel payment. The notice, however, is not a jurisdictional prerequisite to the filing of the suit by the commissioner where payment is not made; it is only for the purpose of enabling the shareholders to do without suit what he may be compelled to do by suit. Here, again, there is another distinction between our statute and the federal law which authorizes the comptroller to enforce the individual liability of shareholders of national banks. When a national bank becomes insolvent, the comptroller appoints a receiver to take charge of its affairs, and the suit to enforce the liability of the shareholders is instituted by the the receiver under the direction of the comptroller and after the latter has determined that a collection from the shareholders is necessary. Under our statute the commissioner himself takes the steps necessary to enforce the liability of the shareholders. There being no such limitation in our statute as is found in the federal law, the proceedings required to adjust and fix the rateable liability of each shareholder are not essential. When the commissioner in this state sues a stockholder, or a former stockholder, and alleges that it is necessary to enforce the liability of the shareholders in order to pay the debts of the bank, who can say that he has not found that it was necessary? What more can any shareholder demand as a condition to a suit than that he shall be given the opportunity to settle without suit the debt which he may be compelled to pay? When the commissioner sent to Campbell the notice copied in the court's findings of fact, Campbell was inform-

ed that the commissioner had judicially determined that it was necessary to call upon former stockholders, as well as present stockholders, for sums equal to the par value of their stock, in order to pay the debts of the bank. That notice furnished Campbell the opportunity to pay the sum for which he was liable, without a suit. It was not necessary for the commissioner, in order to fix the liability of the shareholders, or of the former shareholders, and render them subject to a suit, to adopt a method of assessment more formal than that followed in this instance. Whatever conclusiveness attached to his findings as to the existing shareholders would logically apply in proceedings against the former shareholders. The reasons for the rule are no less cogent in one case than in the other. If a present stockholder is compelled to pay more than is needed in settling the debts of the bank, he is entitled, at the close of the administration, to a return of the surplus; and the same avenue of relief is open to a former stockholder. If either is compelled to pay a sum larger than his proportional part by reason of the default of others equally liable, he has his remedy for contribution; but such relief is no part of this proceeding.

[5] In the pleadings filed in this suit it was alleged that there existed, at the time Campbell transferred his stock, debts of the bank largely in excess of the par value of Campbell's interest which remained unpaid. It was further alleged that it was necessary to enforce the liability of the stockholders in order to pay those debts, and that the commissioner had so determined. Those averments were sufficient, without pleading in detail what debts the bank owed, to authorize a judgment against Campbell for the full amount sued for. We therefore conclude that the court erred in not so holding.

The judgment in favor of Campbell will be set aside, and a judgment here rendered in favor of the commissioner for the full amount sued for, together with interest at the rate of 6 per cent. per annum from date of the notice sent out by the commissioner, and all costs both of this court and of the court below. The judgment against Bodenheim, not being appealed from, is undisturbed.

#### On Motion for Rehearing.

[6] It is insisted that we erred in holding that article 459 of the Revised Civil Statutes confers upon the commissioner of insurance and banking authority to enforce the liability of a stockholder who had transferred his shares of stock prior to the date the bank was closed because of insolvency. It is argued with much force that the article of the statute referred to is, by its terms, confined to shareholders who had not transferred their shares of stock. It is also contended

that while the liability of a former stockholder continues it becomes, after assignment, secondary to that of the existing stockholders, and can be enforced only in an equitable proceeding in the nature of a creditor's bill. It is true that article 459 uses the language, "the stockholders," in authorizing proceedings by the commissioner, and a literal interpretation would support the proposition asserted by counsel for the appellee. But the question is: Would not that interpretation defeat, in part at least, the manifest purpose of the Legislature in the enactment of this banking law? In the case of *Studebaker v. Perry*, 184 U. S. 258, 22 Sup. Ct. 463, 46 L. Ed. 528, the Supreme Court, in construing the federal statute relating to the double liability of shareholders in national banks, uses this language:

"Such may be the true construction of the statute; but, defeating, as it would in the case supposed, the main and obvious purpose of the enactment, such a construction will only be made by a court when compelled by the necessary meaning of the language."

In determining the full scope of the legislative purpose, the following provisions of the banking act should be considered:

"Art. 453. Whenever any state bank or trust company shall become insolvent and shall voluntarily, or by law, or in any manner as provided in this title, come into the hands of the commissioner of insurance and banking, he may proceed to wind up its affairs, either through a receiver or through some competent person, who shall give bond as may be required by the board, payable to the board, for the faithful performance of all duties imposed upon him. \* \* \*

"Art. 456. Upon taking possession of the property and business of such state bank, the commissioner is authorized to collect moneys due to such corporation, and do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof as provided in this chapter.

"Art. 457. The commissioner shall collect all debts due and claims belonging to such state bank.

"Art. 458. Upon the order of the district court, if in session, or the judge thereof, if in vacation, of the county of which such state bank was located and transacting business, the commissioner may sell or compound all bad or doubtful debts, and, on like order, may sell the real or personal property of such state bank, on such terms as the court shall direct.

"Art. 459. The commissioner may, if necessary to pay the debts of such state bank, enforce the individual liability of the stockholders."

An examination of the foregoing makes it plain that the Legislature intended to confer upon the banking commissioner authority to fully administer the affairs of insolvent state banks, and for that purpose empowered him to collect from all sources the funds that might be used in payment of the claims of the creditors. If the commissioner had no authority to enforce the liability of

former stockholders, his administration might in many instances be only partial; in fact, there might arise cases in which the greater part of the funds available for the payment of the claims of creditors must come from parties who had previously assigned their stock. Unless there is some good reason for withholding from the commissioner the power to enforce the liability of former stockholders, no such construction should be placed upon the statute, since to do so would expose the creditors of insolvent banks to the very hazards and delays which the law seeks to obviate. The same considerations of business policy which justify the remedy prescribed for enforcing the liability of present stockholders apply with equal force to that of former stockholders.

The contention that when a stockholder transfers his shares of stock his liability becomes secondary to that of the remaining shareholders is not sound. Whatever may be the order of liability as between the parties to an assignment of shares of stock, the attitude of the assignor toward the creditors who were such at the date of the assignment continues unchanged during the term of one year. The liability of both parties to the transaction is imposed by law and does not arise from contractual obligations.

[7] As another reason for denying the right of the commissioner to proceed against former stockholders in the same manner he may pursue in enforcing the liability of existing stockholders, it is urged that it would unjustly deprive the former of valid defenses. This is based upon the argument that while present stockholders are liable, to the extent of the par value of their respective shares of stock, for all the debts of the insolvent bank, the liability of former stockholders is for only a part of that indebtedness. That may or may not be true, depending upon the facts of each particular case. Situations may easily arise in which there is no practical difference: As when all of the debts are contracted before the assignment of the stock had been made. In such cases it is not easy to find a satisfactory reason for any discrimination between present and former stockholder in the enforcement of their several liabilities. Nor does it appear that there should be any even where the situation is different. As has been stated, the only difference between the attitude of a former stockholder and that of an existing stockholder toward the creditors of the bank is that one class is liable for all debts, and the other may be liable for only a part.

There is no more injustice in permitting the commissioner to determine that debts exist for which a former stockholder is liable and which render it necessary to enforce his liability than for authorizing him to exercise a similar function as a condition for

proceeding against a present stockholder. The only fact which a former stockholder may plead which is not equally available to an existing stockholder is that the unpaid debts of the bank did not exist when he assigned his stock. In ordinary proceedings in a court of equity both classes of stockholders might question the existence of any debts, or the necessity for enforcing their liability. It is no more inequitable to deprive one of that defense than to take it from the other.

This particular proceeding originated in the district court, and all the defenses which the appellee claims he might have pleaded in a court of equity were set up in his answer. It appears that the court heard evidence upon the issues raised, and found as a fact that the bank owed debts in excess of the sum sued for which existed on the date the appellee assigned his stock to his codefendant, Bodenheim. That being true, the appellee has been deprived of no valid defense.

We are of the opinion that our original construction of the statute as to the powers of the commissioner is correct, and the motion for rehearing is overruled.

**AUSTIN, Com'r of Insurance and Banking, v. KELLY et al. (No. 2043.)**

(Court of Civil Appeals of Texas. Texarkana. Feb. 28, 1919. On Motion for Rehearing, March 20, 1919.)

Appeal from District Court, Gregg County; Daniel Walker, Judge.

Suit by Charles O. Austin, Commissioner of Insurance and Banking, against R. M. Kelly and another. From that part of the judgment denying recovery against defendant named, plaintiff appeals. Reversed and rendered.

F. H. Prendergast, of Marshall, and Edwin Lacy, of Longview, for appellant.

Marsh & McIlwaine, of Tyler, and F. J. McCord and Young & Stinchcomb, all of Longview, for appellees.

HODGES, J. Chas. O. Austin, as commissioner of insurance and banking, filed this suit in the district court of Gregg county on June 29, 1917, against G. A. Bodenheim, a stockholder in the People's State Bank of Longview, and R. M. Kelly, a former stockholder, seeking to recover the sum of \$1,000, the face value of their stock. The proof showed that Kelly owned stock of the par value of \$1,000 on the 8th day of December, 1915, and on that date transferred it to G. A. Bodenheim. On the 18th day of August, 1916, the bank became insolvent and its affairs were placed in the hands of the commissioner of insurance and banking. In a trial before the court a judgment was rendered in favor of the commissioner against Bodenheim for the full amount sued for, but he was denied a recovery against Kelly. The court filed his

findings of fact and conclusions of law, which are the same as will be found set out in the opinion this day rendered in *Austin v. T. D. Campbell et al.*, 210 S. W. 277.

For the reasons stated in that opinion, the judgment in favor of Kelly will be reversed, and judgment here rendered against him for the full amount sued for, together with interest and costs.

On Motion for Rehearing.

The motion for a rehearing in this case is overruled, for the reasons stated in the companion case of *Austin v. Campbell et al.*, 210 S. W. 277, this day decided by this court.

**AUSTIN, Com'r of Insurance and Banking, v. YATES et al. (No. 2044.)**

(Court of Civil Appeals of Texas. Texarkana. Feb. 28, 1919. On Motion for Rehearing, March 20, 1919.)

Appeal from District Court, Gregg County; Daniel Walker, Judge.

Suit by Charles O. Austin, Commissioner of Insurance and Banking, against Mrs. J. W. Yates and another. From that portion of the judgment denying recovery against defendant named, plaintiff appeals. Reversed and rendered.

F. H. Prendergast, of Marshall, and Edwin Lacy, of Longview, for appellant.

Marsh & McIlwaine, of Tyler, and F. J. McCord and Young & Stinchcomb, all of Longview, for appellees.

HODGES, J. On June 29, 1917, Chas. O. Austin, as commissioner of insurance and banking, filed this suit against G. A. Bodenheim, a stockholder in the People's State Bank of Longview, and Mrs. J. W. Yates, a former stockholder in that bank, seeking to recover the sum of \$2,000, the par value of stock then held by Bodenheim in the above-named bank. The proof showed that Mrs. Yates owned this stock on the 8th of December, 1915, and on that date sold and transferred it to Bodenheim. On the 18th of August, 1916, the bank became insolvent and its affairs were placed in the hands of the commissioner of insurance and banking. In a trial before the court judgment was rendered in favor of the commissioner against Bodenheim for the full amount sued for, but a recovery against Mrs. Yates was denied. It is from that portion of the judgment that the commissioner has appealed.

The court filed findings of fact and conclusions of law which are the same as will be found in the case of *Austin v. T. D. Campbell et al.*, 210 S. W. 277, this day decided by this court.

For the reasons stated in that opinion, the judgment in favor of Mrs. Yates will be reversed, and judgment will be here rendered against her for the full amount sued for, together with interest and costs.

On Motion for Rehearing.

The motion for a rehearing in this case is overruled, for the reasons stated in the companion case of *Austin v. Campbell et al.*, 210 S. W. 277, this day decided by this court.

AUSTIN, Com'r of Insurance and Banking, v. HUFFMAN et al. (No. 2045.)

(Court of Civil Appeals of Texas. Texarkana. Feb. 28, 1919. On Motion for Rehearing, March 20, 1919.)

Appeal from District Court, Gregg County; Daniel Walker, Judge.

Suit by Charles O. Austin, Commissioner of Insurance and Banking against T. E. Huffman and J. N. Campbell. From that part of the judgment denying recovery against defendant last named, plaintiff appeals. Reversed and rendered.

F. H. Prendergast, of Marshall, and Edwin Lacy, of Longview, for appellant.

Marah & McIlwaine, of Tyler, and F. J. McCord and Young & Stinchcomb, all of Longview, for appellees.

HODGES, J. Chas. O. Austin, as commissioner of insurance and banking, filed this suit in the district court of Gregg county on June 29, 1917, against T. E. Huffman, a stockholder in the People's State Bank of Longview, and J. N. Campbell, a former stockholder, seeking to recover the sum of \$1,000, the face value of stock then owned by Huffman. The record shows that Campbell, the former owner, transferred the stock to Huffman on February 5, 1916; and on the 18th day of August, 1916, the commissioner of insurance and banking took charge of the affairs of the bank as provided for in the statute. In the court below judgment was rendered in favor of the commissioner for the full amount sued for against Huffman, but the court refused a judgment against Campbell; and this appeal is from that portion of the judgment.

The case was tried before the court without a jury, and he filed findings of fact and conclusions of law which are the same as those filed in the case of Austin v. T. D. Campbell et al., 210 S. W. 277, this day decided by this court.

For the reasons stated in that case, the judgment of the trial court will be reversed, and judgment here rendered in favor of the commissioner against J. N. Campbell, together with interest and costs.

On Motion for Rehearing.

The motion for a rehearing in this case is overruled, for the reasons stated in the companion case of Austin v. Campbell et al., 210 S. W. 277, this day decided by this court.

EL PASO & S. W. R. CO. v. LOVICK.  
(No. 933.)

(Court of Civil Appeals of Texas. El Paso. March 6, 1919. Rehearing Denied March 27, 1919.)

1. TIME  $\S$ 9(1) — COMPUTATION — EXCLUDING FIRST DAY.

An order of the Director General of Railroads dated April 9, 1918, became effective

from the first moment of that date and covers all transactions of that date to which it is applicable.

2. RAILROADS  $\S$ 5½, New, vol. 6A Key-No. Series — ACTIONS AGAINST — GOVERNMENT CONTROL.

Orders Nos. 18 and 18a of the Director General of Railroads dated April 9 and 18, 1918, in so far as they require all suits against carriers under federal control to be brought in county or district where plaintiff resides or resided at the time of the accrual of the cause or in the county or district where the cause arose, is inconsistent with and contrary to Act. Cong. March 21, 1918,  $\S$  10 (U. S. Comp. St. 1918,  $\S$  3115½), providing "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law."

3. RAILROADS  $\S$ 5½, New, vol. 6A Key-No. Series — ACTIONS FOR INJURY — ABATEMENT — ORDERS OF THE DIRECTOR GENERAL.

The General Order No. 26 of the Director General of Railroads under federal control, May 23, 1918, ordering that actions and suits included under General Order No. 18 should abate during federal control, is inconsistent with and contrary to Act Cong. March 21, 1918,  $\S$  10 (U. S. Comp. St. 1918,  $\S$  3115½), providing that actions at law or suits in equity may be brought by or against such carriers and judgments rendered as now provided by law.

4. APPEAL AND ERROR  $\S$ 1043(7) — HARMLESS ERROR — CONTINUANCE — ABSENCE OF WITNESSES.

The overruling of a motion for continuance on ground of absence of witnesses presents no reversible error, where the witnesses were present at the trial and testified.

5. MASTER AND SERVANT  $\S$ 288(1) — INJURIES TO SERVANT — ASSUMPTION OF RISK — QUESTION FOR JURY.

In an action by a switchman engaged in interstate commerce against a railroad company for personal injuries, evidence held sufficient to go to the jury on the issue of assumed risk.

6. MASTER AND SERVANT  $\S$ 240(3) — INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE.

Where plaintiff, suing for injuries received while working as defendant's switchman, attempted to board the engine at the designated place on the footboard for another switchman, who had assumed plaintiff's station thereon, and was thrown and injured by the other's attempt to assume his proper station, held, that plaintiff was in the exercise of due care.

7. TRIAL  $\S$ 253(4) — INSTRUCTIONS — IGNORING ISSUES.

In an action by a switchman to recover from railroad company for personal injuries, requested charges which ignored the issue of negligence of a fellow switchman held properly excluded.

8. APPEAL AND ERROR  $\S$ 231(9) — OBJECTION — SUFFICIENCY.

An objection urged in the court below, that "because paragraph 6 of said charge upon the

subject of assumed risk is erroneous," is too general for consideration upon appeal.

**9. DAMAGES  $\Rightarrow$  132(3)—EXCESSIVE DAMAGES—BROKEN BACK.**

Where plaintiff's back was broken and he has suffered and still suffers great pain, his earning capacity has been greatly impaired, and he is deformed and crippled for the balance of his life, a verdict for \$22,500 is not excessive.

Appeal from District Court, El Paso County; Ballard Coldwell, Judge.

Suit by Robert L. Lovick against the El Paso & Southwestern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. M. Peticolas and Del W. Harrington, both of El Paso, for appellant.

A. L. Curtis, of Belton, Winbourn Pearce, of Temple, and Geo. E. Wallace, of El Paso, for appellee.

**Statement of Case.**

HIGGINS, J. On April 9, 1918, appellee, Lovick, filed this suit in the district court of El Paso county, Tex., against appellant, to recover damages arising from personal injuries. The accident upon which the suit is based occurred at Bisbee, Ariz., on October 7, 1917. At the time of the accident, appellee was in the service of appellant as a switchman in the Bisbee yards. He based his suit upon alleged negligence of W. L. Van Winkle, a fellow switchman, in the manner of the latter boarding the switchboard of a switch engine. Appellee alleged that he was a citizen of Texas, but did not allege the county of his residence either at the time of the accident or at the date upon which the suit was filed.

Appellant filed a plea in abatement setting up the President's proclamation of December 26, 1917, by virtue of which possession had been taken and control of its system of transportation assumed by the government; also, pleading the various acts of Congress and orders of the Director General hereinafter mentioned; that the asserted cause of action arose in Cochise county, Ariz., and at the time of the accident Lovick resided in said county. It was also averred that to try the suit in El Paso county would prejudice the just interests of the government, in that it would be necessary to bring certain witnesses to El Paso county, namely, W. L. Van Winkle, W. G. Grace, switchmen, and R. M. Booker, engineer, all of whom were in appellant's service at and near Cochise county, Ariz., and engaged in hauling war materials, troops, munitions, and supplies. On October 3, 1918, the plea in abatement was overruled. The action of the court upon the plea is the first question presented for review.

**Opinion.**

[1] It will be noted that the suit was filed April 9, 1918, which was the date upon which General Order 18 was issued. Under the rule announced in *Lapeyre v. United States*, 17 Wall 191, 21 L. Ed. 606, the order became effective from the first moment of that day and covers all transactions of that date to which it is applicable. See, also, *United States v. Norton*, 97 U. S. 164, 24 L. Ed. 907; *Leldigh Carriage Co. v. Stengel*, 95 Fed. 637, 37 C. C. A. 210.

[2] By the act of Congress approved August 29, 1916 (chapter 418, 39 Stat. 645 [U. S. Comp. St. 1918, § 1971a]), the President, in time of war, was empowered, through the Secretary of War, to take possession and assume control of any system of transportation and to utilize same for certain purposes therein specified.

This country being at war, the President, by proclamation dated December 26, 1917 (U. S. Comp. St. 1918, § 1974a), took possession and assumed control of each and every railroad transportation system within the boundaries of the continental United States. It directed that the possession, operation, and utilization of such systems should be exercised by and through Wm. G. McAdoo, who was thereby appointed and designated Director General of Railroads. This provision was contained in the proclamation:

"Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine."

The act of August 29, 1916, was supplemented by the act approved March 21, 1918 (chapter 25), the eighth, ninth, and tenth sections (U. S. Comp. St. 1918, §§ 3115½h, 3115½i, 3115½j) whereof read:

"Sec. 8. The President may execute any of the powers herein and heretofore granted him with relation to federal control through such agencies as he may determine. \* \* \*

"Sec. 9. The provisions of the act entitled 'An act making appropriations for the support of the Army for the fiscal year ending June thirteenth, nineteen hundred and seventeen, and for other purposes,' approved August twenty-ninth, nineteen hundred and sixteen, shall remain in force and effect except as expressly modified and restricted by this act; and the President, in addition to the powers conferred by this act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred. The provisions of this act shall also apply to any carriers to which federal control may be hereafter extended.

"Sec. 10. Carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of such federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such federal control."

By proclamation dated March 29, 1918 (U. S. Comp. St. 1918, § 3115½h) the President authorized the Director General:

"To issue any and all orders which may in any way be found necessary and expedient in connection with the federal control of systems of transportation, railroads, and inland waterways as fully in all respect as the President is authorized to do, and generally to do and perform all and singular all acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject hereof, the President is authorized to do and perform."

On April 9, 1918, the Director General issued General Order No. 18, the material portion whereof reads:

"Whereas it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in states and jurisdictions far remote from the place where the plaintiff resides or where the cause of action arose; the effect thereof being that men operating the trains engaged in hauling war material, troops, munitions, or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operations of railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs.

"It is therefore ordered that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose."

On April 18, 1918, the Director General issued General Order No. 18a, which reads:

"General Order No. 18 issued April 9th, 1918, is hereby amended to read as follows:

"It is therefore ordered that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

On May 23, 1918, the Director General issued General Order No. 26, the material portions of which read as follows:

"Whereas it appears that there are now pending against carriers under federal control a great many suits for personal injury, freight and damage claims, and the same are being pressed for trial by the plaintiffs in states and jurisdictions far removed from the place where the persons alleged to have been injured or damaged resided at the time of such injury or damage, or far remote from the place where the cause of action arose; the effect of such trials being that men operating the trains engaged in hauling war materials, troops, munitions or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice interferes with the physical operation of railroads; and the practice of trying such cases during federal control in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs:

"It is therefore ordered, that upon a showing by the defendant carrier that the just interests of the government would be prejudiced by a present trial of any suit against any carrier under federal control which suit is covered by General Order No. 18 and which is now pending in any county or district other than where the cause of action arose or other than in which the person alleged to have been injured or damaged at that time resided, the suit shall not be tried during the period of federal control; provided, if no suit on the same cause of action is now pending in the county or district where the cause of action arose, or where the person injured or damaged at that time resided, a new suit may, upon proper service, be instituted therein; and if such suit is now barred by the statute of limitations, or will be barred before October 1, 1918, then the stay directed by this order shall not apply unless the defendant carrier shall stipulate in open court to waive the defense of the statute of limitations in any suit which may be brought before October 1, 1918.

"This order is declared to be necessary in the present war emergency. In the event of unnecessary hardship, in any case either party may apply to the Director General for relief, and he will make such order therein as the circumstances may require consistent with the public interest.

"This order is not intended in any way to impair or affect General Order No. 18 as amended by General Order No. 18a."

This court assumes that the Director General was authorized to issue such executive orders as was necessary to carry out the purpose for which possession was taken of

the transportation systems, not inconsistent with the acts of Congress.

In our opinion the orders relied upon by appellant are inconsistent with and contrary to that portion of the act of March 21, 1918, which provides:

"Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law."

Lovick's cause of action was transitory and maintainable wherever a court might be found having jurisdiction of the parties and subject-matter. *Ry. Co. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. 397, 58 L. Ed. 695. His right of action arose on October 7, 1917, and, when Congress passed the act of March 21st, he then had the right to institute suit thereon in the district court of El Paso county, Tex., and prosecute the same to judgment. How can the Director General deprive him of the right to resort to that court when Congress has said that his action might be brought as then provided by law? How can his action be stayed by an executive order when Congress has protected his right to the rendition of a judgment as it existed on March 21, 1918.

In the opinion of this court that portion of section 10 above quoted protected plaintiff against executive interference with his right to resort to any court having jurisdiction of the subject-matter and person of defendant and his further right to prosecute his suit to judgment. We regard the language employed as plainly indicative of the congressional intent in this respect. But if this intent and meaning of the act cannot be readily ascertained from the words used, it nevertheless becomes apparent when considered in connection with the antecedent proclamation of the President dated December 26, 1917. In this proclamation the President ordered that, except with the written assent of the Director, no attachment by mesne process or on execution should be levied on or against any of the property used by any of the transportation systems in the conduct of their business as common carriers; but that suits might be brought by and against the carriers and judgments rendered as hitherto until and except so far as the Director might, by general or special orders, otherwise determine. There are two features of the act which obviously relate to that portion of the proclamation. The first is the provision with reference to actions at law, suits in equity, and rendition of judgments. The second is:

"But no process, mesne or final, shall be levied against any property under such federal control."

It is significant that whereas, under the proclamation, suits might be brought against such carriers and judgments rendered as hitherto, until and except as the Director

might, by order, otherwise determining, the act itself expressly stipulated that actions at law and suits in equity might be brought against such carriers and judgments rendered as then provided by law, and that, whereas, under the proclamation, mesne process or execution could be levied with the prior written assent of the Director, under the act of Congress it was absolutely forbidden.

These features of the act manifest the interest of Congress to be that under no circumstances was the property of the carriers to be subject to levy and that the right of litigants to bring actions and have judgments rendered as such rights then existed was preserved and protected against future executive interference which was plainly forecast in the proclamation of December 26th.

For the reasons indicated, the trial court did not err in refusing to abate the suit or stay the trial.

[3, 4] Appellant also assigns error to the action of the court in overruling its motion to continue the case during federal control. The motion sets up General Order 26; that W. L. Van Winkle, W. P. Grace, R. M. Booker, and J. H. Smith were material witnesses for defendant; that they resided at Bisbee, Ariz., in the service of defendant, and to bring them to El Paso to testify would prejudice the just interests of the government. What has heretofore been said applies to order 26, but, if the validity of the order should be conceded, the overruling of the motion presents no reversible error for the reason that Grace, Booker, and Smith were in fact present and testified, and Van Winkle was in attendance and could have been placed upon the stand had his testimony been material to the defense. In this condition of the record, the overruling of the motion presents no ground for reversal.

[5] The fourth and fifth assignments assert that the verdict and judgment are contrary to and unsupported by the evidence; the sixth, seventh, and ninth that a peremptory instruction should have been given in defendant's favor. The evidence has been examined, and in our opinion was sufficient to submit to the jury the issue of negligence and that it did not justify the court in assuming as a matter of law that the plaintiff had assumed the risk. The evidence quoted in passing upon the eighth assignment sufficiently shows that the issues of negligence and assumed risk were questions for the jury. For this reason those assignments are overruled.

[6] The eighth assignment reads:

"Because the court erred in the court's charge to the jury because said charge submits the action of the switchman Van Winkle in stepping from the outside of the footboard to the inside as negligence; and in effect submits the manner of so stepping as negligence."



The supporting propositions read:

(1) "It is error for the court to submit, as a question of negligence for the jury to decide, the method alleged to have been employed by a switchman to mount and take his place on the footboard of an engine, when such method is shown by the undisputed testimony of plaintiff's own witnesses to be a customary and usual one in use by the switchmen in the performance of their duties."

(2) "When the only inference that can be reasonably drawn from the evidence is that a switchman, in the performance of a duty incident to his employment, conformed to the general usage of railway employes in performing such duties, such switchman was, as matter of law, in the exercise of due care."

If the evidence was as indicated by the propositions, reversible error would be presented; but it is not so regarded. That portion of the charge here complained of reads:

"If you find from a preponderance of the evidence that, at the time and place complained of by plaintiff, he was in the act of mounting one of defendant's engine footboards, as alleged by him; and if you further find that one of defendant's switchmen, Van Winkle, stepped from the outside of such footboard to the inside thereof, and that said Van Winkle was negligent in so stepping at the time and place he so stepped, if he did; and you further find that the negligence of said Van Winkle was approximate cause of the injuries to plaintiff complained of by him—you will find for the plaintiff, unless you find for the defendant under some other paragraph of this charge."

At the time of the accident, Lovick and Van Winkle were serving in the same switching crew. Lovick was what is known in switching parlance as the "long field" man; Van Winkle as the "short field" man. The switch engine was backing towards the two men, and in the discharge of their duty they were to board the footboard of the engine as it reached them. They were both on or near the track, Van Winkle being between Lovick and the approaching engine and about 12 or 15 feet closer to the engine than Lovick was. According to the rule and custom, the members of a switching crew as they board the footboard line up on the same; a different place being assigned to each man. The place for the foreman is on the engineer's side of the engine at the outer end; the man that follows the engine is next to him on the same side of the engine and between the foreman's position and the drawbar in the center of the engine; the "long field" man is on the fireman's side of the engine at the outer end of the footboard; the "short field" man is on the same side of the engine and between the long field man and the drawbar in the center. The position, beginning on the fireman's side, is then in this order: The long field man, short field man, the man following the engine, and the foreman with the drawbar separating the second and third mentioned men. The engine does not stop,

but the men board it as it is in motion. It is the custom for the men to get on in their designated places. If, for any reason, he gets on out of his designated place, it is the rule and custom and his duty to immediately and without hesitation move thereto; the boarding and moving being a continuous operation. Lovick testified that, when the engine approached, Van Winkle boarded the same in his (Lovick's) designated place on the footboard. He further testified:

"I watched for a second, and he made no effort to move, and that only left me one place, and that was his place; he having got in my place. \* \* \* The instructions were, that is to me, in a way, should you, through error or for any other reason, get on the footboard out of your assigned place or proper place, under no condition, move, unless you were sure all the men were on the footboard or in the clear of the track, for you are liable to kill the others, you having got out of your place, would leave only one place for him, and he would expect to get in that vacant place. Yes, the foreman had instructed me how to get on the engines as they approached, although I needed no special instructions. It was customary in the yards at Bisbee for the switchman, foremen, and yardmen to get on moving engines, and should you fail to you would not accomplish your work, and no foreman would have a man that didn't. I have been working all my life, and I never saw one stop an engine. I have seen General Yardmaster Smith do it many times, and I have been on the footboard with him. Yes, sir; I noticed Van Winkle on in my place, and I couldn't understand what he meant. I watched him a few minutes, and, like I say, he was 12 or 15 feet down the track—I am not positive. I watched him a few minutes; he never turned around, and I couldn't understand. That only left one place for me, and that was the place left vacant by him, so I stepped over to get on the footboard, and, the instant I put my foot up, Van Winkle, without ever turning around, had moved over, and my foot hit his heels and I went under the locomotive. Yes, when I saw Van Winkle occupying my place, and I thought he was not going to move, I stepped over to the place reserved for him. At the time I noticed Van Winkle on the footboard in my place, I was standing at the outer side of the track, which was the proper place for me to be to board the footboard in my place, for the long field man. Mr. Grace had been talking to us just a few minutes prior to the accident. He was close by there. I went under the locomotive, I don't know, it seemed to throw me over three or four times."

The foreman, Grace, also testified:

"If a man would get on here, on the outside, and was intending to move to the center, with a man immediately behind to get on the outside, he would get on with a continuous movement to the center, step there and his next foot would be over here, draw it up that way. Yes, there are two rods there to catch hold of. If he gets on the center, he would make a straight step to the center. Both of those ways are practiced in the yards at Bisbee. If you were going to step up there and remain, of course,

he has something here to hold to, and when he got up he would be in that position (with both feet up). If I was working as long field man and I was standing immediately behind the short field man, and he got on the footboard in that position (last position) and remained stationary, the only thing for me to do would be to step this way and in that position, that would be in the center—that is, if I intended to get on the engine at all and do my work. \* \* \* Assuming that the long field man and the short field man are standing, say, 12 feet apart along the track, with the short field man closer to the engine, it is customary for him to get on the outside of the footboard and then move over next to the drawbar. It is customary for each man, having his designated place on the footboard, either to get on in his designated place or to move to his place immediately, without hesitation. Yes, it is the universal custom, either to get on in his designated place, or immediately to move to that designated place. As I stated, if I were going to get on the engine at all, being the long field man following the short field man who had gotten on the outside of the footboard and remained there, I would get on the center; there wouldn't be anything else to do, under the circumstances, if he wanted to get on. Well, yes; he could have stepped off out of the way and let the engine go by, and, if he had done that, he wouldn't have been run over."

Under the evidence detailed, it will be observed that, when Van Winkle boarded the footboard in Lovick's designated position, it was Van Winkle's duty, under the established rule and custom, to instantly and by one continuous movement move over to his own position. Having failed to do so, Lovick, under the evidence, was in the exercise of due care in attempting to board the engine in Van Winkle's designated place. Van Winkle did not mount and take his position on the footboard in the usual and customary way as is assumed by the propositions relied upon by appellant. Hence the rule of law which they announce is inapplicable.

[7] Error is assigned to the refusal of special charges 3 and 4, which read:

No. 3. "If you believe that it was the habitual and usual custom among the switchmen, and known to the plaintiff, that the short field man should occupy a place next to the drawbar on the footboard, and that the long field man should occupy a place further toward the outside end of the footboard, and you believe that Van Winkle was short field man and Lovick was long field man, and that Lovick saw and knew that Van Winkle had boarded the footboard of the engine, you are instructed that Lovick assumed the risk of attempting to board the footboard next to the drawbar, and your verdict will be for the defendant."

No. 4. "In the event you believe that it was the habitual and usual custom of this and other

switch crews known to the plaintiff that the short field man's place on the footboard was next to the drawbar and the long field man's place was further toward the outer end of the footboard, and you believe that Van Winkle was short field man and Lovick was long field man, and believe that Lovick knew that Van Winkle had boarded the footboard and that Lovick attempted to board the footboard from inside the rail, or directly in front of the engine, then you are instructed that he assumed the risk, and your verdict will be for the defendant."

These charges were properly refused, because they ignore the issue of negligence upon Van Winkle's part, presented by that phase of the evidence which shows that since Van Winkle did not promptly move to the center of the footboard next to the drawbar as he should have done, that Lovick had a right to assume that Van Winkle would not so move after stopping, and that he, Lovick, could safely board in the center. There is nothing in the evidence to show that the risk of such negligence on Van Winkle's part was assumed.

[8] The twelfth assignment complains of the sixth paragraph of the court's charge upon assumed risk. The charge sufficiently conveys the correct conception of the doctrine as applied to the facts presented. We do not think the jury was misled thereby. Furthermore, the exception to this portion of the charge as made in the court below is not regarded as sufficiently specific to support the criticism now made. The objection which appellant urged in the court below was: "Because paragraph 6 of said charge upon the subject of assumed risk is erroneous." This objection was too general. The objection which a party has to a charge should be presented to the trial court with sufficient particularity and certainty that the court may see the error, if any, and correct it. The objection made to the court below in this case was too general. *Petty v. City of San Antonio*, 181 S. W. 224; *Steele Co. v. Dover*, 170 S. W. 809; *Ry. Co. v. Petersikka*, 176 S. W. 70; *Ry. Co. v. Thomas*, 175 S. W. 822; *Ry. Co. v. Casey*, 172 S. W. 729.

[9] The thirteenth and fourteenth assignments complain, respectively, of argument of counsel and excessiveness of the verdict and judgment. These are regarded as without merit. Plaintiff's back was broken. He has suffered and still suffers great pain. His earning capacity has been greatly impaired. He is deformed and crippled for the balance of his life. A verdict for \$22,500 is not excessive.

Affirmed.

## WARD et ux. v. CATHEY. (No. 8985.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 15, 1919. Rehearing Denied  
March 22, 1919.)

1. APPEAL AND ERROR  $\Leftrightarrow$ 1064(4)—HARMLESS ERROR—INSTRUCTIONS.

An instruction defining "ordinary care" as meaning exercise of that degree of care and prudence under given circumstances which a person of reasonable or ordinary "care" would exercise under same or similar circumstances, though not happily worded, *held* harmless.

2. APPEAL AND ERROR  $\Leftrightarrow$ 1068(2)—HARMLESS ERROR—INSTRUCTIONS.

An instruction improperly defining "care" *held* not reversible error, where judgment was sustained by findings on other issues.

3. MUNICIPAL CORPORATIONS  $\Leftrightarrow$ 705(4)—COLLISIONS WITH PEDESTRIANS—AUTOMOBILES—ORDINANCES.

Violation of city ordinance prohibiting an automobilist from passing a standing street car constituted negligence per se.

4. APPEAL AND ERROR  $\Leftrightarrow$ 1064(4)—HARMLESS ERROR—INSTRUCTIONS.

Error in definition of "ordinary care" cannot constitute error of a prejudicial nature, unless charge necessarily entered into and confused jury in considering issue of contributory negligence.

5. MUNICIPAL CORPORATIONS  $\Leftrightarrow$ 705(10)—COLLISIONS WITH PEDESTRIANS—CONTRIBUTORY NEGLIGENCE.

One stepping from a sidewalk to board a street car is not required to anticipate that an automobile would approach and attempt to pass the entrance into the street car in violation of a city ordinance.

6. MUNICIPAL CORPORATIONS  $\Leftrightarrow$ 705(10)—COLLISIONS WITH PEDESTRIANS—CONTRIBUTORY NEGLIGENCE.

A pedestrian who left curb to enter street car was not negligent in turning from street car back in direction of curb, being terrorized by wrongful act of automobilist in passing a standing street car in violation of a city ordinance.

7. DEATH  $\Leftrightarrow$ 89(5)—DAMAGES—AMOUNT.

In action by a woman 55 years of age for death of daughter earning \$50 per month, a verdict of \$8,000 cannot be said to be excessive where plaintiff depended upon daughter for support, and daughter was in all respects an admirable character of exemplary habits and constantly increasing in efficiency as a stenographer.

8. EVIDENCE  $\Leftrightarrow$ 338(11)—LIFE EXPECTANCY—CONCLUSIVENESS.

The jury is not bound by general averages in life insurance tables in determining life expectancy.

9. DEATH  $\Leftrightarrow$ 88—DAMAGES—ELEMENTS.

In action for death of daughter, jury in fixing damages may consider fact that in time

of sickness of plaintiff deceased would, if alive, attend and care for her with tenderness.

10. DEATH  $\Leftrightarrow$ 87—DAMAGES—EVIDENCE.

In action for death, court properly permitted proof that efficiency of deceased as a stenographer was increasing, and would probably increase in future, so that her earning capacity would be greater than at time of her death.

11. EVIDENCE  $\Leftrightarrow$ 18—JUDICIAL NOTICE—HIGH COST OF LIVING.

In considering a question of excessiveness of verdict for personal injuries, court may take judicial knowledge of fact that wages have increased, and that purchasing value of a dollar has been decreased many times.

Appeal from District Court, Tarrant County; Ben M. Terrell, Judge.

Suit by Mrs. G. A. Cathey against W. B. Ward, Jr., and wife. From judgment for plaintiff, defendants appeal. Affirmed.

Thompson, Barwise, Wharton & Hiner and Lattimore, Bouldin & Lattimore, all of Ft. Worth, for appellants.

R. L. Carlock and Massingill & McDonald, all of Ft. Worth, for appellee.

CONNER, C. J. This suit was instituted by the appellee, Mrs. G. A. Cathey, against W. B. Ward, Jr., and his wife for damages for causing the death of Leona Cathey, daughter of Mrs. G. A. Cathey, who was run over and killed on a public street in the city of Ft. Worth by an automobile driven at the time by Mrs. W. B. Ward, Jr.

It was alleged, in substance, that the deceased daughter, Leona Cathey, was approaching a street car for the purpose of taking passage thereon, and that while walking from the sidewalk or curb near the intersection of Ninth and Main streets that Mrs. Ward approached and attempted to pass said street car, which had stopped for the purpose of taking on passengers; that she was driving at an excessive rate of speed without giving any warning of her approach, and that in these particulars she was negligent; that in so attempting to pass the street car she violated an ordinance of the city of Ft. Worth which prohibited persons from driving an automobile past a street car which had stopped for the purpose of taking on or letting off passengers. It was also alleged that Mrs. Ward was negligent in failing to keep a proper lookout to discover persons on the street and near the street car.

The case was submitted to a jury on special issues, and upon the jury verdict the court rendered a judgment in favor of the plaintiff, Mrs. Cathey, against W. B. Ward, Jr., and wife in the sum of \$8,000 and they have appealed from the judgment so rendered.

The following are the issues that were sub-

mitted together with the answers of the jury thereto:

"Issue No. 1: Was it or not the purpose and intention of the deceased, Leona Cathey, just before the accident occurred, to take passage on board a street car near the corner of Ninth and Main streets? Answer 'Yes' or 'No.'

"Answer: Yes.

"Issue No. 2: Was the Polytechnic street car testified about by the witnesses stopped for the purpose of taking on or letting off passengers at the usual stopping place near Ninth and Main streets before the time that the automobile passed the rear entrance of said street car? Answer 'Yes' or 'No.'

"Answer: Yes.

"Issue No. 3: If you answer 'No' to the last preceding issue, then you need not answer this issue. But, if you answer 'Yes,' then state whether or not the defendants' automobile stopped before passing the rear entrance of said street car where passengers ordinarily enter and leave the car. Answer 'Yes' or 'No.'

"Answer: No.

"Issue No. 4: If you answer 'No' to the last preceding issue, then state whether or not such failure on the part of the driver of said automobile to stop the said automobile before passing the said rear entrance of said street car where passengers ordinarily get on or off, if such be your finding, constituted a violation of the city ordinance read in evidence, which prohibits any automobile from passing any street car going in the same direction stopped for the purpose of taking on or letting off passengers. Answer 'Yes' or 'No.'

"Answer: Yes.

"Issue No. 5: If you answer 'Yes' to the preceding issue, then state whether the violation of such ordinance, if you have found that the defendants did violate the same, proximately contributed to cause or bring about the accident to the deceased. Answer 'Yes' or 'No.'

"Answer: Yes.

"Issue No. 6: State whether or not the driver of the said automobile was negligent in the way and manner that she approached and attempted to pass the said street car just prior to the happening of said accident. Answer 'Yes' or 'No.'

"Answer: Yes.

"Issue No. 7: If you answer 'Yes' to the last issue, then state whether such negligence, if any you find, proximately caused the happening of the said accident to the deceased, Leona Cathey. Answer 'Yes' or 'No.'

"Answer: Yes.

"Issue No. 8: Did the driver of the said automobile at the time of and just prior to the happening of said accident give any warning to the deceased, by sounding the horn or otherwise, of her intention to pass the said street car? Answer 'Yes' or 'No.'

"Answer: No.

"Issue No. 9: If you answer 'No' to the last preceding issue, then state whether it was negligence on the part of such driver not to do so, if you have found that she did not do so. Answer 'Yes' or 'No.'

"Answer: Yes.

"Issue No. 10: You will also state whether such failure, if any, to give such warning, proximately contributed to cause the death of the

said Leona Cathey. Answer 'Yes' or 'No.'

"Answer: Yes.

"Issue No. 11: Did the driver of the said automobile, in approaching the place where the deceased was struck and run over by said automobile, keep such a lookout ahead to avoid running upon or injuring the deceased as a person of ordinary care would have done under the same or similar circumstances? Answer 'Yes' or 'No.'

"Answer: No.

"Issue No. 12: If your answer to the last preceding issue should be 'No,' then state whether such failure, if any you find, to keep said lookout ahead, proximately contributed to cause the production of the said accident. Answer 'Yes' or 'No.'

"Answer: Yes.

"Issue No. 13: Did the driver of said automobile fail to use ordinary care with regard to the speed of said automobile in operating same along Main street at and just prior to the happening of said accident? Answer 'Yes' or 'No.'

"Answer: Yes.

"Issue No. 14: If your answer to the last preceding issue be 'Yes,' then state if such act or conduct on the part of the said driver proximately contributed to cause the death of the said Leona Cathey. Answer 'Yes' or 'No.'

"Answer: Yes.

"Issue No. 15: Just prior to the accident did Miss Cathey leave the sidewalk or some point near the sidewalk and walk in a direction towards the street car? Answer 'Yes' or 'No.'

"Answer: Yes.

"Issue No. 16: If you answer 'Yes' to the last preceding issue, then state whether or not there was anything to obstruct her view of the approaching automobile if she had looked for the approach of the same. Answer 'Yes' or 'No.'

"Answer: No.

"Issue No. 17: If you find that she did walk from a point near the sidewalk towards the street car, and if you find that while doing so, and prior to the accident, by looking for the approach of said automobile, she could have seen it in time to have avoided the accident, say whether or not a reasonably prudent person, in the exercise of ordinary care, would have looked for the approach of an automobile under the same or similar circumstances. Answer 'Yes' or 'No.'

"Answer: No.

"Issue No. 18: State whether or not the accident to Miss Cathey was caused by reason of her turning from the point where she was standing as the automobile approached and moving towards it, or in such direction as caused the left fender of the car to strike her. Answer 'Yes' or 'No.'

"Answer: No.

"Issue No. 19: If you answer the above issue in the affirmative, state whether or not a person of reasonable care and prudence, under all the surrounding circumstances, would have seen the approach of said car in time to have avoided the accident. Answer 'Yes' or 'No.'

"Answer: No.

"Issue No. 20: State from the evidence the amount of damages sustained, if any, by the plaintiff on account of the death of her daughter.

ter, Leona Cathey. In ascertaining the amount of damages, if any, you will say what amount of money, paid now, will in your judgment reasonably and fairly compensate the plaintiff for the loss of such pecuniary benefits, if any, as you may believe from the evidence plaintiff had a reasonable expectation of receiving from her daughter had she not been killed on the occasion of said accident; and in determining such pecuniary loss, if any, you have a right to take into consideration the age and accomplishments of Leona Cathey, and also to consider the probabilities as to how long she would have contributed to the support of the plaintiff, and whether or not the same would have increased or diminished from time to time in the future; but in estimating the damages herein, if any you find, you will exclude from your consideration any allowance for grief or sorrow endured by the plaintiff or for the loss of the daughter's companionship or society or by way of solace.

"Answer: \$8,000."

[1, 2] Together with the issues the court submitted several general instructions with appropriate application, among which was a definition of "ordinary care" in the following words:

"'Ordinary care,' as that term is used in this charge, means the exercise of that degree of care and prudence under given circumstances which a person of reasonable or ordinary care would exercise under the same or similar circumstances."

It is insisted that the charge was misleading and confusing, but, while the charge perhaps is not happily worded, we conclude that it does not constitute reversible error. If the word "care" in the charge, made applicable to the person called upon to exercise care, be substituted by the word "prudence," the charge as a whole would be in an approved form. Mr. Webster, in his definition of the word "care," gives, as among its synonyms, the word "prudence," and we think it quite improbable that the jury gave to the word "care," as used in the charge relating to the person, any other meaning.

Moreover, there is but one issue in the case to which, if erroneous, the charge could have effective relation. It was shown without objection that the city of Ft. Worth had duly enacted and promulgated an ordinance which prohibited persons from driving an automobile past the rear entrance of a street car stopped for the purpose of taking on or letting off passengers. The jury found in answer to special issue four, as may be seen by reference thereto, that this ordinance of the city was violated by Mrs. Ward, and that such violation was a proximate cause of Leona Cathey's death. These findings are not attacked by any of appellant's assignments of error, and it follows, therefore, that the findings relating to this issue alone are sufficient to sustain the judgment.

[3-5] All other findings of negligence on the part of Mrs. Ward consequently become immaterial, for the violation of the ordi-

nance constituted, as has been often decided, negligence per se, and the court might have so charged the jury. Error in the definition of ordinary care therefore cannot constitute error of a prejudicial nature, unless, as appellants insist under other assignments of error, it must be said that the charge necessarily entered into, and confused the jury in considering, the issue of contributory negligence, but the jury not only found that Leona Cathey was not guilty of contributory negligence, but we think, after its consideration, the evidence failed to even legally raise the issue. It is true there was evidence tending to show that the street was unobstructed, and had Leona Cathey looked up the street, she might have seen the approaching automobile; but, as the evidence indicates, the automobile approached without warning of any kind, and she was close to the side of the street car, apparently endeavoring to extract car fare from her hand bag, and there were also ten or more people in the crowd. She was not required to anticipate, as held in some of the railway crossing cases, that an automobile would approach and attempt to pass the entrance into the street car in violation of the city ordinance. It is said in *Shearman & Redfield on Negligence* (5th Ed.) vol. 1, § 92:

"As there is a natural presumption that every one will act with due care, it cannot be imputed to the plaintiff as negligence that he did not anticipate culpable negligence on the part of the defendant. He has a right to assume that every one else will obey the law, including not only the common law, but also any statutes or city ordinance, and to act upon that belief."

To the same effect is the rule stated in 20 Cyc. 516. See, also, *Railway Co. v. Gray*, 65 Tex. 32; *Railway Co. v. Shieder*, 26 S. W. 512.

[6] It is also true that there was evidence tending to show that immediately prior to the moment when the automobile struck Leona Cathey she turned from the street car back in the direction of the curb; the driver of the automobile thus accounting for the collision. If Leona Cathey did, in fact, turn back and come in contact with the automobile, as insisted, it was evidently inadvertently or induced by the sudden peril presented by the moving automobile, and, as said in the case of *T. & P. Ry. Co. v. Watkins*, 88 Tex. 20, 29 S. W. 232:

"Where one by his own wrongful act has so terrorized another that such other is thereby impelled to do an act resulting in his injury, the wrongdoer cannot shield himself from liability by showing that the person so terrorized did not act as a reasonably prudent person would have acted under similar circumstances."

See, also, *Railway Co. v. Neff*, 87 Tex. 303, 28 S. W. 283; *Thompson on Negligence*, § 1616.

We accordingly hold that appellants' first assignment of error must be overruled.

What we have said in disposing of the first assignment of error, we think, sufficiently disposes of most of the contentions, but it may not be inappropriate to say that, if it be assumed that the issue of contributory negligence on the part of Leona Cathey was raised by the evidence, nevertheless we find no prejudicial error in the court's charge defining the burden that rested upon the defendants to prove such negligence. The charge distinctly instructed the jury that it would "look to all the facts and circumstances in evidence" in determining the issue. The jury therefore were not restricted to the evidence offered by either party.

There are a number of other objections to the court's charge and to the issues submitted, but, inasmuch as the questions propounded relate to issues of negligence other than that imputed by the violation of the city ordinance, we think we need not discuss them; for, while we have considered them and find no error therein, in no event are they material, relating, as they do, to issues and findings that might be wholly disregarded without disturbing the judgment.

[7] The concluding assignments should perhaps be noticed with more particularity. It is urged that the finding of the jury for damages in the sum of \$8,000 "was grossly excessive and unsupported by the evidence." The evidence is to the effect that the plaintiff at the time of the accident was a woman 54 or 55 years of age, whose life expectancy, as computed by insurance tables, did not exceed 16 or 17 years; that Leona Cathey was single at the time, and only earning a salary of \$40 to \$50 per month. There was evidence, however, to the effect that the plaintiff was almost, if not entirely, dependent upon her daughter for support, and also for the payment of remaining debts due upon a homestead purchased; that Leona Cathey was in all respects an admirable character, of exemplary habits, and constantly increasing in efficiency as a stenographer, and we find no argument or circumstance in the record indicating that the jury were actuated in coming to their verdict by any improper motive. There is no mathematical standard by which we can measure damages for injuries such as shown in this case. As stated by us in the case of *Burnett v. Anderson*, 207 S. W. 540:

"The law merely declares that such damages shall be limited to just compensation, and the determination of that question is committed to the jury in a very large measure."

It was further said in the case of *H. & T. C. Ry. Co. v. McNamara*, 59 Tex. 255, that:

"It is only when the damages are palpably and manifestly excessive that the verdict will be set aside by the appellate court. A large amount of discretion is necessarily left to the

jury in all such cases, and the court will not reverse even if the damages allowed are much greater than the court would have given under the proof."

[8] See, also, *H. & G. N. Ry. Co. v. Randall*, 50 Tex. 254; *Lumber Co. v. Denham*, 29 S. W. 554; *C. & R. I. & T. Ry. Co. v. Jones*, 39 Tex. Civ. App. 480, 88 S. W. 445; *C. & R. I. & T. Ry. Co. v. Swann*, 60 Tex. Civ. App. 427, 127 S. W. 1164; *Railway Co. v. Pigott*, 54 Tex. Civ. App. 367, 116 S. W. 841, writ of error refused. In the case last cited it was held, upon reasoning of which we approve, that the jury were not bound by the general averages in life insurance tables in determining a life expectancy of the plaintiff. On this subject it is said:

"One's life expectancy is estimated from the general average of the lives of a great number of persons; but the principle of 'general average' should only be applied to cases which are neither known, nor can be presumed, to be other than average cases. Therefore such averages are commonly of little use for the particular guidance of any affairs but those which concern large numbers. Hence tables of the chances of life are useful to insurance companies, but they go a very little way toward informing any one of the chances of his own life, or any other life in which he is interested, since almost every life is either better or worse than the average."

[9, 10] The jury therefore may have concluded in this case that the plaintiff had a longer life expectancy in her favor than is contended for by the defendant. The proof further showed that the deceased daughter was exceptionally attentive and devoted to her mother, and, when not actually occupied with her office work, spent her days and nights at home helping with the housework, etc. From all which it may be inferred that in time of sickness she would have attended her mother and cared for her with tenderness, and these services, while difficult of appraisement, possess a value that the jury had a right to take into consideration. As said by the Supreme Court in *Railway Co. v. Lehmberg*, 75 Tex. 61, 12 S. W. 838:

"Every parent and husband has, for his wife and children, a pecuniary value beyond the amount of his earnings by his labor or vocation."

The converse may also be fairly said to be true. There was evidence also on the part of an employer whose evidence was objected to, but which we think was admissible, and which may even have been inferred (see *Railway Co. v. Pigott*, supra), that the efficiency of Leona Cathey as a stenographer was increasing, and would probably increase in the future, so that her earning capacity would be greater, perhaps much greater, than it was at the time of her death.

[11] It is true that some of the early cases cited by appellants would tend to show that the verdict in this case was excessive,

but the verdict here was rendered in 1918, and we cannot ignore the fact, of which we may take judicial knowledge, because of its uniform and general existence, that wages have increased, and that the purchasing price of a dollar to-day has been decreased many times from what it was 10 or more years ago, so that on the whole we feel unwilling to say that the verdict in the case before us is excessive.

We think what has been said sufficiently disposes of all the assignments of error, and accordingly they are all overruled, and the judgment affirmed.

**GRIFFITH v. STATE ex rel. AINSWORTH.**  
(No. 991.)

(Court of Civil Appeals of Texas. El Paso.  
March 13, 1919.)

**1. INJUNCTION ⇨150—RESTRAINING ORDER—NATURE.**

In a proceeding in the nature of a quo warranto to oust a county judge, an order fixing date for hearing and temporarily restraining the respondent from receiving a warrant or salary held to be a temporary injunction, as distinguished from temporary restraining order, effective only until a time during which it has life is fixed by the judge's fiat.

**2. APPEAL AND ERROR ⇨71(3), 920(3)—JURISDICTION OF APPEAL—INJUNCTION—NECESSITY OF ANSWER.**

In view of Vernon's Sayles' Ann. Civ. St. 1914, art. 4644, giving right of appeal to any party to any civil suit wherein temporary injunction may be granted, and article 4645, relating to briefs and hearing on appeals, and article 4663, providing that defendant to an injunction may answer as in other civil suits, the allegations of the petition are taken as true upon review, and it is not essential to the jurisdiction of the appellate court that an answer to the merits should have been filed.

**3. INJUNCTION ⇨148(1)—VALIDITY—BOND.**

A temporary injunction issued as directed without a bond is void.

Appeal from District Court, Upton County; James Cornell, Judge.

Proceeding in the nature of a quo warranto by the State, on the relation of L. W. Ainsworth, petitioner, against H. B. Griffith, seeking to oust respondent from the office of county judge of Upton county and to install relator in said office. From a judgment granting a temporary injunction, the respondent appeals. Temporary injunction dissolved.

Snodgrass, Dibrell & Snodgrass, of Coleman, for appellant.

R. D. Blaydes and Howell Johnson, both of Ft. Stockton, and Wright & Harris, of San Angelo, for appellee.

WALTHALL, J. L. W. Ainsworth, on January 14, 1919, through his attorneys, presented to Hon. James Cornell, district judge of the Eighty-Third judicial district, embracing Upton county, a petition for a temporary writ of injunction. The petition was signed by the district attorney of the Eighty-Third judicial district, and duly verified by appellee as relator, and asking leave to file an information in the nature of a quo warranto against H. B. Griffith, appellant, as defendant, seeking to oust appellant from the office of county judge of Upton county and to install in said office relator, Ainsworth.

The petition alleged, in substance, that at the primary election preceding the general election in 1918 relator and appellant were candidates for the office of county judge of Upton county; that relator, having received a majority of the votes cast, was duly declared the nominee of the Democratic party for said office, and that after said primary election appellant was no longer a candidate, and his name was not upon the ticket at the general election; that at the general election held in Upton county on the 5th day of November, 1918, relator was duly elected to the office of county judge of Upton county, and that by reason of said election he was authorized and entitled to hold and enjoy said office for a term of two years from and after December 1, 1918, alleging the emoluments of said office to be the sum of \$2,000 during said term; that by virtue of his election as county judge he also became ex officio superintendent of public instruction for Upton county, and that he has at all times been willing and ready to qualify as such officer by executing the bond and taking the oath of office required by law; that the county of Upton pays a salary to the county judge, as such judge and ex officio superintendent of public instruction, of \$900 per annum, payable quarterly in the sum of \$225 per quarter, which quarterly payment is made on the second Monday in February, 1919, and every three months thereafter.

Appellee further alleges that at the November election in 1916 appellant was elected and duly qualified as county judge of Upton county, and as such county judge was entitled to hold said office until the 1st day of December, 1918; that on the 11th day of November, 1918, appellant, as county judge, and two county commissioners, naming them, met at the county courthouse for the purpose of canvassing the returns of the said general election, and made and entered upon the minutes of the commissioners' court the following order:

"On this day came on to be canvassed the returns of the general election held on the 5th day of November, A. D. 1918, and it appearing to the court that said returns are insufficient as there has been no certificate made to said re-

turns by the judges and clerks of said election, and it appearing to the court that an election has been held in only one precinct in said county, and that the returns thereof were insufficient, it is therefore ordered by the court that said election be held for nought, and that the several county officers of said county, who are now duly qualified, remain in their respective offices until a successor be duly elected and qualified."

Relator further alleged that it was true, as stated in the said order, that an election was held only in one precinct in said county, and at which precinct relator received all the votes cast, to wit, nine; that by reason of the premises relator was entitled to receive a certificate from the proper officer showing his election to said office, and has at all times been ready and willing to qualify by executing a bond and taking the oath of office required by law; but, on the contrary, the commissioners' court of Upton county, Tex., entered the order hereinbefore set forth, whereby the said Griffith still continues illegally and wrongfully to hold the office of county judge of Upton county, exercising its powers and enjoying and receiving the profits and emoluments thereof and thereto pertaining.

As a basis for a temporary injunction prayed for the petition alleges that Griffith is insolvent. Upon the presentation of said petition the judge entered the following order thereon:

"The above and foregoing petition, verified as shown, was presented to me on January 14, 1919, and I hereby set down for hearing the matter of issuing the restraining order as therein prayed for, and I hereby set such hearing for Saturday, January 25, 1919, at Upland, in Upton county, Tex., at the courthouse, at 3 o'clock p. m., but will, in the event of an agreement between relator, Ainsworth, and defendant, Griffith, have such hearing at the courthouse in San Angelo, Tex. Under the facts stated in the petition the defendant, Griffith, would not receive any warrant or salary prior to the second Monday in February, 1919, but, since it is possible that a hearing may not be had prior to that time, upon the application of the relator for an injunction, the defendant, Griffith, is hereby temporarily restrained from receiving from the county clerk of Upton county, Tex., or from any one, any warrants, script, or any kind of order for salary as county judge of Upton county, Tex., or as ex officio superintendent of public schools of said Upton county, Tex., and is so temporarily restrained from receiving salary as the holder of either of said offices in any form from any one, and the county clerk of Upton county, Tex., is hereby instructed and directed to issue an order directed to said H. B. Griffith in accordance with the terms of this fiat. Signed at Ft. Stockton, Tex., this January 14, 1919," and signed by the judge.

No bond or notice was required of relator, and none was given. Appellant filed no answer, and no action further than to make said order is shown to have been taken by the district judge. Late in the afternoon

of the 25th day of January, 1919, the judge not appearing, the appellant filed with the clerk of the district court of Upton county his appeal bond, appealing from the order of the court granting the injunction.

Appellee filed a motion in this court to dismiss the appeal: First, because the order of the court is a temporary restraining order, and not a temporary injunction; and, second, because the appeal was perfected without having filed an answer, and without answer filed this court is without jurisdiction to dissolve the injunctive order.

[1, 2] Appellee prayed for a writ of injunction, and the judge recites in his order that he sets for hearing the matter as therein prayed for, and orders that, as a hearing may not be had at the time the hearing is set, appellant is by the order temporarily restrained from drawing the salary, the matter complained of, but fixed no further time for a hearing in the event the hearing is not had at 3 o'clock on the 25th of January; nor does the judge in the injunctive order granted place any limitation or restriction as to the time of its operation. It is not clear from the judge's fiat, from which the character of the injunctive order must be determined, that the order was to operate only until a hearing was had, at a fixed time or at a time to be definitely fixed. If the order is to be regarded as a restraining order merely, it had no life after 3 o'clock January 25, 1919, the time set for the hearing. Ex parte Andrew Zuccaro, 108 Tex. 197, 163 S. W. 579, Ann. Cas. 1917B, 121. We think the order entered might well be considered a temporary injunction as distinguished from a temporary restraining order effective only until a time during which it has life as fixed in the judge's fiat. Is it essential to the jurisdiction of this court on appeal that an answer to the merits should have been filed by appellant in the court below? It is insisted by appellee that articles 4644 and 4645, Vernon's Sayles' Statutes, must be so construed. We do not concur in that view. Article 4644, Vernon's Sayles' Statutes, gives the right of appeal to any party to any civil suit wherein a temporary injunction may be granted, and the right is not conditioned on the filing of an answer to the merits of the case; nor is the jurisdiction of the appellate court made to depend on the filing of an answer. Article 4645 has reference to proceedings on appeal; that is, it is not necessary to brief as in other appeals; the case is heard on the bill and answer, etc. Article 4663 provides that the defendant to an injunction may answer as in other civil suits, that is, at term time; but, should appellant seek to dissolve the injunction granted, we think in whatever court the motion may be presented, in considering such motion, the allegations of the petition are taken as true. A motion interposed before answer is in the



nature of a demurrer, by which, for purposes of the motion, the truth of the allegations in the petition are admitted. Such seems to be the general rule, and we think our statutes conform thereto. *Young v. Grundy*, 6 Cranch, 51, 3 L. Ed. 149; *Pocahontas Coke Co. v. Powhatan Coal & C. Co.*, 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901, 9 Ann. Cas. 687; *Ruling Case Law*, vol. 14, p. 466. The motion is overruled.

[3] Having concluded that the order of the district judge granted and directed the issuance of a temporary injunction, and without requiring the execution of a bond, and the issuance of the writ as directed, and without bond, it necessarily follows that the injunction proceeding is void. *Marshall v. Spiller*, 184 S. W. 285; *H. I. & B. Co. v. Olint*, 159 S. W. 416; *Paine v. Carpenter*, 51 Tex. Civ. App. 191, 111 S. W. 432.

We need not discuss other questions presented.

For reasons stated, the temporary injunction granted is now here dissolved.

#### LEONARD v. TORRANCE et al. (No. 1494.)

(Court of Civil Appeals of Texas. Amarillo. March 12, 1919.)

##### 1. TRIAL ⇐404(2)—FINDINGS—CONCLUSIONS OF LAW OR FACT.

Conclusions, in court's findings of fact, that cancellation of plaintiff's agency was not done in bad faith, that one of defendants was the procuring cause of the sale, and that plaintiff was not the procuring cause, are conclusions of fact, not law.

##### 2. APPEAL AND ERROR ⇐1071(1)—INTERMINGLING CONCLUSIONS OF LAW AND FACT—REVERSIBLE ERROR.

That conclusions of law and fact are to some extent intermingled in court's findings of facts does not necessitate reversal of the case.

##### 3. TRIAL ⇐395(5)—FINDINGS OF FACT—SUFFICIENCY.

In suit by plaintiff broker for commission in which defendants alleged that agency had been canceled in good faith, and that one of defendants, and not plaintiff, was the procuring cause of the sale, held that court's findings of fact were sufficient to comply with Rev. St. 1911, arts. 1985-1991, requiring only a statement of conclusions on issuable facts, and not a statement of the evidence from which conclusions are reached.

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Suit by Wade B. Leonard against R. J. Torrance and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Geo. K. Holland, of Dallas, for appellant.

Flippen, Gresham & Freeman, of Dallas, for appellees.

BOYCE, J. Wade B. Leonard, appellant, brought this suit against appellees, R. J. Torrance and J. P. Kittrell, alleging that the plaintiff was a broker, engaged in the sale of corporate stocks, bonds, and physical properties of corporations, etc., and that on or about August 1, 1916, defendants listed with him for sale their stock in the Oak Lawn Ice & Fuel Company, a corporation, the capital stock of which was \$50,000, all of which was owned by said defendants, and the plaintiff was authorized to sell their said stock and the physical property of the said corporation, at a price of \$45,000; that the plaintiff was given the exclusive agency for the sale of said property, and in case of sale he was to receive the sum of 5 per cent. commission, on any and all sales made to any one except one W. M. Brown; that plaintiff conducted negotiations with numerous persons and offered the property for sale to D. Mack Jones, C. E. Kennemer, and others, but was unable to make sale; that defendants reduced the price of said property to \$35,000 and procured an offer of \$25,000 therefor, which offer defendants declined, but requested plaintiff to continue his efforts to sell said property and submit to them offer of the highest price obtainable; that about the 3d day of October, 1916, plaintiff procured the said D. Mack Jones, C. E. Kennemer, and others associated with them, as purchasers for said property at the price of \$30,000; that about September 20, 1916, defendant Kittrell bought out the interest of the defendant Torrance in said property for the sum of \$15,000, and that about October 7, 1916, said defendant Torrance sold said property to the persons theretofore procured as purchasers by plaintiff, selling the same at a price of \$27,500; that such acts on the part of defendants were done for the purpose of defrauding plaintiff of his commission on the sale of said property; that by reason thereof he was entitled to 5 per cent. commission on the sale from Kittrell to Torrance, and 5 per cent. on the sale from Torrance to the said D. Mack Jones, C. E. Kinneman, and their associates. The defendants denied that plaintiff was given the exclusive agency for the sale of said property, and alleged that plaintiff never did anything toward the sale of said property, except to secure an offer from D. Mack Jones to purchase the same for the sum of \$25,000; that thereafter the said R. J. Torrance purchased the interest of the said Kittrell in said property, and about September 26th, the said Torrance in good faith canceled the agency of the plaintiff, and thereafter through his own efforts procured the sale of said property to C. E. Kinnemer and J. B. Adoue, Jr.; that the said R. J.

Torrance was the sole and only procuring cause of said sale to said persons, and that the plaintiff had nothing whatever to do therewith.

Trial was had before the court, and judgment rendered for the defendants. No statement of facts is brought up, and as the assignments complain of the failure of the court to comply with the law in making his conclusions of fact, we here set out, in substance, the conclusions of fact as found by the court:

(1) In this paragraph of the conclusions it was found that the plaintiff was engaged in the business of broker, as alleged.

(2) In this paragraph it was found that defendants were engaged in the business of manufacturing ice, and owned and operated said business known as the Oak Lawn Ice & Fuel Company, as alleged.

(3) In this paragraph it was found that about August 1, 1916, defendant Torrance, acting for himself and Kittrell listed said property with the plaintiff for sale at the price of \$45,000, agreeing to pay him a commission of 5 per cent. thereon for procuring a purchaser at said price: This finding contained this further statement as to the understanding of the parties:

"That if he (plaintiff) had a good bid, to submit it, no limitation as to time—good until the sale was consummated, or until it was no longer for sale, with the distinct understanding, however, that it was not an exclusive agency, but that Mr. Torrance and Mr. Kittrell were also to try to effect a sale of these properties."

(4) Under this paragraph it was found that plaintiff, Leonard, advertised said property for sale, but was unable to submit but one definite proposal, which was from D. M. Jones, for \$25,000, which was refused. "That after its refusal R. J. Torrance purchased the interest of Mr. Kittrell, and withdrew the sale of said plant and physical properties from Mr. Leonard the latter part of September, Mr. Leonard having done nothing in the premises except to have written Mr. D. Mack Jones to raise his offer, and requesting Messrs. Torrance and Kittrell to lower their offer after Torrance and Kittrell had refused the bid he (Leonard) had submitted to them from Mr. Jones, and that said withdrawal was not done in bad faith."

(5) The fifth paragraph of the finding is as follows:

"(5) That thereafter R. J. Torrance, through his own efforts, procured a purchaser in one O. E. Kennemer, who in turn interested J. B. Adoue, Jr., in the purchase; that neither Kennemer or Adoue knew Leonard in the deal, as he had never written to either of them, had any conversation with either of them, or in any way submitted to either of them the Oak Lawn Ice & Fuel Company plant for purchase, but that same was submitted to O. E. Kennemer by Mr. Torrance direct."

(6) Under the sixth paragraph it was found that plaintiff "was in no manner the procuring cause or an efficient means of the sale and purchase, but that R. J. Torrance was."

These findings of fact were followed by conclusions of law, separately stated, to which it is not necessary to further refer.

[1, 2] It is first complained that the said findings of fact include therein conclusions of law. It is suggested in the statement under this assignment that the conclusions that the cancellation of plaintiff's agency was not done in bad faith, that R. J. Torrance was the procuring cause of the sale, and that the plaintiff was in no manner the procuring cause are conclusions of law. We think that these statements are conclusions of fact. If the case had been submitted to the jury issues such as these would have been submitted for its finding. Even if the conclusions of fact and law were to some extent intermingled, this fact alone would not necessitate a reversal of the case. *Heirs of Ryon v. Rust*, 65 Tex. 532; *Wells v. Yarbrough*, 84 Tex. 660, 19 S. W. 867; *Mortgage Co. v. McCarty*, 34 S. W. 306; *Transit Co. v. Alexander*, 90 S. W. 1119; *Robt. McLane Co. v. Swernemann*, 189 S. W. 282.

[3] It is also assigned that the court "erred in making and filing only broad general findings of fact," and in not finding specific facts as requested in a written motion for specific findings, filed before the conclusions of fact and law were prepared and filed by the court. The language of article 1989, which provides that the trial judge shall, at the request of either of the parties, "state in writing the conclusions of fact found by him, separately from the conclusions of law," and its setting in the statute (articles 1985 to 1991) shows, we think, that it was the purpose of the law to require only a statement of the conclusions on issuable facts, and not a statement of the evidence from which such conclusions are reached. Where the trial is before the court the conclusions of fact are regarded in the same manner as the special verdict of the jury, where the trial is before the jury. Articles 1990 and 1991, R. S. It is expressly provided by article 1985 that the special verdict "must find the facts established by the evidence, and not the evidence by which they are established." So it has been held in numerous cases that the trial court is not required to state the evidence upon which conclusions of fact are based. *Gordon v. McCall*, 20 Tex. Civ. App. 283, 48 S. W. 1113; *Thompson v. Mills*, 45 Tex. Civ. App. 642, 101 S. W. 561; *Maury v. McDonald*, 55 Tex. Civ. App. 50, 118 S. W. 817; *Ragley-McWilliams Lumber Co. v. Hare*, 61 Tex. Civ. App. 509, 130 S. W. 864; *Barnes v. Riley*, 145 S. W. 292. The Supreme Court, in the case of *Callaghan v. Grenet*, 66 Tex. 240, 18 S. W. 508, makes this statement on this subject:

"What the statute requires is a succinct and clear statement of what the judge thinks is the true result of the evidence—what it proves pertinent to the issue between the parties."

In this case we think the court, in his findings, announced a conclusion as to every issue of fact made by the pleadings and the request for findings, in so far as it related to matters as to which the appellant had the right to request a finding, was sufficiently complied with. We are of the opinion, therefore, that the judgment should be affirmed.

# INGRAM v. LATTIMORE et al. (No. 8997.)

(Court of Civil Appeals of Texas. Ft. Worth. Feb. 15, 1919.)

## 1. LANDLORD AND TENANT §246(3)—LANDLORD'S LIEN—INCORPORATION OF LESSEES.

Where, as contemplated when a partner, as authorized, took a lease, the partners incorporated, and the lease was used for the corporation's benefit, it as well as they became liable thereon, and the landlord was entitled, as against them and it, to the preference lien given by Vernon's Sayles' Ann. Civ. St. 1914, art. 5490.

## 2. CHATTEL MORTGAGES §152—PRIORITY—LANDLORD'S LIEN.

The landlord being a subsequent creditor and lienholder in good faith, his lien on tenant's property in the building at time of lease takes priority under Vernon's Sayles' Ann. Civ. St. 1914, art. 5655, over prior chattel mortgage thereon not forthwith deposited and filed in county clerk's office as thereby required, but filed subsequent to the lease.

Appeal from District Court, Tarrant County; Ben M. Terrell, Judge.

Suit by H. S. Lattimore, trustee, against W. K. Dunn and others; J. C. Ingram and others intervening. From an adverse judgment, the named intervener appeals. Reversed and rendered.

Slay, Simon & Smith and A. W. Christian, all of Ft. Worth, for appellant.

Lattimore, Bouldin & Lattimore, of Ft. Worth, for appellees.

CONNER, C. J. H. S. Lattimore, as trustee, instituted this suit against W. K. Dunn, R. I. E. Dunn, and W. L. Dunn, upon a promissory note for the sum of \$3,300, and for the foreclosure of a chattel mortgage on certain printing machinery and printing material which had been executed by the said Dunns in order to secure the payment of said note. The Farmers' & Mechanics' National Bank of Ft. Worth intervened, setting up that it was the owner of the note, and it prayed for judgment with foreclosure of the

chattel mortgage in its behalf. A. J. Anderson Company also intervened; but, inasmuch as that company has not appealed from the judgment, no further notice of its intervention need be given. Appellant, J. C. Ingram, also intervened, alleging, in substance, that on January 31, 1917, by a contract in writing executed by said W. K. Dunn for himself and for the Ft. Worth American Publishing Company, he had leased, for the use and occupancy of said Dunn & Co., a portion of a brick building in the city of Ft. Worth, described in the petition, for a term of 14 months beginning on the 1st day of February, 1917, for a total rental of \$920, payable in equal monthly installments; that the property, described in the plaintiffs' petition and upon which the plaintiffs sought to foreclose the mortgage, was situated in said building at the time of the execution of his said lease, and thereafter used in the business of said W. K. Dunn and the Ft. Worth Publishing Company; that only \$80 had been paid upon said rental contract, leaving still due and unpaid thereon the sum of \$840, for which he sought judgment and a foreclosure of the landlord's lien which he alleged existed by reason of the facts above stated.

The court rendered a judgment in favor of the Farmers' & Mechanics' National Bank through H. S. Lattimore, as its trustee, and against W. K. Dunn, R. I. E. Dunn, and W. L. Dunn for the sum of \$3,844.33, with the foreclosure of the chattel mortgage described in the plaintiffs' petition, decreeing that said mortgage lien was prior and superior to the claim of any and all other parties to the suit. From this judgment the intervener J. C. Ingram has appealed.

[4] We see no escape from the conclusion that the court erred in its judgment. It is undisputed that the mortgage upon which appellees sought a foreclosure was executed on January 11, 1917, but was not filed for record until April 18, 1917. The evidence also tended very strongly to show, if indeed it does not conclusively so appear, that W. K. Dunn for himself and partners, then owners of the property, and who a little later incorporated their business under the name of the Ft. Worth Publishing Company, executed the lease and occupied the premises and used the mortgaged property within said premises, as substantially alleged by appellant, Ingram. Ingram was undoubtedly a creditor of the parties named, for no serious attack in the evidence has been made upon the authority of W. K. Dunn to execute the lease made to Ingram, nor can it be seriously doubted from the evidence that, at the time the lease was executed by W. K. Dunn it was then contemplated that he and his partners would thereafter incorporate, which being done and the lease used for the

benefit of the publishing company, that company as well as the Dunns became liable upon the lease. This being true, the issue upon which the case below seems to have been fought out, of whether the lease was that of W. K. Dunn or that of the incorporated publishing company, seems to us immaterial. In either event, as against the Dunns and as against the publishing company, appellant, Ingram, was entitled to the preference lien given landlords by the statute. The statute, so far as necessary to quote, reads as follows:

"All persons leasing or renting any residence, storehouse or other building, shall have a preference lien upon all the property of the tenant in such residence, storehouse or other building, for the payment of the rents due and that may become due." Vernon's Sayles' Statutes, art. 5490.

[2] As against the right of the landlord given by this statute, appellees present only their mortgage. The law relating to this character of lien thus provides:

"Every chattel mortgage, deed of trust, or other instrument of writing, intended to operate as a mortgage of or lien upon personal property, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the property mortgaged or pledged by such instrument, shall be absolutely void as against the creditors of the mortgagor or person making same, and as against subsequent purchasers and mortgagees or lienholders in good faith, unless such instrument, or a true copy thereof, shall be forthwith deposited with and filed in the office of the county clerk of the county where the property shall then be situated." Vernon's Sayles' Stat. art. 5655.

As before noted, it is undisputed that appellees' mortgage was not forthwith "deposited with and filed in the office of the county clerk of the county where the property was situated." Ingram's lien therefore was undoubtedly prior in point of right to the mortgage lien of the appellees, for Ingram, under the decisions, was both a creditor and subsequent lienholder in good faith; it not being pretended at the time of the rental contract made by him that he had notice of the mortgage in question. *Liquid Carbon Acid Mfg. Co. v. Lewis*, 32 Tex. Civ. App. 481, 75 S. W. 47; *Austin v. Welch*, 31 Tex. Civ. App. 526, 72 S. W. 881; *Rogers v. Grigg*, 29 S. W. 654; *Berkey & Gay Furn. Co. v. Sherman Hotel Co.*, 81 Tex. 135, 16 S. W. 136, writ of error denied.

We believe that the judgment below should be reversed and here rendered for appellant, establishing the superiority of his lien and directing the proceeds of the sale of the property to be applied first to the payment of intervener Ingram's unpaid rents, interest, and all costs incurred by him in this cause here and in the court below; the

remainder of such proceeds to be applied as directed by the court below. The judgment in other respects is left undisturbed. Judgment accordingly.

BUCK, J., disqualified and not sitting.

#### INGRAM v. FRED. (No. 8930.) \*

(Court of Civil Appeals of Texas. Ft. Worth.  
Dec. 7, 1918. Rehearing Denied  
Jan. 18, 1919.)

#### 1. LANDLORD AND TENANT §106, 195(1)—LEASES—REPAIRS.

A tenant, who leased a building for two years for a specific sum payable in monthly installments, may vacate and refuse to thereafter pay rent, where lessor has failed to keep building in repair and tenantable as agreed.

#### 2. COMMON LAW §17—EVIDENCE—DECISIONS OF COURTS.

Decisions of English courts are not conclusive proof of what common law of England really is, although entitled to great weight, and decisions of different states of Union which have adopted common law of England may be looked to, to determine what common law is.

#### 3. LANDLORD AND TENANT §152(3)—LEASE—DUTY TO REPAIR.

A lease of a building, providing that lessor "shall have reasonable time to repair the same," when notified of leaks, held to contemplate that it was duty of lessor to make such repairs upon receiving such notice.

#### 4. LANDLORD AND TENANT §150(1)—REPAIRS—DUTY OF LANDLORD.

To exempt landlord from damages to tenant resulting from defects in roof, and at same time hold tenant liable for full contract price, which he agreed to pay upon understanding that building was tenantable, would be unreasonable and obviously unjust to tenant, and such construction of lease should not be favored.

#### 5. LANDLORD AND TENANT §150(1)—REPAIRS.

If landlord was obligated to repair roof of building, such obligation was not discharged by unsuccessful efforts to remedy defects, under plea that such efforts constituted reasonable diligence to accomplish purpose.

#### 6. LANDLORD AND TENANT §231(2)—REPAIRS—NOTICE TO LANDLORD—EVIDENCE.

In action against tenant under lease for rent, tenant having vacated because of defects in roof, it was proper to admit in evidence written notices of defects in roof, sent to landlord after execution of lease, while tenant was holding under prior lease.

#### 7. TRIAL §352(4)—SPECIAL ISSUES—EVIDENCE—ACTION FOR RENT.

In action under lease for rent, tenant having vacated by reason of leaks in roof, court properly refused to submit to jury question whether

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Writ of error refused March 19, 1919.

leak was caused by downspouts being stopped by refuse thrown on roof by persons in adjoining building, where no proof was offered to show that it was impracticable to avoid such stopping of downspouts by use of some character of screen upon roof.

**8. TRIAL  $\S$  352(4)—SPECIAL ISSUES—EVIDENCE—ACTION FOR RENT.**

In action under lease for rent, tenant having vacated by reason of plaintiff's failure or inability to stop leaks in roof, court properly refused to submit issue whether or not holes made by sign braces erected by tenant caused roof to leak, where evidence that plaintiff had stopped all leaks caused by braces was uncontroverted.

**9. TRIAL  $\S$  351(2)—SPECIAL ISSUES—ERRONEOUS REQUESTS.**

A requested special issue embracing question not applicable to evidence is properly refused as a whole.

Appeal from District Court, Tarrant County; Ben M. Terrell, Judge.

Action by J. C. Ingram against A. Fred. Judgment for defendant, and plaintiff appeals. Affirmed.

Samuels & Brown, of Ft. Worth, for appellant.

McLean, Scott & McLean and Marvin H. Brown, all of Ft. Worth, for appellee.

**DUNKLIN, J.** J. C. Ingram, plaintiff in the trial court, has appealed from a judgment denying him a recovery against A. Fred, the defendant, upon a demand for rents claimed to be due on a storehouse in the city of Ft. Worth, owned by Ingram and leased to Fred for a period of two years.

The lease was in writing, and the rental period stipulated therein was from June 5, 1914, to June 5, 1916, and the price to be paid by the defendant, stipulated in the lease, was \$4,800 for the full rental period, payable in equal monthly installments of \$200. The defendant, who was pursuing the business of pawnbroker and dealer in clothing, occupied the building for the first year covered by the lease and paid all rents accruing during that period. He then vacated the premises and refused to pay rentals for the second year upon the plea, which was urged as a defense to plaintiff's suit, that by reason of the leaky condition of the roof the building was rendered untenable and that plaintiff had failed to remedy that condition after due notice thereof from the defendant.

In answer to special issues, the jury found that during the first year of the lease term, and before defendant vacated the premises, the roof of the building leaked from rainfall to such an extent as to render the building untenable for defendant's business; that defendant gave plaintiff notice in writing of such condition of the roof, and allow-

ed him a reasonable time after such notice and before vacating the building within which to repair the roof, and finally moved out of the building solely by reason of its leaky condition.

Following the clause demising the premises to defendant for the specific use already stated, the lease contains the following provisions:

"To have and to hold the same, with the appurtenances, unto the said parties of the second part, from the 5th day of June, 1914, for and during the term of two years next ensuing and fully to be completed and ended on the 4th day of June, 1916, and said lessees yielding and paying therefor the sum of forty-eight hundred dollars (\$4,800.00), as hereinafter provided. It is hereby understood and agreed, in case building shall be destroyed by fire or other causes, or rendered untenable, after June 5, 1914, it shall at lessor's option terminate this lease. \* \* \*

"In case building shall from any cause leak, lessee shall notify lessor of same in writing, and he shall have reasonable time to repair same, and shall not be liable for damages accruing therefrom. \* \* \*

"And the said lessees covenant and agree with said lessor as follows, that is to say: That they (said lessees) will pay said rent, to wit, the sum of forty-eight hundred dollars, in equal monthly installments, to wit, the sum of \$200 on the 5th day of June, 1914, and the same amount on the 5th day of each and every month thereafter, until the whole sum of \$4,800 shall have been fully paid, unless said premises shall be destroyed or rendered untenable by fire, or unavoidable accident, without fault or default on part of said lessees, in which event only a ratable proportion of said rent shall be paid by said lessees, that they will not do or suffer any waste therein. \* \* \*

"In case of loss or damage by storms, wind, fire, or lightning, or from any other cause, or from burglary, theft, or from breaking of water, gas, or sewer pipes, or loss caused by negligence, theft, or carelessness of other occupants or of employees of lessees, no liability therefor is assumed by lessor, and lessees expressly agree not to hold lessor responsible for any loss or damage that may occur by reason thereof."

The principal contention urged in appellant's brief is that, notwithstanding the facts found by the jury, defendant was legally bound to pay the full sum of \$4,800, because the lease, which was in writing and unambiguous, expressly stipulated for the payment of the full sum of \$4,800 for the entire lease term, and for an exemption of liability of the lessor for damages resulting from a leaky condition of the roof, and contained no provision expressly giving to the tenant the right to vacate the building and cease paying rents if it should become in such condition as to render it untenable. In 16 R. C. L., bottom page 698, section 187, the following is said:

"A cardinal principle in the construction of leases is, as in case of other contracts, to give

effect to the intention of the parties, and in arriving at the intention, the subject-matter, the situation of the parties, and the object had in view and intended to be accomplished by the parties at the time are to be regarded. \* \* \* A construction should be avoided, if it can be done consistently with the tenor of the agreement, which would be unreasonable or unequal; and that construction which is most obviously just is to be favored as most in accordance with the presumed intention of the parties."

The language last quoted was taken from the opinion of our Supreme Court in *Howeth v. Anderson*, 25 Tex. 557, 78 Am. Dec. 533. Again on bottom page 699, section 188, of the same volume of *Ruling Case Law*, the following is said:

"The general rule that in the construction of a deed the grantee is to be favored in case of ambiguity applies to leases. Thus in construing provisions of a lease, relating to renewals, if there is any uncertainty, the tenant is favored, and not the landlord, because the latter, having the power to stipulate in his own favor, has neglected to do so, and also upon the principle that every man's grant is to be taken most strongly against himself."

And in section 178, bottom page 691 of the same volume, occurs the following:

"And it has been said that the English authorities, ancient and modern, are conclusive that, even where the landlord is bound by custom or express contract to repair, and by his failure to do so the premises become uninhabitable, or unfit for the purposes for which they were leased, the tenant has no right to quit the premises or to refuse to pay rent according to his covenant, but his only remedy is by action for damages. Where, however, a landlord has covenanted or is under obligation to repair, and by reason of his failure to do so the premises have become untenable, this may, it seems, according to the better rule in this country, constitute a constructive eviction justifying the tenant in abandoning the premises."

See, also, sections 177 and 179, bottom pages 691 and 692, same work; *Lunn v. Gage*, 37 Ill. 19, 87 Am. Dec. 233; *Tedstrom v. Puddephatt*, 99 Ark. 193, 137 S. W. 816, Ann. Cas. 1913A, 1092.

In *Berman v. Shelby*, decided by the Supreme Court of Arkansas, reported in 93 Ark. 472, 125 S. W. 124, it was held that a landlord, who had made a covenant with the tenant to put a water heater in the bathroom, could not collect rents from the tenant after the latter had abandoned the premises by reason of the failure of the landlord to install the water heater. The doctrine upon which that decision was rendered was expressed in another decision by the same court in *M. P. Ry. Co. v. Yarnell*, 85 Ark. 320, 46 S. W. 943, from which latter decision the following was quoted with approval:

"The obligations of the contract were mutual, and, if the appellee failed to comply with it, he could not hold the appellant to a compliance. This is too plain to require argument or au-

thorities. The failure of one party to a contract to comply with its terms releases the other party from compliance with it."

[1, 2] Numerous other decisions which might be cited announce the same rule of mutuality of covenants between landlord and tenant. In *Vincent v. Central City Loan & Investment Co.*, 45 Tex. Civ. App. 36, 99 S. W. 428, by the Court of Civil Appeals of the Third district, it was held that the failure of the landlord to make repairs on a building in accordance with his agreement so to do was sufficient cause for abandonment of the building by the tenant, and was a valid defense to an action for the rent accruing after such abandonment. We have been cited to no Texas authorities, and have found none, announcing a contrary rule in this state, and the rule so announced in the decision last noted seems to be in accord with the clear weight of authorities in this country, as stated in the quotation above made from *Ruling Case Law*, and we think it is supported by more equitable reasons, although some of the American decisions seem to have followed the English rule stated above. The decisions of the English courts are not conclusive proof of what the common law of England really is, although they are entitled to great weight. And the decisions of the different states of the Union, which, like our own, have adopted the common law of England, may be looked to to determine all such questions. 12 *Corpus Juris*, pp. 196, 199; *Grigsby v. Reib*, 105 Tex. 600, 601, 153 S. W. 1124, L. R. A. 1915E, 1, Ann. Cas. 1915C, 1011; *Palacios v. Corbett*, 172 S. W. 777. But if there be any principle of public policy prevailing in England, which would exempt a lease contract from the operation of the general rule of mutuality of covenants applicable in the construction of other contracts and stated by the Supreme Court of Arkansas, in the quotation above, the same does not obtain in this state. On the contrary, such an exception in favor of a landlord and against the tenant, which, so far as we can perceive, is purely arbitrary and without any reasonable or equitable basis, is incompatible with the spirit and genius of our institutions, and should not be allowed. *Davis v. Davis*, 70 Tex. 124, 7 S. W. 826; *Swayne v. Lone Acre Oil Co.*, 98 Tex. 605, 86 S. W. 740, 69 L. R. A. 968, 8 Ann. Cas. 1117; *Grigsby v. Reib*, 105 Tex. 601, 153 S. W. 1124, L. R. A. 1915E, 1, Ann. Cas. 1915C, 1011; 12 *Corpus Juris*, 188, 189; 5 *Ruling Case Law*, pp. 911, 912.

[3, 4] While the lease contract in the present suit did not expressly and specifically bind the landlord to repair the roof, in case it should become so leaky as to render the building untenable, yet we think that such obligation was clearly implied from the terms of the lease itself. The obligation of the tenant expressed in the lease to notify the lessor

If the building should leak, and the further stipulation that the lessor "shall have reasonable time to repair the same," clearly imports an understanding between the parties to the instrument that the lessor would make such repairs upon receiving such notice. In the absence of such an understanding, that clause in the lease would be entirely useless. Furthermore, to exempt the landlord from damages to the tenant resulting from defects in the roof, for which he would be liable under the common-law rule, in the absence of a stipulation to the contrary, and at the same time to hold the tenant liable for the full contract price of the lease, which he agreed to pay upon the understanding that the building was tenantable, would be unreasonable and obviously unjust to the tenant upon the plainest principles of equity, and such a construction therefore should not be favored.

[5] And if the landlord was obligated to so repair the roof of the building that obligation was not discharged by the efforts he made to remedy the defects, upon his further plea that such efforts constituted reasonable diligence to accomplish that purpose.

[6] The lease was dated March 28, 1914, although it did not begin to run until June 5th, following that date. Complaint is made of the admission in evidence of two written notices, one dated April 1, 1914, and the other May 12, 1914, to the landlord from the tenant, calling attention to the leaky condition of the roof and of damage done to the tenant's goods by reason of leaks from rains, while he was holding under a prior lease. One of the grounds of objection to that evidence was that the notices were given prior to the beginning of the lease term. We think there was no merit in this objection. At all events, the landlord treated the notices, and other notices given orally, as a compliance with the requirement of the lease, by making repeated efforts to repair the roof. Appellant requested the submission of the following special issue to the jury, which was refused by the court, and the refusal of the same is assigned as error:

"If you find from the testimony that water from rains entered the brick building at 1107 Main street, in the city of Ft. Worth, in the main room and show window, in such quantities as to render it untenable as a clothing and pawnbroker's store, between June 5, 1914, and July 5, 1915, was the entrance of said water into the building and show window caused by the downspouts being stopped up and holes caused by the bracing of defendant's sign?"

[7-8] In support of the assignment appellant has cited the testimony of his witness Lydick, whom he employed on repeated occasions to repair the roof after appellee had complained of its leaky condition. According to the testimony of that witness, the

leaks were caused by the downspouts leading from the roof becoming stopped up with rubbish thrown upon the roof by occupants of an adjoining building. He further testified that the building occupied by the defendant was a one-story building, while the adjoining building was a two-story building; but no proof was offered to show that it was impracticable to avoid such stopping of the downspout by the use of some character of screen upon the roof, which would prevent the rubbish from being washed into the downspout. Furthermore, according to testimony introduced by plaintiff himself, which was uncontradicted, there were never any appreciable leaks through the holes in the wall caused by the bracing of the defendant's sign, and such leaks as were so caused entirely ceased after the holes were closed by appellant. Under such circumstances it would have been error to submit to the jury the issue whether or not the leaks in the building rendering it untenable were caused by the bracing of defendant's sign. And with that vice in the requested issue no reversible error was committed in the court's refusal to give it, even though it could be said that the question whether or not the leaks were caused by the downspouts being stopped up should have been submitted.

For the reasons indicated, all of appellant's assignments of error are overruled, and the judgment is affirmed.

#### PRINCE v. BLISARD. (No. 9020.)

(Court of Civil Appeals of Texas. Ft. Worth. Feb. 22, 1919.)

#### 1. PLEADING $\S$ 18—INDEFINITENESS—DAMAGES—BREACH OF CONTRACT FOR LEASE.

In action for breach of contract for farm lease, paragraph of complaint, alleging as damages what plaintiff would have saved in living expenses by occupying the farm, held not sufficiently specific to enable defendant to be prepared to meet such allegations with controverting evidence, and subject to special exceptions.

#### 2. CONTRACTS $\S$ 32—ORAL NEGOTIATIONS—WRITTEN CONTRACT.

Where it was understood and intended by the parties negotiating orally that a written contract was to be entered into to bind the parties, there was no contract between the parties.

Appeal from District Court, Tarrant County; R. E. L. Roy, Judge.

Action by W. L. Blisard against J. S. Prince. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

R. S. Phillips, of Ft. Worth, and S. C. Padelford and F. E. Johnson, both of Cleburne, for appellant.

Mays & Mays and John L. Poulter, all of Ft. Worth, for appellee.

DUNKLIN, J. J. S. Prince has prosecuted this appeal from a judgment rendered in favor of W. L. Blisard for the breach of an alleged parol contract for a lease by Prince to Blisard of a farm consisting of 300 acres of land situated in Johnson county, Tex., for the year 1917. The proof showed that there were some negotiations between the parties relative to the leasing of the land for the year 1917, but later Prince refused to permit Blisard to have it. The case was tried before a jury, who returned findings upon special issues. According to those findings Prince did rent the farm to Blisard for the year 1917, and by reason of defendant's breach of same, plaintiff sustained damages, which were itemized by the jury, and which damages aggregated the sum of \$4,195 over and above the amount plaintiff and his family could reasonably have earned in the pursuit of occupations other than the cultivation of the farm.

One paragraph of plaintiff's petition, upon which the case was tried, reads as follows:

"Plaintiff shows to the court that had he been permitted to have used and occupied said farm as aforesaid, that he would have raised a garden thereon, and that such garden would have furnished plaintiff and family food, and that he would have also raised and grown his own meat; that also in accordance with the contract and agreement that defendant would have had to furnish plaintiff a sufficient number of milk cows, thereby reducing the costs of plaintiff's and family living for the year 1917 at least \$300, and that on account of the breach of such contract, plaintiff has been forced and compelled to expend at least the sum of \$300 additional as living expenses, consisting in the purchase of milk, butter, groceries and vegetables, and that said sum of \$300 was and is a reasonable sum therefor in addition to what he would have made in that respect upon said farm."

The verdict of the jury shows a finding that the living expenses, incurred by Blisard over and above what such expenses would have been had he been permitted to occupy the farm, amounted to \$300. A special exception was addressed to the paragraph of the petition, copied above, because the same was indefinite and uncertain and failed to specify any items, or to give any data to justify the conclusion alleged that his living expenses during the year would have been reduced the sum of \$300 had he been permitted to occupy the farm. And defendant excepted to that allegation of damages on the further ground that the same constituted special damages, and the petition contained no allegation sufficient to show that the same were within the contemplation of the parties at the time the alleged contract was entered into as a probable conse-

quence of a breach thereof by the defendant, Prince.

[1] Clearly, plaintiff could not have "grown his own meat" without incurring some expense in so doing, and even though defendant had furnished him cows to milk he would have been at some expense to feed them in order for them to produce milk and butter for his family. Even though it be supposed that the pleader intended to say that more groceries were required for his family during the year than would have been required had he resided on the farm, yet it is clear that such as he would have used on the farm would have cost the same price. The defendant was entitled to more specific allegations of facts with reference to the damages claimed in that paragraph of the petition in order to be prepared to meet the same with controverting evidence, and the trial court erred in overruling the special exceptions.

And the same observations apply to special exceptions to other portions of plaintiff's petition in which other items of damages sustained by him were alleged, but we deem it unnecessary to discuss such exceptions at length, since, with what we have said already as a guide, the trial court will experience no difficulty in correctly determining their merits if insisted upon by the defendant in the further progress of the case in that court.

In his testimony the defendant denied that he made the rental contract alleged in plaintiff's petition. He did testify to certain negotiations between the parties looking to a possible trade, but according to his testimony such negotiations never reached the stage of consummation of a contract. Plaintiff testified at length to several interviews with the defendant relative to said proposed rental contract, of propositions and counter propositions of each party relative thereto, and while, according to certain isolated portions of his testimony, a definite agreement was reached, yet, according to other portions of his testimony, it was contemplated by both parties that the contract was to be reduced to writing, and he himself was unwilling to rent the farm except under a written contract from the defendant, by reason of the fact that he had been informed that defendant was a very mean man. And with reference to what occurred in the final interview between them when defendant refused to let him have the farm and all further negotiations were terminated, plaintiff testified as follows:

"I wanted a written contract, but that wouldn't necessarily make a man afraid to take it; it was understood the day I entered the place that we were to sign a written contract. It was understood between Mr. Prince and I the day we closed the trade at his barn, about the 20th of October, that we would both enter into a written contract, and we were to meet down there, and he was to tell me what I was



to do about the Johnson grass, and I was to tell him what to do about the house, so we could put that in the contract. The things that had to go into the contract were things that had to be agreed upon between us. Yes; I wanted that contract so I wouldn't have any trouble about it, and I suppose he wanted it so that he wouldn't have any trouble about it; that is what you have a contract for."

[2] If plaintiff understood and intended, as indicated by his testimony, that a written instrument was necessary in order for the oral negotiations between the parties to ripen into a valid and binding contract for the lease of the farm, then it is clear that no binding contract whatever was ever made between the parties. 6 R. O. L. p. 18, § 39.

The burden was upon the plaintiff to establish by proof a definite contract for the rental of the farm, and we are of the opinion that his testimony, considered as a whole, was too indefinite, to say the least, to sustain a finding that the alleged rental contract was in fact made; and in this connection it is to be observed further that according to plaintiff's testimony nearly all the negotiations between the parties occurred when no one else was present who could testify as to what then occurred.

For the reasons indicated, and without reference to other assignments of error, the decision of which is unnecessary, the judgment is reversed, and the cause is remanded for another trial.

#### DORSEY v. COGDELL. (No. 9015.)

(Court of Civil Appeals of Texas. Ft. Worth. Jan. 25, 1919.)

##### 1. TRIAL $\S$ 349(2)—SUBMISSION OF CAUSE ON SPECIAL ISSUE—STATUTES.

Vernon's Sayles' Ann. Civ. St. 1914, art. 1984a, providing for submission of cause on special issues when requested, is mandatory, and failure to so submit is excusable only in cases that cannot be determined upon submission of special issues.

##### 2. TRIAL $\S$ 351(2)—SUBMISSION UPON SPECIAL ISSUES—REFUSAL.

In an action for breach of contract to purchase corn, plaintiff's request for peremptory instruction and for special issues which may not have been raised by evidence in the judgment of the court did not relieve the trial court of the duty to submit the case upon special issues, in view of Vernon's Sayles' Ann. Civ. St. 1914, art. 1984a.

##### 3. TRIAL $\S$ 349(2)—SUBMISSION OF SPECIAL ISSUES—WAIVER.

Rev. St. art. 1985, providing that upon appeal or writ of error an issue not submitted or requested shall be deemed as found by the court in such manner as to support the judgment, did not relieve the court from the duty to comply

with Rev. St. art. 1970, providing that in all civil cases the judge shall, unless expressly waived by the parties, deliver written charges, or submit special issues, where the latter were requested in due time.

Appeal from Hood County Court; W. L. Dean, Judge.

Action by H. B. Dorsey against B. H. Cogdell. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

W. J. Arrington, of Paducah, and Bryan, Stone & Wade, of Ft. Worth, for appellant. Estes & Estes, of Granbury, for appellee.

BUCK, J. This suit originated in the justice court, and was an action for damages for an alleged breach of contract on the part of the defendant, Cogdell, to purchase 4,000 bushels of corn at 83½ cents per bushel, to be delivered during the month of December, 1913. Judgment was rendered for defendant in the justice court, and also in the county court, and plaintiff has appealed.

Various assignments of error are presented in appellant's brief, but we do not find it necessary to consider any question save that raised in the second assignment, to wit:

"The court erred in refusing to submit the case to the jury on special issues upon a request in writing made by the plaintiff that the case be so submitted."

Bill of exception reserving this point, omitting formal parts, is as follows:

"Comes now the plaintiff in the above numbered and entitled cause. Before the reading of the charge to the jury and before the argument of counsel, the court asked plaintiff's attorney to prepare a charge which he thought should be submitted. Said attorney stated that he thought said issue should be submitted on special issues, to which the court replied that he thought probably so. In the event plaintiff's special charges Nos. 1 and 2 are refused by the court, and now makes written request of the court that the case be submitted to the jury on special issues."

The qualification by the court of this bill states that:

"This day the above request was presented to me in open court under the circumstances stated in said request, and by me refused, to which action of the court the plaintiff then and there excepted."

[1] The two special charges, mentioned in the bill as having been tendered by plaintiff before the request for submission on special issues was made, were peremptory instructions for plaintiff. The court refused to submit the case on special issues, and also refused a number of special issues requested by plaintiff, and submitted the cause under a general charge. We are of the opinion that

the court erred in such action, and that his refusal to submit the case on special issues, when requested, constituted reversible error, unless it can be held that the cause is one which cannot be determined on the submission of special issues. Article 1984a, Vernon's Sayles' Texas Civil Statutes, provides:

"In all jury cases the court, upon request of either party, shall submit the cause upon special issues raised by the pleadings and the evidence in the case. Such special issues shall be submitted distinctly and separately, and without being intermingled with each other, so that each issue may be answered by the jury separately. In submitting special issues the court shall submit such explanations and definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues, and the court may submit said cause upon special issues without request of either party, provided that if the nature of the suit is such that it cannot be determined on the submission of special issues, the court may refuse the request to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court, and this article shall be construed in connection with article 1985 of chapter 14, title 37, Revised Statutes."

We are of the opinion that the pleadings and the evidence are such that the cause might be determined on the submission of special issues. This article is held to be mandatory on the trial court, and the only justification of his failure to submit the case on special issues, when requested, is that the nature of the suit is such that it cannot be determined on the submission of such special issues. *Guffey Petroleum Co. v. Dinwiddie*, 168 S. W. 439; *Gordon Jones Const. Co. v. Lopez*, 172 S. W. 987; *Shaw v. Garrison*, 174 S. W. 942; *Klyce v. Gundlach*, 193 S. W. 1092.

[2, 3] We are of the opinion that the action of the court in the respect complained of constitutes reversible error, and that, even though the plaintiff, before he requested the submission of special issues, had tendered a request for peremptory instruction, and even though the special issues requested by plaintiff may not have been, in the judgment of the trial court, raised by the evidence, the trial court would not have been relieved of the duty devolving upon him to submit to the jury the issues of fact involved in this case. It is a statutory rule of practice that:

"Upon appeal or writ of error, an issue not submitted and not requested by a party to the cause, shall be deemed as found by the court in such manner as to support the judgment; provided, there be evidence to sustain such a finding." Article 1985, Revised Statutes.

But we think this statute does not relieve the court of the duty to comply with article 1970, Revised Statutes, nor of the duty to

submit special issues when requested in due time. This article provides that in all civil cases the judge shall, unless the same be expressly waived by the parties to the suit, prepare and deliver a written charge to the jury on the law of the case, or submit issues of fact to the jury.

For the reasons given the judgment of the trial court is hereby reversed, and the cause remanded.

Reversed and remanded.

BELL et al. v. SELF. (No. 8991.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 15, 1919. Rehearing Denied  
March 22, 1919.)

# 1. EVIDENCE $\S$ 445(2)—VARYING BY PAROL.

The rule that a party may be precluded by a sale contract provision from invoking a parol warranty not contained therein has no application to a subsequent oral agreement upon a new consideration concerning the same subject-matter, made while the contract was still executory and modifying the written agreement.

# 2. APPEAL AND ERROR $\S$ 843(3) — REVIEW — NECESSITY.

Where breach of warranty that silo would withstand ordinary winds was established by proof, court on appeal need not determine admissibility of evidence that other silos made by defendant failed to withstand wind.

Appeal from District Court, Tarrant County; Ben M. Terrell, Judge.

Action by Keller J. Bell and another against Norman W. Self. From judgment for defendant, plaintiffs appeal. Affirmed.

Flournoy, Smith & Storer and Dedmon, Potter & Pinney, all of Ft. Worth, for appellants.

Slay, Simon & Smith, of Ft. Worth, for appellee.

DUNKLIN, J. Keller J. Bell and Sid R. Clift, partners doing business in the trade-name of Western Silo Company, sued Norman W. Self upon two promissory notes executed by the defendant in consideration of the sale to him by plaintiffs of two silos which were manufactured by plaintiffs. The defendant denied liability on the notes on the ground that he was induced to sign them and give security therefor not required by the contract of purchase by a warranty made by plaintiffs' agent that the silos, which had then been shipped to defendant and were ready for delivery, would when erected in accordance with plaintiffs' specifications and directions withstand ordinary winds prevailing in Wilbarger county, where defendant resided; that said silos were afterwards so

erected and had been blown down by such winds and by reason thereof were worthless, and the consideration for the notes sued on had wholly failed. Defendant claimed that such contract of warranty and the execution of the notes given in consideration therefor was to that extent a modification and change of the prior original written contract of purchase, which was in writing. Defendant also by cross-action sought a recovery against plaintiffs for damages sustained by him in the matter of expenses incurred in the erection of the silos in reliance upon plaintiffs' warranty that they would withstand the tests above mentioned.

Judgment was rendered denying plaintiffs a recovery, from which they have appealed. Defendant also was denied a recovery on his cross-action, but no appeal was taken from that judgment.

The trial was without a jury, and following are the findings of fact and conclusions of law filed by the trial judge:

"The court finds: That on February 2, 1914, the plaintiffs and defendant entered into a written contract, by the terms of which plaintiffs agreed to manufacture and deliver to defendant at Vernon, Tex., two silos, for which defendant agreed to pay plaintiffs \$1,068.00, one-fourth thereof in cash upon delivery of the silos, and the balance to be paid on January 1, 1915, without interest, which contract provided that failure to make settlement as above specified releases the plaintiffs from all responsibility and makes the entire amount due and payable in Ft. Worth, Tex., and that, if upon receipt of silo, any part is found defective or missing, defendant should within 10 days notify plaintiffs in writing and give them reasonable time to replace all such parts, and at such time as such replacements are made the responsibility ceases; that said contract constitutes the entire and only agreement between the parties, and plaintiffs would not, under any circumstances, allow any deductions of whatsoever nature not specified in said contract. That, to induce defendant to enter into the contract, plaintiffs, their agents and representatives, represented to defendant that the anchorage system which plaintiffs furnished as a part of said silos was amply sufficient to hold the silos up under ordinary conditions and in ordinary winds where they were to be erected in Wilbarger county, Tex., and that said system had been tried out and tested by plaintiffs and had proven good, and that plaintiffs would guarantee that said silos would stand up under ordinary conditions. That defendant believed said representations to be true and relied thereon, and but for his reliance thereon would not have entered into the contract to purchase the silos. That defendant was wholly unacquainted with the silos and the means of anchoring same, and relied on said representations in making the purchase, and plaintiffs' agents at the time knew that defendant was unacquainted with the silos and the anchorage system and was relying upon their statements and representations. That plaintiffs and their said agents knew, at the time of making said statements and representations, that they were false and untrue. That plaintiffs authorized their said agents to make such repre-

sentations and guaranty. That said representations were in fact false. That said anchorage system was wholly insufficient to sustain the silos under ordinary conditions in Wilbarger county, Tex., and said silos were worthless and of no value whatever.

"That said silos were shipped to Vernon, Tex., about April, 1914, with freight charges unpaid, and the common carrier handling same refused to deliver same until the freight charges were paid. That about said date defendant was informed that said anchorage system was wholly insufficient to hold the silos up under ordinary conditions and was told that the silos were worthless and of no value, and that by reason thereof defendant refused to accept the silos and notified plaintiffs thereof. That thereafter plaintiffs sent their agent, F. W. Schopmeyer, to see defendant concerning the silos. That the said Schopmeyer called upon defendant at Vernon, Tex., about the 19th day of May, 1914, and defendant immediately notified him that he (defendant) would not accept the silos under any circumstances and unconditionally refused to accept them and informed said Schopmeyer that his reason for so refusing was that he had heard that the silos would not stand up and were worthless, and Waggoner's Champion silos had all blown down, and that he offered to let defendant have them if he wanted them at ten cents on the dollar. Whereupon, after a number of propositions made by the said Schopmeyer to defendant in an effort to induce him to purchase the silos, the said Schopmeyer stated to defendant that Waggoners had used an old anchorage system which was not like the one plaintiffs would furnish to defendant, and that, besides, plaintiffs were worth a million dollars and stood behind their guaranty of the anchorage system, and that, if defendant would take the silos at the original price of \$1,068, plaintiffs guarantee and warrant that the silos would stand up under ordinary conditions in Wilbarger county, Tex., and that the anchorage system and means and manner of anchoring same furnished by plaintiffs for the purpose of holding them in position on their foundations and preventing them from being blown down were amply sufficient to enable said silos to resist and stand any winds that might reasonably be expected to occur in said section of country; and that they would accept the defendant's notes secured by deed of trust in amounts, terms, and conditions same as the ones sued on herein by plaintiffs, which proposition defendant accepted, and in consummation thereof, on May 19, 1914, in consideration of the delivery to him of said silos and the guaranty or warranty by plaintiffs that the silos would stand up under ordinary conditions and that the anchorage system and means and manner of anchoring same furnished by plaintiffs for the purpose of holding them in position on their foundations and preventing them from being blown down were amply sufficient to enable said silos to resist and stand up against any winds that might reasonably be expected to occur in the section of country where they were to be erected, defendant executed and delivered to plaintiffs the notes and deeds of trust sued on.

"I further find that defendant thereafter gave said silos and anchorage system a full and fair trial and test; that he erected one of said silos

in accordance with the plans and specifications furnished by plaintiffs, and the same was blown down by an ordinary wind and a wind ordinarily expected to occur in said section; that he again, at the instance of plaintiff, re-erected said silo in accordance with the plans and specifications furnished by plaintiffs, and the same was again blown down by an ordinary wind; that he tendered said silos to plaintiffs in due time and demanded the cancellation and return of his notes and deed of trust; that silos and anchorage system wholly failed to be as guaranteed and warranted, in that they would not stand up under ordinary conditions and would not resist an ordinary wind in that section of country and were worthless.

"I further find that the parties intended to and did, on May 19, 1914, make a new deal and contract for the sale of the silos to defendant, which was verbal and intended as substitute for or modification of the original contract made on February 2, 1914, and intended to, and did, contain the verbal warranty or guaranty aforesaid. I further find that the consideration for the notes and deed of trust sued on by plaintiffs has wholly failed. I further find that it was contemplated that defendant should erect said silos as he did.

"I further find that defendant lost, in time, labor, and value of material in erecting said silos in an effort to make the same stand up, the sum of \$330, that being the reasonable value of said time, labor, and material necessarily used in erecting and re-erecting said silo, but that said \$330, the amount so expended, was not within the contemplation of the parties at the time they made said original and substitute contracts.

"I conclude that the arrangements entered into on May 19, 1914, constituted the contract of sale between the parties and was a substitute for, or, to the extent of the change in terms, including the verbal guaranty or warranty, a modification of, the written contract entered into on February 2, 1914; that the mutual agreements of the parties, the agreement upon the part of defendant to pay interest on the notes and to give a deed of trust lien on his land, constituted a sufficient and a valuable consideration sustaining the agreements of May 19, 1914, as a substitute for, or modification of, the contract of February 2, 1914; that, the silos being worthless, the consideration for the notes and deed of trust sued on has wholly failed, and the guaranty, or warranty, breached; and that by reason thereof plaintiffs are not entitled to recover any sum of defendant—to all of which plaintiffs except.

"I further conclude that defendant take nothing by reason of his cross-action and counterclaim against plaintiffs, because the amount so claimed by defendant in his said counterclaim was not within the contemplation of the parties at the time they made either the original or substitute contract hereinabove set out—to which defendant excepts."

The original contract of purchase contained the following stipulations:

"If upon receipt of silos any part is found defective or missing, I will within ten days notify the Western Silo Company in writing and give them reasonable time to replace all such

parts and at such time as such replacements are made, their responsibility ceases. \* \* \*

"It is understood that this order contains the entire and only agreement between the parties hereto, and the Western Silo Company will not under any circumstances allow any deductions of whatsoever nature not specified in this order."

[1] By several assignments the contention is made that by those provisions of the contract defendant was precluded from invoking the parol agreement of warranty pleaded, because proof of same varied the terms of the written contract.

We overrule that contention, since the rule invoked has no application to an agreement upon a new consideration made subsequently to the execution of the written instrument, and while the contract is still executory as to both parties, which modifies or changes the written agreement. The rule is that in such cases that part of the original agreement which is so changed will not be given effect, if it is inconsistent with the terms of the new agreement, although the original agreement, in so far as it has not been modified, together with the new agreement, will constitute the entire contract after such modification; and especially is this true when the new agreement is supported by a new and valuable consideration. As shown by the findings of the trial judge, copied above, there was an additional consideration for the new agreement in the present suit, in that the deed of trust upon real estate mentioned was executed in order to procure the modification and change in the original contract. 3 Elliott on Contracts, § 1865; *Galveston v. G., C. & S. F. Ry. Co.*, 46 Tex. 435; *Foley v. Storrie*, 4 Tex. Civ. App. 377, 23 S. W. 442; *Anderson Electric Co. v. Cleburne Water, I. & L. Co.*, 27 S. W. 504; *Galveston v. Devlin*, 84 Tex. 319, 19 S. W. 395.

[2] Several assignments of error are addressed to the admission of testimony of different witnesses over plaintiffs' objections with respect to the manner other silos of the same make sold by plaintiffs to some of the defendant's neighbors in Wilbarger county were erected and that they were blown down by ordinary winds. It is not necessary for us to determine whether or not there was error in those rulings, since it was established by other proof, which was uncontradicted, that defendant erected the silos he purchased in strict accordance with plans and specifications furnished by plaintiffs, and that, after being so erected, they would not withstand ordinary winds prevailing in that vicinity, and therefore plaintiffs' warranty that they would do so was breached.

We are unable to conclude that the court's finding that the salvage left after the silos were blown down was worthless was contrary to the uncontroverted proof on that issue. It is true, as urged in appellants'

brief, that one of their witnesses testified to the value of the material used in the construction of such silos; but it is clear from his testimony that he referred to new material used at the factory in such construction and had no reference to the value of the remnants of the silos after they were blown down. It cannot be inferred that the salvage, constituting at best secondhand material and consisting partly of material set in the ground with cement, could have been reclaimed from the wreckage at a substantial profit over and above the expense necessary to reclaim it. Furthermore, the proof showed conclusively that all that material had been tendered to plaintiffs and by them refused, and there is nothing in the record indicating that they cannot yet have it, if they consider it of any value and desire it.

For the reasons indicated, all assignments of error are overruled, and the judgment is affirmed.

# GENERAL BONDING & CASUALTY INS. CO. v. HARLESS. (No. 8086.)

(Court of Civil Appeals of Texas. Dallas. Feb. 1, 1919. Rehearing Denied March 15, 1919.)

## 1. SEQUESTRATION §20—QUASHAL OF WRIT—EFFECT ON REPLEVY BOND.

Quashal of a writ of sequestration sued out by plaintiff rendered null and void the replevy bond executed by the original defendant, and relieved of all liability the surety thereon.

## 2. SEQUESTRATION §20—QUASHAL OF WRIT—EFFECT ON REPLEVY BOND—JUDGMENT NOT RESTING ON SUCH BOND.

Where it is apparent that plaintiff was not awarded judgment against the surety on defendant's replevy bond by virtue of the latter's contractual liability as surety on the bond, which was rendered null and void by quashal of the writ of sequestration sued out by plaintiff, judgment for plaintiff was not affected by quashal of the writ.

## 3. APPEAL AND ERROR §742(1)—BRIEFS—PROPOSITION—STATEMENT OF PROCEEDINGS.

Rule requiring there shall be subjoined to each proposition asserted in the brief a brief statement in substance of such proceedings, or part, contained in the record, as will be sufficient to explain and support the proposition, is not satisfied by a simple reference to the pages of the statement of facts where the testimony of the witnesses and other matters bearing on the proposition may be found; statement of substance of testimony at least being required as well.

## 4. PLEADING §49—PETITION—CONSTRUCTION.

Petition by seller of jewelry against buyer and latter's surety on replevy bond given when property was replevied from seizure under writ of sequestration held not to seek to enforce sure-

ty's statutory liability on bond, but rather to seek recovery, either on the bond as a common law obligation, or for conversion.

## 5. PLEADING §52(1)—PLEADING BY COUNTS.

The system of pleading by counts is not in vogue in Texas.

## 6. APPEAL AND ERROR §253—RESERVATION OF GROUNDS OF REVIEW—OBJECTION TO PLEADING.

An objection to the petition not raised by any plea, exception, or other pleading in the trial court, cannot be raised for the first time on appeal.

## 7. APPEAL AND ERROR §742(5)—ASSIGNMENT OF ERROR—REFUSAL OF CHARGE—FAILURE TO SET OUT EVIDENCE.

An assignment that the trial court erred in refusing to give defendant's requested charge cannot be considered, where the testimony, on which the right to the charge as claimed was based, is nowise set out in the statement made under the assignment.

## 8. APPEAL AND ERROR §719(1)—ABSENCE OF ASSIGNMENT—"ERROR APPARENT UPON THE FACE OF THE RECORD."

An error which can be ascertained only by looking into the record and considering the evidence may not be considered without an assignment of error, as it is not an "error apparent upon the face of the record," which means that the error can be found upon looking on the face of the record, the fact pointed out showing good ground for the court to interfere.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Error Apparent.]

## 9. APPEAL AND ERROR §730(1)—ERROR NOT APPARENT ON FACE OF RECORD—REFUSAL OF PREEMPTORY CHARGE.

Where asserted error was not apparent on face of record, it was necessary under statute that assignment of error, complaining of court's action, in order to entitle it to consideration, distinctly point out error relied on, which an assignment that court erred in refusing to give defendant's requested charge to return verdict for defendant did not do.

## 10. APPEAL AND ERROR §301—RESERVATION OF GROUNDS OF REVIEW—ASSIGNMENTS IN MOTION FOR NEW TRIAL.

Assignments of error not included in the motion for new trial cannot be considered on appeal, unless the error assigned arose after filing of the motion.

## 11. APPEAL AND ERROR §742(1)—ASSIGNMENT OF ERROR—STATEMENT—RULES.

Statement of facts under assignment of error held not in compliance with the rules.

## 12. TROVER AND CONVERSION §69—JUDGMENT—ACTION AGAINST SURETY ON REPLEVY BOND.

Where plaintiff, seller of jewelry, recovered against surety on defendant's replevy bond, writ of sequestration having been sued out, on theory that surety had converted property on which, he (the seller) had a valid mortgage lien, and did not recover on the replevy bond, usual

judgment rendered when recovery is had on replevy bond was not called for and would not have been proper.

**13. APPEAL AND ERROR ⇨742(1)—ASSIGNMENT OF ERROR—EXAMINATION OF EVIDENCE.**

Court of Civil Appeals is not required to examine all the evidence contained in the statement of facts to determine whether an assertion of an assignment of error is true, where it cannot be said that the error claimed is not one apparent on the face of the record.

**14. APPEAL AND ERROR ⇨742(5, 6)—ASSIGNMENT OF ERROR—STATEMENT.**

Statement under assignment of error, stating or quoting no testimony in support of assertion of assignment that instruction and verdict complained of were contrary to undisputed evidence, held insufficient to require consideration of assignment.

**15. APPEAL AND ERROR ⇨742(7)—ASSIGNMENT OF ERROR—INSUFFICIENCY.**

Assignment of error submitted as proposition that court erred in refusing to grant defendant new trial, for reason set forth in specified paragraphs of defendant's amended motion for new trial, held insufficient, as not calling attention to any proposition of law, first proposition not being itself proposition, and as unsupported, together with its propositions, by any statement showing truth of allegations of paragraph of motion for new trial.

**16. APPEAL AND ERROR ⇨907(2)—PRESUMPTION FAVORING COURT BELOW—ACTION ON MOTION FOR NEW TRIAL.**

In absence of showing of testimony, presumption on appeal is that such as was presented on the issues attempted to be raised on certain grounds of defendant's motion for new trial was such as to justify trial court in overruling it.

Appeal from District Court, Dallas County; Kenneth Force, Judge.

Suit by Ben F. Harless against Maude White, alias Maude Nelson, wherein writ of sequestration was sued out; defendant replevying the property and giving replevy bond with the General Bonding & Casualty Insurance Company, as surety, plaintiff making such company a party defendant. From judgment for plaintiff, the insurance company appeals. Affirmed.

W. D. Cardwell, of Wichita Falls, for appellant.

W. M. Jones, of Farmersville, and Etheridge, McCormick & Bromberg, of Dallas, for appellee.

**TALBOT, J.** The appellee Harless sued Maude White, alias Maude Nelson, April 18, 1913, on notes secured by a chattel mortgage given for the purchase price of certain articles of jewelry, and prayed for foreclosure of the mortgage lien. At the time of the institution of the suit, appellee sued out a writ

of sequestration, which was levied upon "one diamond, weight about 3 karats, and one diamond necklace, all platinum chain and settings, with about ten diamonds," then in the possession of said Maude White, alias Maude Nelson, and of the alleged value of \$1,300. After the seizure of the property under the writ of sequestration, the same was replevied by the defendant giving a replevy bond with the appellant, General Bonding & Casualty Insurance Company, as surety. Thereafter, on December 19, 1914, the appellee filed his first amended original petition, in lieu, and in stead, of his original petition filed on the 18th day of April, 1913, and in lieu of his first supplemental petition filed on the 28th day of September, 1914, making the General Bonding & Casualty Insurance Company, surety on the replevy bond, a party defendant. In this amended petition appellee pleaded that General Bonding & Casualty Insurance Company converted his security, having executed its bond and taken possession of said property, and he prayed for a foreclosure upon the same, or, if it were not in possession of the appellant, for a judgment for its conversion. In February, 1915, defendant General Bonding & Casualty Insurance Company filed its motion in the trial court to quash the sequestration proceedings, which said motion was conceded by counsel for plaintiff to be well taken, and judgment was entered quashing the sequestration proceedings on the 27th day of February, 1915. The cause came on for trial before a jury on the 14th day of November, 1917, the plaintiff being present in person and by counsel, and the defendant the General Bonding & Casualty Insurance Company being present by counsel, but other defendants came not. At the close of plaintiff's testimony, counsel for defendant General Bonding & Casualty Insurance Company filed its motion requesting the court to instruct the jury to return a verdict for defendant bonding company, which was by the court overruled, and to which exceptions were duly taken. Thereupon counsel for plaintiff requested the court to instruct the jury to return a verdict in favor of the plaintiff against the defendant Maude Nelson for the amount of his debt, interest, and attorneys' fees on the notes executed by her, and against the defendant bonding company in the sum of \$1,651, being the alleged value of the articles in controversy, with interest thereon, which said motion was by the court granted. Thereupon counsel for defendant bonding company, before said charge was given to the jury, presented to counsel for plaintiff and to the trial judge his objections in writing to said charge. The jury thereafter returned its verdict into court in accordance with said instructions, and judgment was entered against the defendant

bonding company in the sum of \$1,051. The appellant filed a motion for a new trial, which was overruled, and it alone perfected an appeal to this court.

Appellant's first and second assignments of error, each of which is submitted as a proposition, are, in substance, that the trial court erred in instructing a verdict for the appellee for the reason that the record shows that a judgment was entered in the suit quashing the affidavit, bond, and writ of sequestration sued out by appellee, whereby the replevy bond executed by the original defendant in the case was rendered null and void and appellant relieved as surety of all liability thereon.

[1, 2] That such was the legal effect of the quashal of the writ of sequestration is affirmed by a number of decisions of the appellate courts of this state and not denied by the appellee. Appellee contends, however, that it is apparent that he was not awarded a judgment against the appellant by virtue of its contractual liability as surety on the replevy bond and that no principle announced in said assignments would defeat the judgment rendered in his favor. This contention of appellee we believe to be correct, and the first and second assignments of error will be overruled.

[3, 4] The third assignment of error is to the effect that the court committed "fundamental error apparent upon the face of the record" in instructing the jury to return a verdict in favor of appellee and in rendering judgment upon the verdict returned in obedience to such instruction, because the pleadings and evidence clearly indicate this to be a suit against appellant upon the replevy bond. Appellee objects to a consideration of this assignment, because the alleged error is nowhere complained of in the motion for a new trial and because there is no statement of the "evidence" which appellant asserts indicates the suit to be against appellant upon the replevy bond. The statement contains a quotation of the pertinent pleadings, but neither states nor quotes the evidence relied on to support the assignment of error. The only reference in the statement under the assignment to the evidence is as follows:

"The testimony of plaintiff's witness W. M. Jones is found at pages 5 and 6 in statement of facts, reference to which is here made. The testimony of plaintiff is found at pages 7 to 9 and at page 13 of the statement of facts, reference to which is here made. The affidavit and bond in sequestration was filed in this suit April 18, 1913. The replevy bond was filed and approved by the sheriff April 19, 1913. The judgment of the court quashing the sequestrations proceedings was entered February 27, 1915."

The rule requiring that there shall be subjoined to each proposition asserted in the brief a brief statement in substance of such proceedings, or a part thereof, contained in

the record, as will be necessary and sufficient to explain and support the proposition is not satisfied by a simple reference, as in the present instance, to the pages of the statement of facts where the testimony of the witnesses and other matters bearing upon the proposition may be found. A statement of the substance of the testimony at least is required, as well as a reference to the pages of the record where it may be found. So far as the pleadings are concerned, they do not, in our opinion, show this to be a suit against appellant upon its contractual liability as surety upon the replevy bond. It is alleged in substance that while plaintiff, through his said agent, the sheriff aforesaid, was in possession of said property, said diamond and necklace, the defendant General Bonding & Casualty Insurance Company executed and delivered to the said sheriff and agent of plaintiff a certain bond in the sum of, to wit, \$1,000, conditioned that the said defendant would produce, or cause to be produced, the property above mentioned to await the orders of this court; that the appellant took into its possession from said officer of the court the jewelry in question and has and retains the same, or has converted the same; and that, if appellee's contract mentioned be valid, it is a mortgage of said property and is entitled to a foreclosure upon the same, and in the alternative for a judgment for its value, against all of the defendants including the appellant, if it should appear that appellant is not in possession of said property but has converted the same. Appellant further alleged:

In the event it should appear that appellee is not entitled to his said chattel mortgage, "and the right hereinbefore set forth incident thereto, that then and in such event he did not part with the title to his said property and is now entitled to the same and to his judgment therefor against all of the defendants herein, including General Bonding & Casualty Insurance Company; and plaintiff shows that he is entitled to a judgment against the said Maude White as principal and the said General Bonding & Casualty Insurance Company as surety upon the bond hereinbefore alleged, upon the conditions thereof as an obligation in the common law compelling them to return to his said agents the property to the possession of which he was legally entitled in the event the said property be not upon the trial hereof produced to await the orders of this honorable court."

The prayer of the petition is to the effect that upon final hearing appellee have judgment for his said debt, damages, interest, attorneys' fees, and costs of suit, together with a foreclosure of his said chattel mortgage lien, "and in the alternative for the possession of said property if it be tendered into court, and, if not, for the value thereof, and for a recovery upon said bond, and for the conversion of said property, and for such other relief as to the court may seem meet."

Manifestly, appellee's petition was drawn with a view of obtaining a recovery upon either phase of the case alleged, to which he might show himself entitled under the law and the evidence, and he did not commit himself by the allegations made to a suit based upon the replevy bond as a statutory obligation. By the allegations of the petition the bond is treated as a common-law obligation, and upon no other theory can it be said that a recovery was asked upon it.

As to the claim that the evidence shows the suit to be one upon the statutory replevin bond, it may be said that if we would be justified in considering the assignment of error, notwithstanding appellant's failure to comply with the rules in not stating enough of the evidence to enable us to determine that question, and even if the evidence could be looked to for the purpose of determining the basis of the suit, which is not admitted, we are not prepared to say that it supports this contention of appellant.

[5, 6] The second proposition under this assignment is that—

"An action in tort (as for a conversion) cannot be joined in an action against the sureties on a replevy bond under our court."

It is sufficient to say, in answer to this contention, as is contended by appellee, that the system of pleading by counts is not in vogue under the rules of Texas pleading, and that even if the objection should be well taken it was not raised by any plea, exception, or other pleading in the court below and cannot be raised for the first time on appeal.

What has already been said disposes of the third proposition under this assignment against the contention of appellant.

[7-9] The fourth assignment of error is as follows:

"The court erred, as is apparent upon the face of the record, in refusing to give defendant's requested charge to the jury instructing them to return a verdict in favor of the General Bonding & Casualty Insurance Company."

This assignment is submitted as a proposition and is the only proposition presented under it. Appellee objects to a consideration of the assignment because no reference thereto is made in the motion for a new trial, nor is said motion referred to in the assignment. A consideration of the assignment is further objected to because the testimony upon which the right to such charge as claimed would be based is in no wise set out in the statement made under it. The last objection is clearly well taken, and, unless the rules prescribed for the briefing of cases is to be ignored, the assignment of error cannot be considered. The statement made contains nothing but what purports to be a copy of a bill of exception taken to the action of the court in refusing the requested charge.

There is not a syllable of testimony stated or quoted, and it cannot be said that the error, if error, is fundamental. As pointed out in *Houston Oil Co. v. Kimball*, 108 Tex. 94, 122 S. W. 533, 124 S. W. 85, Webster defines the word "apparent" thus: "Clear or manifest to the understanding; plain, evidently obvious; appearing to the eye or mind." And in that case the Supreme Court held this language did not mean that an error which can be ascertained by looking into the record and considering the evidence may be considered without an assignment, for that would include every error which can be considered at all. The court further held that the language "apparent upon the face of the record" indicates that it is to be seen upon looking at the face of the record, that is, the assignment itself, the fact pointed out by it must show a good and sufficient ground for the court to interfere to prevent injustice being done to one of the parties." The Supreme Court further held, in effect, that even though by an examination of the record it might be found that the facts existed which showed that the court erred as claimed, yet since they were not manifest and not evident, not obvious, without an examination and weighing the evidence, the error was not one "apparent" upon the face of the record. Again, the asserted error not being "apparent upon the face of the record," it was necessary, under the statute, that the assignment of error complaining of the court's action, in order to entitle it to consideration, distinctly point out the error relied on. This, as will be noted, the assignment does not do. It merely asserts that the court erred in refusing to give the peremptory charge requested, no ground whatever in support of the assertion being stated. *Railway Co. v. Roberts*, 194 S. W. 218. The assignment of error is not entitled to consideration.

[10] The fifth assignment of error, a consideration of which is also objected to by appellee, cannot be considered. The appellant filed a motion for a new trial in the lower court, which constitutes its assignments of error here, and this assignment was not included therein. It has been distinctly held that assignments of error not included in the motion for a new trial cannot be considered on appeal unless the error assigned arose after such motion had been filed. *Hayes v. Furniture Co.*, 180 S. W. 149; *Zmek v. Dryer*, 174 S. W. 659. The error here claimed did not arise after appellant's motion for a new trial was filed and is not one "apparent upon the face of the record." Adhering to the rules and decisions of our courts, neither the assignment nor propositions advanced under it can be considered.

[11] The next assignment is to the effect that the court erred in refusing to instruct the jury to return a verdict for appellant



because the evidence showed that appellant never had in its possession the property involved in the suit, and hence could not have converted it. There is no statement under this assignment pointing out the evidence upon which appellant relies to show that it never had possession of the property in controversy, and appellee objects to its consideration. Under the word "statement" is the following: "The same as first proposition under fifth assignment of error." Looking to the statement thus referred to, we find no testimony stated or quoted that will enable us to determine the question sought to be presented. We find under "statement" this, in substance: The replevy bond offered in evidence by plaintiff will be found at pages 11 and 12 of the statement of facts and a clause in it stating that property in controversy in the suit "has been permitted to remain in the hands of the said Maude Nelson, alias Maude White." The testimony of the witness W. M. Jones is found at pages 5 and 6 of the statement of facts. The testimony of the plaintiff, Ben F. Harless, is found at pages 7-9, and at page 13 of the statement of facts:

"The plaintiff and his witness W. M. Jones went to the office of the bonding company to inquire about the diamonds within a few days after the replevy bond had been accepted and approved by the sheriff (see testimony of W. M. Jones and Ben F. Harless in statement of facts as above cited). The testimony of plaintiff and his witness Jones was: (If said diamonds were ever in the possession of this defendant) that they were advised that they had been turned over to the attorneys for the defendant Maude Nelson, prior to the time of their visit to the office of the bonding company to inquire about them (see testimony of W. M. Jones and Ben F. Harless cited above)."

The statement is not in compliance with the rules; but, if we were warranted in considering the assignment, our general knowledge of the testimony contained in the statement of facts leads us to believe that it is amply sufficient to show that at one time after execution and delivery of the replevy bond the property in controversy was in the possession of appellant. Indeed, from the declaration in the statement, to the effect that appellee and his witness W. M. Jones went to the office of appellant to inquire about the property in controversy, and that they testified they were there advised that it had been turned over to the attorneys for the defendant, it may be inferred that appellant had had possession of said property.

[12] The next contention is, in substance, that, appellant being a surety upon the replevin bond, judgment, if appellee was entitled to recover, should have been for the return of the property replevied, or, in the event of the failure of defendant to return same, for their value. The answer to this assignment is that appellee does not contend

that the liability of appellant was based upon any contractual liability by reason of the replevy bond. He recovered, as we understand the record, upon the theory that appellant had converted the property upon which he had a valid mortgage lien and not upon the replevy bond. This being true, the usual judgment rendered when recovery is had upon a replevy bond was not called for and would not have been the proper judgment.

This also disposes of the eighth assignment of error, which seeks to present practically the same question as the one just discussed.

[13, 14] The ninth assignment of error complains:

"That the court erred in instructing the jury to find for the plaintiff against this defendant in the sum of \$1,651 for the reason that said instruction and said verdict is contrary to the undisputed evidence in this case."

Consideration of this assignment is objected to by appellee because it is too general and is not supported by any proposition nor by any appropriate statement. The only statement made under this assignment is that—

"The judgment of the court (Tr. 17) shows that the judgment was rendered against this defendant for \$1,651.00, being the alleged value of the two articles of jewelry in controversy as shown by preceding assignments."

No testimony whatever is stated or quoted in support of the assignment "that said instruction and said verdict is contrary to the undisputed evidence in the case." To determine whether or not that assertion is true, we would have to examine all the evidence contained in the statement of facts. This, since it cannot be said that the error claimed is not one "apparent upon the face of the record," we are not required to do. That the error is not fundamental or "apparent upon the face of the record" is clearly affirmed by the holding of the Supreme Court in *Houston Oil Co. v. Kimball*, supra, and a number of other cases which might be cited. We regard the rules and decisions of this state as binding upon us, in reference to briefing of cases, especially where a consideration of them is objected to on that ground, no matter how much disposed we might be to waive a noncompliance with them. The assignment cannot be considered.

[15, 16] The last assignment of error, which is submitted as a proposition, is that—

"The court committed error in refusing to grant defendant a new trial for the reasons set forth in paragraphs 11 and 12 of defendant's amended motion for a new trial."

Appellee objects to a consideration of this assignment: (1) Because the same is insufficient to call the court's attention to any proposition of law, and because the first proposition thereunder is not itself a prop-

osition; (2) because said assignment and propositions thereunder are not supported by any statement showing that allegations in paragraphs 11 and 12 of defendant's motion for new trial are true or that the court heard any testimony in support of such allegations, nor is any such evidence presented in the record. The presumption therefore is that such testimony, if any, as was presented on the issues, if any, attempted to be raised on said grounds of the motion, was such as to justify the court in overruling the same. Clearly, the objections are well taken and are therefore sustained.

The judgment of the court below is affirmed.

### BAKER v. BROWN et al. (No. 8954.)

(Court of Civil Appeals of Texas. Ft. Worth. Dec. 21, 1918.)

#### 1. CARRIERS ⇐228(5) — LIVE STOCK SHIPMENT—DELAY—SUFFICIENCY OF EVIDENCE.

Evidence that it took railroad more than 40 hours to transport shipment 221 miles, and that there were two delays of 8 hours each, held sufficient, in the absence of explanation on part of railroad justifying delays, to warrant finding that delay was unreasonable.

#### 2. CARRIERS ⇐228(5)—LIVE STOCK SHIPMENT—UNREASONABLE DELAY—EXPLANATION OF DELAY.

Where there is evidence of unusual delay in transmission of shipment of stock, railroad's failure to explain delay is of itself clothed with probative force on the question of whether delay was unreasonable.

#### 3. EVIDENCE ⇐17—JUDICIAL NOTICE—TIME CONSUMED IN TRAVEL.

A court is authorized to take judicial cognizance of the length of time consumed in travel by the present modes of conveyance between two designated places; such facts being facts of general knowledge.

#### 4. EVIDENCE ⇐66—PRESUMPTIONS—LENGTH OF TIME CONSUMED IN TRAVEL.

Jurors will be presumed to have knowledge of the length of time consumed in travel between two designated places; such facts being facts of general knowledge.

#### 5. CARRIERS ⇐230(8) — UNREASONABLE DELAY—ACTION FOR DAMAGES—INSTRUCTIONS.

Evidence held to warrant instruction on issue of whether railroad company exercised ordinary care to avoid unusual and unreasonable delay in live stock shipment.

#### 6. APPEAL AND ERROR ⇐1064(4)—REVIEW—HARMLESS ERROR—SUBMISSION OF ISSUE.

In shipper's action for delay in transmission of live stock shipment, instruction on issue whether carrier held shipment "for a great

length of time" was not prejudicial, though some other expression than that quoted could have been more appropriately used, where there was undisputed evidence of delay.

Appeal from District Court, Howard County; W. W. Beall, Judge.

Suit by G. A. Brown and another against James A. Baker, receiver. Judgment for plaintiffs, and defendant appeals. Affirmed.

Littler & Penix and S. A. Penix, all of Big Spring, for appellant.

J. A. Templeton, of Ft. Worth, for appellees.

BUCK, J. Suit was brought by G. A. Brown and W. H. Jackson against the receiver of the International & Great Northern Railway Company for the sum of \$1,875, alleged damages to a shipment of mules from Big Springs to Thrall, Tex., shipment made over the Texas & Pacific Railway from Big Springs to Ft. Worth, and from Ft. Worth over the International & Great Northern Railway to Thrall. Plaintiffs pleaded that the shipment was delivered to the defendant by the Texas & Pacific Railway in good condition, but that the defendant was guilty of negligence in the manner of the handling of said shipment; that the train containing the shipment made a slow run from Ft. Worth to Thrall, frequently stopped and delayed for considerable time en route, stopping and starting with great force and violence, etc. The principal delay alleged occurred at the station of Gause, in Milan county, some 45 miles from Thrall. It was alleged that the delay at Gause was for a period of about 8 hours, the train arriving there about 1 o'clock a. m. January 2, 1917; that the engine pulling the train was uncoupled from the train and used for purposes wholly disconnected with the movement of said stock, and that the stock were left on the side track without feed or water, both of which they were sorely in need of, for said 8 hours; thereafter they were transported over defendant's line to Thrall, where they arrived about 1 o'clock a. m. January 3d; that upon the arrival of the shipment at Thrall, plaintiff Jackson, who accompanied same as caretaker, at once called the defendant's agent and notified him of the arrival of said stock and of the necessity of unloading, feeding, and watering them, but that said agent negligently and wrongfully failed to unload or feed or water said stock until about 9 o'clock a. m. of said last-mentioned date, when he permitted the stock to be unloaded, but that he did not water or feed them until about 10 o'clock p. m. of said date, when a few of the mules were watered in tubs and given a small amount of

feed. Plaintiffs further alleged that defendant was negligent in failing to have at Thrall proper facilities for feeding and watering said stock. Defendant answered by general demurrer and general denial, and specially pleaded that the plaintiff Jackson entered into a written contract with defendant whereby he agreed and obligated himself to feed and water the stock and to pay for the feed while in the stockyards, and that defendant was under no obligation to water and feed them, and it was plaintiffs' duty to do so. Plaintiffs, in their supplemental petition, pleaded that no suitable pens and facilities were provided for feeding and watering the stock, or for unloading and resting them, while in transit on defendant's line.

The first assignment is leveled at the giving in charge to the jury the following paragraph of the court's main charge, to wit:

"It was the duty of the receiver of the International & Great Northern Railway to use ordinary care and diligence in handling and transporting plaintiffs' mules from Ft. Worth to Thrall, Tex., and to do so without any delays except such as were reasonable and necessary, and without injury other than such as was natural and incident thereto."

It is urged that it was error for the court to submit the issue as to whether any delays occurring in transit were reasonable and necessary, or were unreasonable and unnecessary, in the absence of any evidence upon that issue. It does not appear that any witness testified as to what was the usual and customary time for such shipment from Ft. Worth to Thrall, or whether or not the time taken, to wit, 40 hours, to travel about 221 miles, was a usual or unusual time. The evidence shows that the explanation given by the railway company for the delay at Gause was that the engine pulling the stock train was needed to pull a passenger train whose engine had become disabled. Jackson testified:

"My recollection is that I shipped out of Ft. Worth that night about 6 o'clock—I mean that they were reloaded about 6 o'clock, and we got out of there at about 8, something a little after 8; they went out of Ft. Worth over the I. & G. N. road. \* \* \* I think it was the 1st day of January—it was night—that we got out of Ft. Worth, about 8 o'clock. As to whether we had any considerable delay: Well, the run was as good as we get over a local, on a local, till we got to Valley Junction, and we staid there a little while, and we run up then to Gause, a little place, I think it was 7 or 8 miles from Valley, and there they sidetracked this train, and took the engine to go back and get the through passenger, the fast train; the engine had went dead, the locomotive had, and they took the locomotive off of this train and went back to pull this passenger train. And when they sidetracked, and I seen that they had

taken the engine off, I went to the conductor and asked him what they was going to do about it, and he told me, and he says, 'There is another train that will pick you up in about four hours;' and I said, 'It might and might not, you know how those things are; and if they did stay there, I had those mules over there, and if it didn't come along in a reasonable time, I will unload them and feed them;' and he said it wouldn't be necessary; and he just left me there on the sidetrack. That was about 1 o'clock the 2d day of January; \* \* \* and I stayed there then until about 10 o'clock that night on the sidetrack, and they picked me up and run me into Thrall, where I was billed to. \* \* \* We got into Thrall about 1 o'clock."

[1, 2] While it appears no witness testified in so many words that the time taken for the trip was unusual or longer than necessary, yet we think the jury, composed of men of ordinary sense and experience, were justified in concluding that the delays at Thrall and Gause were unusual and even unreasonable delays, in the absence of some explanation justifying such delays. It does not appear that any explanation was made of the delay at Gause, except that the engine was detached for the purpose of hauling the passenger train. No explanation is given for the delay in not unloading the shipment at Thrall, except that the defendant's station agent at Thrall testified that the stock arrived there during the night, as testified by witness Jackson, and that they were unloaded the next morning. Jackson testified, in substance, to the facts pleaded in plaintiff's petition. The facts were before the jury, as to the two delays, one at Gause and the other at Thrall, of some 8 hours each, and that some 40 hours were taken from the time the shipment left Ft. Worth until the stock were unloaded at Thrall. We think this evidence tends to establish unreasonable delays in the transmission of the shipment, and that at the same time it discloses that it was within the power and to the interest of the railway company to show that the delays were not unreasonable. The silence of the railway company in such a case, not only strengthens the probative force of the affirmative proof, but is of itself clothed with a certain probative force. *M., K. & T. Ry. Co. v. Day*, 104 Tex. 237, 136 S. W. 435, 84 L. R. A. (N. S.) 111; *G., H. & S. A. Ry. Co. v. Young*, 45 Tex. Civ. App. 430, 100 S. W. 994; *W. U. Tel. Co. v. Cates*, 105 Tex. 324, 148 S. W. 281; *S. A. & A. P. Ry. Co. v. Williams*, 158 S. W. 1178; *State Bank v. Burrus Mill & Elevator Co.* (No. 8900) 207 S. W. 400, recently decided by this court, and cases there cited.

16 Cyc. p. 933, reads as follows:

"The party having the burden of proof may establish a prima facie case in several ways: (1) He may prove facts which give rise to an

inference of that probative weight; or (2) he may establish the existence of some legal substitute for such an inference of fact; or (3) he may proceed by a combination of these methods as to the whole or different parts of his case."

[3-5] We think the jury, from the common experience and knowledge of men with reference to the usual and customary rate of travel of shipments like the one in question, were authorized to find that 40 hours taken in a trip of 221 miles, and two delays of 8 hours each, are unusual and not customary, and to conclude, in the absence of any explanation given by the railway company, that said delays were unreasonable. A court is authorized to take judicial cognizance of the length of time consumed in travel by the present modes of conveyance between two designated places. 16 Cyc. 863; *Magee v. Chadoin*, 30 Tex. 644; *Blethen v. Bonner*, 52 S. W. 571, writ denied; 16 Cyc. p. 873 (lv). If a court can take judicial knowledge of such matters, it is because they are facts of general knowledge; hence juries, composed of men of ordinary intelligence and experience, are presumed to have such knowledge. We are of the opinion that the evidence cited presented the issue of whether or not the railway company exercised ordinary care to avoid unusual and unreasonable delays in the shipment in question, and the court did not err in the charge given.

Complaint is also made in the use of the expression of "a great length of time" in the court's charge as follows:

"And if you further find from the evidence that defendant, or his agents or employes, held said live stock in his care in his yards for a great length of time, as alleged by plaintiff," etc.

[8] The proposition of this assignment is:

"It is error for the court to instruct the jury upon a point not raised by the evidence, even though the issue is made by the pleadings."

While we think some other expression might have been used more appropriately, yet we are unable to say that the uncontradicted evidence does not show that, under the circumstances, the live stock in question were held by the defendant "for a great length of time." We are of the opinion that the jury could not have been misled, and that the defendant was not injuriously affected by the use of the expression in the connection in which it was used. The facts as to the delays were largely undisputed, and appellant does not claim any material conflict as to the evidence upon the question of the delays in defendant's yards; hence we overrule both of appellant's assignments, and the judgment is affirmed.

Judgment affirmed.

# ROSSER v. LEVI et al. (No. 8109.)

(Court of Civil Appeals of Texas. Dallas. Feb. 22, 1919. Rehearing Denied March 22, 1919.)

## 1. BROKERS $\S$ 96 — AUTHORITY TO RECEIVE PURCHASER'S DEPOSIT.

A broker to sell property has no inherent authority to receive part payment or earnest money from the purchaser.

## 2. BROKERS $\S$ 108 — PURCHASER'S PAYMENT TO BROKER—RATIFICATION.

That vendors signed purchaser's offer reciting payment of \$500 as part of purchase price without demanding payment of said sum held, in view of agreement between vendors' brokers and purchaser, of which agreement vendors knew nothing, not to constitute ratification of payment to brokers so as to make vendors liable for return of the \$500, where purchaser receded from offer because of material alteration of the same.

## 3. PRINCIPAL AND AGENT $\S$ 166(1) — UNAUTHORIZED ACT—RATIFICATION.

A ratification of an unauthorized act or contract, to be effectual and obligatory upon alleged principal, must be shown to have been made by him with a full and complete knowledge of all the material facts.

## 4. APPEAL AND ERROR $\S$ 1040(3)—SUSTAINING OF SPECIAL EXCEPTION—HARMLESS ERROR.

Error in sustaining special exceptions that cause was barred need not result in reversal, where plaintiff was not entitled to recovery against them in any event.

Appeal from Dallas County Court; T. A. Work, Judge.

Suit by V. O. Rosser against Marcus C. Levi and others. From the judgment rendered, plaintiff appeals. Affirmed.

J. F. Evans, Jr., Marshall Thomas, and Crane, Crane & Umphres, all of Dallas, for appellant.

Grover Adams, Thompson, Knight, Baker & Harris, and Alex F. Weisburg, all of Dallas, for appellees.

RASBURY, J. Appellant sued appellees, Marcus C. Levi, J. K. Hexter, Jas. G. Houston, and De Witt Bennett, composing the firm known as the Bennett Company, real estate brokers, hereafter referred to as the Bennetts, alleging that he entered into a written contract with Levi and Hexter by which they agreed to sell and appellant to purchase a lot in the city of Dallas, in which transaction Levi and Hexter were represented by the Bennetts; their agents, and to whom appellant paid \$500 as part of the purchase price of said lot, and which amount appellant was entitled to recover back for the

reason that the contract of purchase was materially changed without the consent or ratification or appellant after he had executed and delivered same. Appellees Hexter and Levi, after general demurrer and denial, pleaded specially that they were not liable for said sum for the reason that the Bennetts acted as agents of appellant in receiving said money, which was never paid over to them, and further that any change made in the contract was with the knowledge and consent of appellant or ratified by him. Appellees Levi and Hexter also by cross-action sought to recover from appellant \$100 on the ground that appellant, without legal excuse, repudiated his contract to purchase said lot, said sum representing the difference between the amount he agreed to pay for said lot and its market value at the time of such repudiation. Appellees, the Bennetts, tendered the general demurrer, special exception presenting the bar of the two-year statute of limitations, and the general denial. Upon call of the case the court, among other matters, sustained special exception presenting the bar of limitation of appellant's cause of action against the Bennetts, to which appellant excepted. There was trial to jury, upon conclusion of which the court peremptorily directed the jury to return verdict against appellant on his cause of action against Levi and Hexter and a similar verdict against Levi and Hexter on their cross-action against appellant. Such verdict was returned, followed by similar judgment, from which this appeal is taken.

The fact deducible from the record and necessary to a disposition of the issues presented are in substance these: Levi and Hexter, owners of a lot in the city of Dallas, listed it with the Bennetts, real estate brokers, for sale. Thereafter the Bennetts sold same to V. O. Rosser. Rosser acted in the name of A. W. Macon, his employe, but, since it is not denied that Rosser was the real party in interest, no further reference will be made to Macon. The sale to Rosser was evidenced by an agreement in writing signed by Rosser and Levi and Hexter, and recited, in substance, that Levi and Hexter had received \$500 from Rosser in part payment of the lot for which Rosser agreed to pay \$30,625. The consideration was to be paid part in cash, part by notes of Rosser, and the balance by Rosser accepting conveyance "subject" to an existing indebtedness against the lot. There was also provision for the deferred payments to bear interest, for the payment and adjustment of taxes, etc., not important to detail. If examination of abstract disclosed title was not good, and if it was not made good within 60 days after attorney's opinion, the \$500 was to be returned to Rosser. The contract was a printed form with blanks to be filled in according to the agreement, and was prepared

and signed by Rosser before it was delivered to Levi and Hexter. In one of the blanks it was recited that Rosser would pay 7 per cent. per annum interest on deferred payments, the interest to be paid annually. When the contract was received by Levi and Hexter, they signed same and altered the contract so as to make the interest on the deferred payments payable semiannually. The change was made by Hexter, who says the change was made to conform the written portions to the printed, which in every reference to the interest recited that it was to be payable semiannually. When Rosser signed the contract, he delivered the same to the Bennetts with his check for \$500 payable to the Bennett Company or order. Simultaneously with the execution and delivery of the contract of purchase and the check Rosser took from the Bennetts an agreement in writing reciting that in the event Rosser elected to forfeit the \$500 advanced in the manner detailed the Bennetts would assume one-half of the loss. At the time Rosser delivered the check to the Bennetts they notified Rosser that it was their purpose to deposit the money to the credit of the Bennett Company, to which Rosser made no objection. It was so deposited. The time in which the purchase was to be completed was extended twice at the request of Rosser. Before the expiration of the last extension Rosser advised the Bennetts that he would not proceed with the purchase, but instead would forfeit the \$500, and at that time agreed with the Bennetts that they could retain the \$250 which they had agreed to refund him in event he concluded not to proceed with the purchase on condition that the Bennetts would allow him that sum on his next indebtedness to them as brokers, to which the Bennetts assented. Following out his purpose to recede from the contract, Rosser refused to accept deed, pay the cash consideration, and sign note and trust deed when presented to him. Subsequently he learned that the contract had been changed in the manner already recited, and that the deed tendered bound him to assume the existing indebtedness against the property instead of taking the same "subject" to the existing lien, whereupon he notified one of the Bennetts that, it appearing that Levi and Hexter had never accepted his offer, but changed it materially without his knowledge or consent, nor tendered deed, etc., in compliance therewith, he was not bound by his offer, and hence entitled to recover the \$500 deposited by him. The foregoing facts are not in material controversy. Whether Rosser consented to or ratified the change in the contract, or whether Levi and Hexter knew at the time they signed the contract that the money had been paid to the Bennett Company, were matters in dispute.

[1] Upon the facts so related we have reached the conclusion that the judgment of

the trial court in peremptorily directing verdict for appellees Levi and Hexter should be affirmed. While the several propositions advanced by appellant under assignment of error challenging the action of the court in the respect stated are conceded to be sound, the facts do not, in our opinion, warrant their application. It is declared by an accepted authority that—

"Except in a case of custom or usage, of trade to the contrary, or an estoppel arising against the principal, a payment made to a broker, and not received by the principal, is not ordinarily binding on the latter as a payment to him, unless the broker has express or implied authority to receive it. \* \* \* Thus a broker employed to sell property has no inherent authority to receive the price, and consequently, if the purchaser pays it to him and the principal does not receive it, it does not constitute a payment to the latter, especially when the purchaser knows, or should know, that the broker is acting as such, or where the principal is known to the purchaser." 9 C. J. 670.

Another accepted authority declares that—

"Moreover, as a broker is usually given only such authority as is commensurate with the duty of negotiating a deal, he is deemed to have no implied power to receive payment in behalf of his employer, and a debtor of the latter making payment to him does so at the risk of having to pay again in case the broker defaults." 4 R. C. L. 259.

The facts just detailed by us fail to disclose any of the exceptions to the general rule, such as custom, usage, or estoppel, which would warrant the payment of the purchase money by Rosser to the Bennetts, the brokers, save one circumstance presently to be noticed. The principals, Levi and Hexter, did not receive the payment made to the brokers and hence it was not a payment to them, and as a consequence they are not bound to account for same, even though there was such material alteration of the contract as to warrant a holding that the offer made by Rosser was never accepted, and we incline to that opinion. *Colvin v. Blanchard*, 101 Tex. 231, 106 S. W. 323.

[2, 3] But it is contended by appellant that appellees Levi and Hexter knew when they accepted the offer of Rosser that it recited the payment of \$500 as part of the purchase money, and that their failure to demand the money was a ratification of or an acquiescence in its payment to the brokers which they are estopped to deny. There would be undoubted force in the contention but for the reason that it is a further rule consistent with the one invoked that—

Any "ratification of an unauthorized act or contract, in order to be made effectual and obligatory upon the alleged principal, must be shown to have been made by him with a full and complete knowledge of all the material

facts connected with the transaction to which it relates." *Mechem, Agency*, vol. 1, par. 395.

"Assent may in some cases be presumed from acquiescence after notice. But it is a principle too clear for doubt or question, and of universal recognition, 'that there can be no binding ratification without full knowledge.'" *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

If it may be said that, when Levi and Hexter accepted the offer of Rosser without demanding the money from the agent, they assented that the agent should receive it, such assent in law contemplated that the money should be unconditionally received for the very purpose recited in the agreement; that is to say for the use and benefit of Levi and Hexter. The facts, in our opinion, disclose that Rosser paid the money to the Bennetts, and they received it under agreements and circumstances which never contemplated that it should be paid to Levi and Hexter in the event Rosser receded from his offer, and concerning which Levi and Hexter knew nothing. It is in the record without dispute that the Bennetts, when the money was paid them, advised Rosser it was their intention not to retain it for their principal, but to deposit same to their personal credit. Rosser knew that, if they did so, it would not be a payment to Levi and Hexter, and yet did not object. Subsequently, and when he had concluded to recede from his offer to purchase, he agreed that the entire \$500 should be appropriated by the Bennetts to their individual use if the Bennetts would, when next they represented him in a similar deal, allow him \$250. It is difficult to argue under the facts related that the money paid to the Bennetts was not a payment to Levi and Hexter. Neither Rosser nor the Bennetts intended they should have the money if it was forfeited. Their disposition of it upon forfeiture ought to, and does, in our opinion, settle that issue. The fact that it later developed that a forfeiture could have been avoided does not affect the fact that Rosser did dispose of or divert the fund.

[4] Complaint is made of the action of the court in sustaining special exception of the Bennetts which presented the issue that appellant's cause of action against the Bennetts was barred by the two-year statute of limitations. The money was paid to the Bennetts, according to the petition, October 25, 1913. The original petition is not in the transcript, but it appears from an amendment thereof that the original suit was filed November 2, 1914, which was less than two years after the cause of action accrued. From the transcript it appears that the Bennetts were made parties defendant at the time the suit was filed; at least that inference is as reasonable as would be the inference that they were not. As a consequence on the record as presented to us it appears that the court did err in sustaining the special exception. However, that

fact need not, in our opinion, result in a reversal of the cause, for the reason that we are also of the opinion that the appellant was in no event entitled to recover against the Bennetts. As between Rosser and the Bennetts, the fund, in our opinion, belonged to the former, since it does not appear from the record that the Bennetts had any interest in the fund, unless they were by custom entitled to a portion of it if forfeited by Rosser, which is suggested in the testimony of one of the Bennetts. Rosser's right to recover of the Bennetts did not depend upon the liability of Levi and Hexter for the reason, as we have said, that it was never received for the benefit of Levi and Hexter. Rosser waived liability of the Bennetts in the manner we have recited. He did not make that agreement under any mistake of fact so far as relates to the Bennetts. What induced the arrangement does not appear. It may be that he believed the usefulness of the Bennetts in the future would warrant the arrangement. In any event the agreement was made, and we know of no legal objection to its binding force.

Appellees Levi and Hexter in their brief consent that their cross-assignment may be overruled if the case is affirmed, and for that reason it is not considered.

Finding no reversible error in the record, it becomes our duty to affirm the case. Affirmed.

**BEST & RUSSELL CIGAR CO. v. WILLIAM REESE CO. et al. (No. 8951.)**

(Court of Civil Appeals of Texas. Ft. Worth. Jan. 25, 1919.)

**1. RAILROADS — 265 — RECEIVER'S LIABILITY — TERMINATION OF RECEIVERSHIP.**

After termination of railroad receivership, receiver cannot be held liable for negligence in operation of railroad during receivership, where he was not personally at fault; the receiver's liability being official, and being terminated upon termination of receivership.

**2. RAILROADS — 212 — RECEIVERSHIP — TERMINATION — LIABILITY OF RAILROAD.**

In absence of statute, railroad, upon termination of receivership, is not liable for negligence in operation of road during the receivership, unless profits of operation during such time have been paid over to the company or invested in betterments, or the company or its property was made liable for debts of the receivership in the order or decree discharging receivers.

**3. STATES — 4 — FEDERAL RECEIVERSHIP — LAWS APPLICABLE.**

State statutes are not applicable to federal receiverships.

**4. RAILROADS — 270 — RECEIVERSHIP — TERMINATION OF RECEIVERSHIP — ACTION AGAINST RAILROAD.**

In action against railroad, after termination of receivership, to recover damages from operation of road by receivers, plaintiff has burden of proving that profits of operation of road by receivers were paid over to company or invested in betterments, or that railroad was made liable for the receiver's debts by order or decree of court.

**5. SALES — 343, 344 — QUANTUM MERUIT.**

Irrespective of an express contract of purchase, one receiving and using goods is liable in quantum meruit for their reasonable value.

Appeal from Comanche County Court; J. H. McMillan, Judge.

Action by the Best & Russell Cigar Company against the William Reese Company and others. From judgment for defendants, plaintiff appeals. Affirmed in part, and reversed and remanded in part.

W. T. McPherson, of Comanche, for appellant.

Smith & Palmer, of Comanche, for appellees.

CONNER, C. J. Appellant filed this suit to recover the sum of \$105 for a case of cigars, which in one count of its petition it was alleged that the William Reese Company had ordered and had contracted to pay therefor the sum stated. In another count of the petition it was alleged that the cigars had, in fact, been shipped and delivered to the William Reese Company and used by them, and that they were therefore liable for the reasonable value thereof, which it was alleged amount to \$105.

The plaintiff further alleged that, if it should be found that the William Reese Company had neither purchased nor received the case of cigars in question, as specially asserted by them in their answer, it was nevertheless true that the cigars had been received by the railroad company, and its receivers named, for the purpose of delivery to the William Reese Company, and the prayer was, in the event of a judgment for that defendant, that the plaintiff might have judgment against the railway company and its receivers for the reasonable value thereof, as already stated.

The case originated in the justice court, but on a trial de novo in the county court, on the issues as above stated, there was a jury verdict and judgment for the defendant William Reese Company, and a directed verdict in favor of the railway company and its receivers, from all of which the plaintiff has appealed.

[1] We find it necessary to discuss but two questions presented, and this will be done briefly. Appellant insists that the court

erred in summarily dismissing and entering judgment for the railway company and its receivers. In this action, however, it cannot be said that the trial court erred. It is true that the evidence tends to show, if it did not conclusively show, that the case of cigars in question had been received and transported over the defendant railway to Comanche, Tex., to which point it was billed; but it is undisputed that this occurred, if at all, during the pendency of the receivership, and that the receivers had been duly discharged by the court appointing them long before the trial. The sole liability of the receivers, except in cases in which they are personally at fault (and nothing of that character is alleged in this suit) is official; and when their official career ceases, and when the property delivered to them as receivers has passed from their hands under orders of the court that appointed them, and they have been by that court discharged from their trust, then no judgment can be rendered against them. With the termination of their official existence, their official liability is ended. See *Ryan v. Hayes*, 62 Tex. 47; *Brown, Receiver, v. Gay*, 76 Tex. 444, 13 S. W. 472, and cases therein cited. It cannot therefore, as stated, be said that the court improperly dismissed the receivers in this case.

[2] We do not feel able to say that the court erred in rendering judgment for the railway company. It was alleged in the answer of the railway company that if the case of cigars had ever been transported over its line of road, as alleged by plaintiff, and delivered, that it was so done while its property was in the hands of the receivers, who had been duly appointed by the federal court at Ft. Worth, Tex., and that therefore it was not liable in any event. No pleading in behalf of plaintiff controverted these allegations, nor does appellant point out any evidence indicating an issue on this point, and we must assume, we think, that the court based his action upon the pleading so presented and undisputed evidence supporting them. Such being the state of the record, it seems clear that no cause of action was presented against the railway company. As stated by this court in the case of *Ft. Worth & Rio Grande Ry. Co. v. Burleson*, 214 S. W. 617, decided on November 30, 1918, in an opinion not yet officially published:

"In the absence of some statute otherwise providing, neither a railway company nor its property, after the termination of the receivership proceedings, is liable for the negligence of the receivers while operating the property, unless it be shown that the receivers had operated the railroad at a profit, which profit had been paid over to the railroad company when the receivership was terminated, or that sufficient proceeds arising from the operation of the road had been invested by the receivers in the improvement and betterment of the physical property returned to the company, or that the com-

pany or its property had been made liable for the debts of the receivership in the order or decree discharging the receivers and under which the company resumed possession and control."

[3, 4] And in cases of federal receiverships, to which our statutes otherwise providing have no application, a shipper, suing for damages because of negligence of the receivers, has the burden of alleging and proving some one or more of the essential facts, as above stated, in order to justify a recovery against the railway company and its properties. See *Kansas City, M. & O. Ry. Co. v. Russell*, 184 S. W. 299; *I. & G. N. Ry. Co. v. Perkins*, 185 S. W. 657; *Hovey v. Weaver*, 175 S. W. 1089; *Ft. Worth & R. G. Ry. Co. v. Zidell*, 202 S. W. 351. The plaintiff, therefore, not having in this case alleged or proven any fact necessary to entitle him to a recovery against the railway company, properly suffered judgment against him as given by the court. The judgment below, in so far as it was in favor of the receivers and the railway company, must accordingly be affirmed.

We are of the opinion, however, that there was reversible error relating to the verdict and judgment in favor of the defendant William Reese Company. As between the plaintiff and the William Reese Company the court thus submitted the issues:

"If you find, from a preponderance of the evidence, William Reese Company bought the case of cigars in question from plaintiff, as alleged by plaintiff, and you further find that plaintiff shipped said case of cigars to said defendant, or caused such shipment to be made, and that such shipment reached the depot in Comanche, you will find for the plaintiff against William Reese Company for the price of said cigars, with interest at the rate of 6 per cent. per annum from the 1st day of January, 1914. Unless you find from a preponderance of the evidence that the defendant bought said cigars, and plaintiff shipped or caused said case of cigars to be shipped to defendant, you will find for the defendant."

[5] As already noted, the plaintiff, in addition to the contract declared upon, also presented a plea in the nature of a quantum meruit. Evidence was conflicting on the issue of whether the William Reese Company had ordered and agreed to pay for the case of cigars as alleged by the plaintiff, and it was proper for the court to submit that issue; but it is clear that the whole charge quoted excludes entirely any right of recovery in the plaintiff on the ground that William Reese Company, notwithstanding they had not purchased the cigars, had received them and used them, and were therefore liable for the reasonable value of the same. Appellants insist that the evidence was conclusive in its favor on this issue, but after careful consideration of the evidence, we do not feel able to say so. We think that there was evidence in favor of the plaintiff on this issue that would have supported a verdict in



its favor, and the charge of the court was undoubtedly erroneous in excluding the issue. Appellant's objections to the charge sufficiently present the question, and its assignments relating thereto are accordingly sustained, and the judgment, as between the appellant and the William Reese Company, will be reversed, and the cause as to said parties remanded for trial.

Affirmed in part, and reversed and remanded in part.

**REPUBLIC OIL & GAS CO. v. OWEN et al.**  
(No. 8961.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Jan. 25, 1919. Rehearing Denied  
March 1, 1919.)

**APPEARANCE ¶9(5)—MOTION TO CONTINUE.**

A motion to continue constitutes a general appearance from the fact that defendant has asked an adjudication and invoked the court's powers, so that he necessarily subjected himself to its jurisdiction.

Appeal from District Court, Wichita County; Edgar Scurry, Judge.

Suit by T. W. Owen and another, composing the firm of Owen & Wilson, against the Republic Oil & Gas Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Cardew, Starling, Cardew, Hemphill & Wallace, of Dallas, for appellant.

Weeks & Weeks, of Wichita Falls, for appellees.

**CONNER, C. J.** The firm of Owen & Wilson, composed of T. W. Owen and G. E. Wilson, instituted this suit in the Thirtieth district court of Wichita county on the 4th day of June, 1917, to recover upon a promissory note in the sum of \$1,417.45 executed by the Republic Oil & Gas Company, and to foreclose a chattel mortgage given to secure said note on certain personal property described in plaintiff's petition. Citation appears to have been issued, but the service thereof, upon motion of the defendant, was quashed on the 16th day of June, 1917, and on the 19th day of June the court of the Thirtieth district made the following order:

"This day the 30th court on its own motion transferred the above entitled and numbered cause to the Seventy-Eighth district court for service and trial."

Thereafter, on the 19th day of September, 1917, the defendant company by its counsel verbally presented, in the Seventy-Eighth district court, a first application for continuance on the sole ground of the absence of a witness named Owsley, at the time thought to be in

California, but whose exact whereabouts was alleged to be unknown to the defendant. In this application, which it was agreed might be presented verbally, it was stated that the witness named had gone to California with the knowledge of the defendant, but that defendant had failed to ascertain the exact location. It was made to further appear that since the institution of the suit the witness had been in California the greater portion of the time, but that he had not been communicated with, and no effort had been made to take his deposition. Counsel for the defendant stated that at the time the witness left for California no arrangement had been made to have him come back as a witness, but that he thought he would be back by December, at which time he supposed the case would come up for trial, the suit having been filed in the Thirtieth district court, and he being of the opinion that the transfer to the Seventy-Eighth district court could not be legally made.

Counsel for plaintiff stated that about August 30, 1917, he had been in the office of counsel for the defendant with a view of fixing a date for the trial of the cause, and later received a letter, advising that they, defendant's counsel, would "try to arrange to try this case one day during the week of the 17th (of September) and I will write you next Tuesday what day we can come up there." In this letter counsel for defendant inclosed a check for \$5, and wrote, "Please put this case on the docket and oblige." Upon receiving the letter counsel for the plaintiff caused the case to be placed upon the jury docket and the jury fee paid, and the case set for trial September 17, 1917. The court, after having heard the application, overruled it, but was of the opinion that the case should be postponed to some convenient time, "and it was agreed in open court by counsel for both sides that the case should be set for trial September 27th in order to allow time for counsel for the defendant \* \* \* to ascertain Owsley's address." To which action of the court in overruling said application for continuance, said defendant then in open court excepted.

On September 28, 1917, when the case was called for trial in the Seventy-Eighth district the defendant through its counsel presented a written motion to quash the sheriff's return on the citation on the ground that it failed to show that defendant had been served with a certified copy of plaintiff's petition. The motion alleged that the citation served had attached thereto a copy of the plaintiff's petition, but averred that said copy was not certified to by the clerk as being a correct copy of plaintiff's original petition. This motion was overruled by the court, and was also a motion presented by one of defendant's

counsel as *amicus curiæ* on the ground that the Seventy-Eighth district court was without jurisdiction to try the case. On the same day, to wit, September 28, 1917, the defendant filed its original answer to the merits, and also filed its first amended answer to plaintiff's first supplemental petition, and the case proceeded to trial, and judgment in plaintiff's favor, and the defendant has appealed.

Appellant's only assignment of error presents a question of jurisdiction. It is insisted that the effect of the quashing of service of the citation by the Thirtieth district court on June 16th, was, by operation of law, to continue the case to the succeeding term of said Thirtieth district court, which was in December, 1917, and that there could be no legal transfer of the case to any other court, as was done by the Thirtieth district court, so as to enforce, without new service, or without a general appearance, an appearance and trial before the date of the opening of the next term of the original court.

By law two district courts were authorized for Wichita county, and section 3 of the act of February 10, 1915 (Acts 34th Leg. c. 6 [Vernon's Ann. Civ. St. Supp. 1918, art. 80]), constituting the Seventy-Eighth district court of Wichita county, reads as follows:

"The judges of the Thirtieth and the Seventy-Eighth district courts for Wichita county may each, in his discretion, at any time or upon agreement of the parties or where the judge may believe the administration of justice will be facilitated thereby transfer any cause, civil or criminal, from the dockets of their respective courts to the docket of the other district court for Wichita county and shall note such transfer on the docket; whereupon the clerk of the district court shall enter said cause upon the docket of the other district court to which such cause has been transferred and such case shall there be tried or disposed of as if originally filed in said court," etc.

By the terms of the law the first term of the Thirtieth district court after the quashal of the service upon the defendant on June 16, 1917, began in December, 1917, while the first term of the Seventy-Eighth district court after such quashal of service began on the first Monday in September, 1917.

Article 1883, Vernon's Sayles' Statutes provides that—

"Where the citation, or service thereof, is quashed on motion of the defendant, the case may be continued for the term, but the defendant shall be deemed to have entered his appearance to the succeeding term of the court."

We do not feel prepared to hold that this article of the statutes should be construed as appellant evidently insists that it shall be. Of course, if applied literally, and no further action of any kind had been taken by appellant and the case had remained in the Thirtieth district court, the effect of the quashal

of the service upon appellant, June 16, 1917, would have postponed the time when appellant would have been compelled to answer until the December term of the Thirtieth district court. But as we have seen the act of February 10, 1915, expressly authorized the district courts of Wichita county to transfer causes, and expressly declares that when such transfer has been made the district court to which the case shall be transferred shall there try or dispose of it, as if originally filed in said court. Thus apparently, at least, when this case was transferred to the Seventy-Eighth judicial district court it stood as if the suit had originally been filed in that court, and, if so, the effect of the quashal of the service of the citation would continue the case only to the succeeding September term of the Seventy-Eighth district. However, we need not determine this question, and do not determine it, inasmuch as we find it unnecessary to do so. We are of the opinion that a full answer to appellant's contention here is to be found in action taken in its behalf after the transfer of the cause to the Seventy-Eighth district. It is undisputed that pursuant to request of appellant's counsel a jury was demanded and the case placed upon the jury docket, and that thereafter, on the 19th day of September, a motion for continuance was made, which was acted upon by the court, and counsel for appellant thereupon agreed that the case might be set down for trial on September 28th. At this time counsel for appellant made no suggestion that the court was without jurisdiction, nor was the application for continuance in any manner limited, and we feel no hesitation in holding that in so doing appellant entered its appearance and submitted itself to the jurisdiction of the court. It is well settled with us that all appearances are general appearances unless specially limited, and that a general appearance is a waiver of process and confers jurisdiction of the court over the person appearing. See *Mueller v. Heidemeyer*, writ of error refused, 49 Tex. Civ. App. 259, 100 S. W. 447, and authorities therein cited, and *A. T. & S. F. Ry. Co. v. Stevens* (Sup.) 206 S. W. 921. It has been often held that a motion to continue constitutes an appearance. See *Degetau v. Mayer*, writ of error refused, 145 S. W. 1054, and authorities therein cited. In such cases it is not the fact that a motion to continue, or for any other affirmative action, is sustained or overruled, which operates as an appearance, but it is the fact that the defendant asked an adjudication. Thereby he invoked an exercise of the court's powers and in so doing necessarily subjects himself to the court's jurisdiction.

We think it clear that under the circumstances of this case already stated, appellant appeared and submitted itself to the jurisdiction of the Seventy-Eighth district court,

and, having done so, it could not thereafter, by a motion to quash service of citation or otherwise, deprive the court of the jurisdiction so obtained.

We conclude that appellant's first and only assignment of error should be overruled, and the judgment affirmed.

# STOVALL v. MARTIN et al. (No. 9917.)

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 9, 1918. On Motion for Rehearing, Jan. 25, 1919.)

## 1. APPEAL AND ERROR §931(1)—ACCEPTANCE OF TRUTH OF EVIDENCE.

Court of Civil Appeals must accept as true defendants' evidence of identity of cattle; trial court having found for defendants.

## 2. EVIDENCE §472(6)—CONCLUSION—MIXED QUESTION OF LAW AND FACT.

In suit to recover for taking of cattle claimed by one defendant as having been stolen from him, and having passed to plaintiff, defendant's positive statement that cattle in controversy belonged to him, being a conclusion on a mixed question of law and fact, was incompetent to prove title, and furnished no proper basis for judgment in defendants' favor.

## 3. APPEAL AND ERROR §931(6)—PRESUMPTIONS—CONSIDERATION OF INCOMPETENT EVIDENCE.

After judgment for defendants, Court of Civil Appeals cannot presume that court considered, for purpose of furnishing basis for judgment, incompetent conclusion of one defendant that cattle in controversy belonged to him.

## 4. TROVER AND CONVERSION §35—TAKING CATTLE—OWNERSHIP—BURDEN OF PROOF.

In suit for taking cattle claimed by one defendant as having been stolen from him and having passed to plaintiff, defendants had burden to show that cattle in controversy were included in cattle stolen from owner defendant at time of theft.

## 5. TROVER AND CONVERSION §40(3)—TAKING CATTLE—EVIDENCE—OWNERSHIP.

In action for taking cattle claimed by one defendant as having been stolen from him, and having passed to plaintiff, plaintiff's purchase of cattle from a third person, and his possession and title under the purchase at time defendants took cattle, was prima facie proof of title in plaintiff, entitling him to recover, in absence of prima facie proof by defendants that cattle were among those stolen from owner defendant, and his property when taken.

On Motion for Rehearing.

## 6. ANIMALS §10—TAKING CATTLE—BURDEN OF PROOF—BRANDS AND EARMARKS.

In suit for taking of cattle claimed by one defendant as having been stolen from him, and having passed to plaintiff, to overcome plain-

tiff's prima facie proof of title, by showing possession under a purchase, it was incumbent on defendants to identify cattle as included in those stolen from owner defendant, and so to do they had burden, not only to show that his V brand was placed on them by owner defendant, but also that his earmark of a slit had been changed by the thief to an underbit.

## 7. EVIDENCE §54—PRESUMPTIONS.

In suit for taking of cattle claimed by one defendant as having been stolen from him and having passed to plaintiff, to make out defendant's ownership of the cattle, it was not permissible to build on a conclusion that the V brand on the cattle was defendant's, established by circumstantial evidence and presumptions, the further conclusion that thief had made a change in earmarks to conceal theft.

Appeal from District Court, Baylor County; J. H. Millam, Judge.

Suit by W. M. Stovall against I. E. Martin and another. From judgment for defendants, plaintiff appeals. Reversed, and cause remanded.

Andrews & Coombes, of Stamford, B. D. Glasgow, of Spur, J. A. Wheat, of Seymour, and Carrigan, Montgomery Britain, of Wichita Falls, for appellant.

Dickson, Kenan & Newton, of Seymour, G. E. Hamilton and T. T. Bouldin, both of Matador, and Cowan & Burney, of Ft. Worth, for appellees.

DUNKLIN, J. On May 15, 1916, I. E. Martin and H. L. Robertson took from the pasture of W. M. Stovall, in Dickens county, without his knowledge or consent, 45 head of steer calves, under a claim by Martin that the same belonged to him. Robertson, who was then a state ranger and in the employment of the Texas Cattle Raisers' Association, acted with Martin and in his behalf in such taking. Stovall was not present at the time, and, upon being told by Robertson that the animals had been so taken, entered his protest and demanded a return of the property, informing Martin and Robertson that he claimed title thereto by purchase from Ben G. Reynolds, who operated a ranch in Scurry county. He made diligent efforts to convince Martin of his title, but failed; the claim of Martin being that the animals were stolen from his pasture during the month of October of the previous year, and that therefore he still owned them, regardless of the purchase of them by Stovall. Under that claim of title Martin refused to return the cattle to Stovall, and a few days later drove them to his ranch in Motley county and has there held them ever since.

Stovall instituted this suit against Martin and Robertson to recover actual and exemplary damages for the taking of the cattle, upon allegations that defendants had wrong-

fully converted them to their own use. The case was tried before the court without the aid of a jury, and the trial resulted in a judgment in favor of the defendants, from which plaintiff has appealed.

Only two assignments of error are presented in appellant's brief, the substance of which present the contentions that the judgment was erroneous, in that, by uncontradicted evidence, plaintiff proved that he was in actual peaceable possession of the cattle when taken by defendants, and held title thereto through a regular chain of transfers extending back to D. O. Medley, who raised them and owned them when he sold them, and that there was no evidence introduced to justify the court's finding that the cattle were the property of either of the defendants at the time they were taken.

Much testimony was introduced upon the trial, which we shall not attempt to review at length. Admittedly the cattle were forcibly taken by defendants from plaintiff's pasture, without his knowledge or consent, at which time plaintiff was in actual and peaceable possession thereof, and such taking was under no claim of right, except that defendants believed the animals had been stolen from Martin, and therefore belonged to him. Testimony introduced by plaintiff showed conclusively that 249 head of cattle, a great majority of which were steer calves, were bought from D. O. Medley, off his ranch in Jeff Davis county, early in December, 1915, by the firm of Shultz, Gleim & Epsy, who immediately shipped them, together with about 350 head of other cattle in various other and different brands, to the stockyards in Ft. Worth, where they sold them through the Cassidy-Southwestern Commission Company to the firm of Marrs & Lake; that upon the same yards Marrs & Lake sold 168 head of the lot, some of them in Medley's brand and mark, and some in other brands, to Ben G. Reynolds, who purchased them through his agent, Nored & Spears Commission Company, and sold the rest to other buyers; that Reynolds then shipped the cattle to his ranch in Scurry county, and on or about April 1, 1916, sold them, together with about 105 head of other cattle purchased in the vicinity of his ranch, to W. M. Stovall, plaintiff in the case, who held and claimed them under that purchase.

The cattle which came from Medley's ranch were branded with the letter V on the right jaw, placed thereon with a "running" iron, as distinguished from a "stamp" iron, and the right ear was marked with an underbit, practically in the shape of the figure 7, made by cutting out a part of the ear, and such had been the brand and mark of Medley for a number of years, and were used upon all his cattle. Before the cattle purchased by Reynolds in Ft. Worth were shipped to his ranch, they were dehorned

and branded on one hip with the letter S, which was Reynolds' brand; the branding iron used being a "stamp" iron. The 105 head purchased later by Reynolds in the vicinity of his ranch were also branded with the same brand; different branding irons being used.

According to the positive testimony of plaintiff, Stovall, supported by other proof equally as positive, the 45 head of cattle in controversy were included in the 283 head which he purchased from Reynolds, and were also included in the purchase by Reynolds from Marrs & Lake.

The proof showed conclusively that defendant Martin's brand was also the letter V on the right jaw, placed thereon with a "stamp" iron, but that the earmark used by him was a slit or hack in the lower part of the right ear, but that such a slit was not such an underbit as that used by Medley. It was also shown by uncontradicted proof that defendant Martin dehorned all his 1915 crop of steer calves in the summer of that year, and that his ranch included about 25,000 acres of land.

As noted, the proof was conclusive that Medley owned all the 249 head of cattle sold by him to Shultz, Gleim & Epsy, and that the same title passed to Marrs & Lake, and from them to their vendees, and in their brief appellees, Martin and Robertson, do not controvert the legally conclusive effect of that proof. But they do contend, in substance, that testimony introduced by them tended to show that the 45 head of cattle in controversy were not included in the sale to Reynolds by Marrs & Lake. Their theory, as shown in their briefs, is that the cattle were stolen from Martin and later included in the 105 head purchased by Reynolds in the neighborhood of his ranch after the purchase of the 168 head at Ft. Worth, and then included in the lot sold to Stovall by Reynolds; that after the theft the cattle were branded with the letter S and the earmark changed from a slit or hack to an underbit, such as shown on them when they were taken from plaintiff's pasture. And in support of that theory and contention testimony is set out in appellees' brief to the following tenor and effect:

First. Testimony establishing the theft of about 50 or 60 head of defendant Martin's calves about November 20, 1915, at the time he sold 442 head of such calves to Baldo Newman.

Second. Testimony of defendant Martin positively to the effect that the cattle in controversy were his cattle, and testimony of him and other witnesses to the effect that all those cattle were owned by Martin prior to his sale to Newman in November, 1915, and testimony of some witnesses identifying by flesh marks two of the cattle as having been formerly owned by Martin.

Third. Testimony of several witnesses, experienced cattlemen, who qualified as experts, to the effect that they examined the cattle in Martin's pasture after he had taken them from plaintiff's pasture, and that, in their opinion, the V brand on the jaw had been placed thereon with a "stamp" iron, the character of iron used by Martin, and not with a "running" iron, the character of iron used by Medley; that the cattle had been dehorned several months prior to the date of their purchase by Reynolds; that the cattle had the general appearance of being natives of the latitude of Motley county, where Martin's ranch was located, and not of the latitude of Jeff Davis county, in which Medley's ranch is situated; that the S brand on the cattle, which, according to plaintiff's contention, was placed by Reynolds in December, 1915, before he shipped the cattle to his ranch, was, in the opinion of the witnesses, placed several months later, and was placed with a "running" iron, instead of a "stamp" iron.

But we are cited to no evidence, and have found none, to identify the cattle as a part of the 50 or 60 head which Martin claims were stolen from him. Such proof was a necessary link in defendants' chain of evidence to prevent a recovery by plaintiff upon his *prima facie* proof of ownership, undoubtedly established, and which entitled him to a recovery, in the absence of other evidence legally sufficient to put in issue its truth. In the absence of such additional evidence, in order to put in issue the truth of plaintiff's *prima facie* proof of title, it would be necessary to indulge the presumption that the cattle in controversy were a portion of the lot stolen, and upon that presumption or inference that the thief, or some one claiming under him, sold them to Reynolds, and that the earmark was changed and the S brand used in order to conceal the theft.

In *F. W. & D. C. Ry. Co. v. Jones*, 106 Tex. 345, 166 S. W. 1130, our Supreme Court said:

"A presumption of fact cannot rest upon a fact presumed. The fact relied upon to support the presumption must be proved. 'No inference of facts should be drawn from premises which are uncertain. Facts upon which an inference may legitimately rest must be established by direct evidence, as if they were facts in issue; one presumption cannot be based upon another presumption.' 16 Cyc. 1051; *Missouri Pac. Ry. Co. v. Porter*, 73 Tex. 307, 11 S. W. 324."

See, also, *G., C. & S. Ry. Co. v. Davis*, 161 S. W. 932.

"It is a well-established rule that a presumption can be legally indulged only when the facts from which the presumption arises are proved by direct evidence, and that one presumption cannot be deduced from another. To hold that a fact inferred or presumed at once becomes an established fact, for the purpose of serving as

a base for a further inference or presumption, would be to spin out the chain of presumptions into the regions of the barest conjecture." 10 R. C. L. bottom page 870.

See, also, *Grand Fraternity v. Melton*, 102 Tex. 399, 117 S. W. 788; *First State Bank of Amarillo v. Jones*, 107 Tex. 623, 183 S. W. 874; *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059; *F. W. & R. G. Ry. Co. v. McMurray*, 173 S. W. 929.

While defendant Martin did testify positively that the cattle belonged to him, yet his whole testimony shows that his statement to that effect was his conclusion based upon the mere fact that some 50 or 60 head were stolen from him in October, 1915, that he identified two or three of the steers by certain flesh marks, and all of them by his brand V on the jaw and his recollection of their general appearance. Such identification, however, merely relates to his ownership of such cattle prior to the theft of 50 or 60 head of calves in October, 1915, and not to the identity of any of those he missed after the theft.

[1] Accepting such evidence of identity as true, as we must do in determining the question now under discussion, it only proves that prior to the theft, which was contemporaneous with the date of the sale to Newman, Martin owned cattle of that description; but it fails to furnish *prima facie* proof that the cattle in controversy were included in the number that were stolen, and no other testimony introduced was of any greater probative force upon that issue than the testimony of Martin himself.

For identification of the cattle, special stress is made of the testimony of defendant Martin and others with respect to certain flesh marks by which the witnesses recognized two or three of the animals as the ones belonging to Martin prior to the theft. But no witness testified that those animals were not included in the lot sold to Newman, and the testimony of two of Martin's sons tended strongly to show that probably they were included in that sale to Newman and were shipped away by him.

The defendant Martin testified with reference to the cattle stolen as follows:

"At the time I delivered my steer calves to Newman, I did miss some calves, between 50 and 60 head, according to the count. I delivered all my calves in October, with the 10 per cent. out; that is, all of them with a 10 per cent. back. These steer calves I delivered them to Mr. Newman at Matador, and when they were tallied out at Matador there was 442 head of them. I counted them out, or helped to count them out; turned them out and loaded them on the train; that is all I know about it. I missed these cattle the day I tallied them out. \* \* \* I said the day I missed them I was short 50 or 60 calves. \* \* \* I did not find any evidence where anybody had stolen any cattle before I found these cattle down there at Stovall's, and I had not heard

of anybody driving any out of the country. \* \* \* There was two of these animals I could identify by the flesh marks, the listed one, and a red bald-faced one with the underhack in its ear. There is another one, a dark black-tailed fellow; dark hair up to the hock, shows cold blood; he is out of a cow I bought. When I sold these cattle, I did not check them up to see whether or not that listed calf was in the bunch; I know I did not sell the listed calf, because I found him in this bunch. If he was shipped back, it might be him. I do not know whether Newman got that one or not; and I do not know whether Newman got this black-tailed one or not, nor the one with the slit in his ear. They were not checked up, to see what particular ones Newman got. I do not know whether this listed steer was shipped out by Newman or not; and whether this black-tailed one was shipped out by Newman or not, I do not know. I do not know but what this one with the slit was shipped out by Newman, but I do know that I found these steers up in Stovall's pasture, and I know they are mine."

Martin further testified that his brand V on the jaw was never recorded. Defendant Robertson, who first discovered evidence of the theft, testified that he passed through Martin's pasture two days after the delivery to Newman of the cattle he purchased, and further testified in that connection as follows:

"I struck the trail of a bunch of cattle about 300 or 400 yards from this pen going west; the trail indicated there was about 50 or 75 head of cattle in the bunch. Some of the tracks showed to be grown cattle tracks, and the rest of them were calves; it had been raining, and those tracks showed to have been made during the rain."

He further testified that he found the tracks of two horses and one mule along with the tracks of the cattle, and a boot track where the animals passed through a fence, the wires of which had been removed; the boot tracks being at two posts, from which the staples holding the wire had been pulled. W. G. Hall, who was with Robertson at the time he followed the tracks, testified: "It looked like there might have been 40 or 50 calves." But neither Martin nor any other witness attempted to testify whether any of the 40 or 50 calves stolen were steer or heifer calves, and the evidence shows that in Martin's herd there were calves of both genders.

[2, 3] The positive statement by defendant Martin in his testimony that the cattle in controversy belonged to him was, as clearly shown by his other testimony, but a conclusion drawn from the facts detailed by him and noted above. It was a conclusion upon a mixed question of law and fact, to decide which was exclusively the province of the court sitting as judge of the facts and law, and such conclusion, being incompetent to prove title, furnished no proper basis for a judgment in defendants' favor; nor can we presume that the court considered it for that

purpose. *Henry v. Phillips*, 165 Tex. 466 (loc. cit.) 151 S. W. 537, 538.

[4, 5] If it should be said that the expert testimony introduced by defendants to show that the V brand on the cattle was Martin's brand, and not Medley's brand, and that the underbit mark in the ear had originally been a slit or hack, which was Martin's, and not Medley's, mark, was legally sufficient to support a finding that the cattle had formerly belonged to Martin, and did not come from Medley's ranch, nevertheless such proof did not show title in Martin at the time of the taking, and did not relieve defendants of the burden which was clearly upon them, to show that the cattle were included in the number stolen from Martin in October, 1915; for, even if the cattle had formerly belonged to Martin and did not come from Medley's ranch, yet plaintiff's purchase of them from Reynolds, and his possession and claim of title under that purchase at the time defendants took them, constituted prima facie proof of title in him, which entitled him to a recovery, in the absence of prima facie proof by defendants that the cattle were included in the number stolen from Martin, and therefore were his property when taken.

As said already, plaintiff by clear proof established, prima facie, a right to recover, and by reason of the missing link in defendants' evidence, noted above, the truth of such proof was not legally challenged, and for that, if for no other, reason the judgment was erroneous.

Even though it could be said that the proof introduced by defendants tended in some measure to identify the cattle in controversy as a portion of the number stolen from Martin, yet such proof consisted largely, to say the least, of mere inferences based upon other inferences, and plaintiff's proof to the contrary is so overwhelming as to require a reversal of the judgment for that reason alone. And we are of the opinion further that appellant's assignments are sufficient to require a reversal of judgment on that ground, as well as on the other grounds mentioned. See *I. & G. N. Ry. Co. v. Brice*, 111 S. W. 1096, 1097 (loc. cit.), and other authorities there cited; *P. & N. T. Ry. Co. v. Welshimer*, 170 S. W. 263; *Irving v. Freeman*, 106 Tex. 38, 155 S. W. 931.

Accordingly the judgment is reversed, and the cause is remanded.

#### On Motion for Rehearing.

Appellees seem to construe our conclusions on the original hearing as having been predicated principally upon the theory that proof was made of an outstanding title in the cattle in controversy in Newman, to whom sale was made of steer calves, as shown in our original opinion. They cite testimony to show that all of the animals

purchased by Newman were shipped to Chicago, and also they refer to a statement in appellant's brief to show that his counsel likewise construed such testimony.

Appellant, in his reply to motion for rehearing, insists that, as shown by other testimony of the same witness, those witnesses did not, in fact, know whether the cattle were shipped to Chicago, but only concluded that such was done, drawing such conclusions from the fact that Newman stated that he bought them for such a shipment, and that he loaded them on the cars for that purpose.

The interpretation of our opinion, suggested above, is erroneous. We referred to the testimony of two of Newman's sons as tending to show that two or three only of the animals which bore certain flesh marks, and which flesh marks were especially relied upon by appellees as proof of title in Martin to all of the 45 animals in controversy, were probably included in the number sold to Newman; and we do not think that we were in error in that conclusion, especially when the testimony of those two witnesses is read in connection with the testimony of Martin himself, set out in the original opinion. But that conclusion was stated merely as additional argument in support of the judgment rendered by us, and the correctness of that judgment was not intended to hinge or depend upon that conclusion, alone.

The suggestion that 50 or 60 head of calves, which, according to the theory of defendants, were stolen from Martin, might have been driven to Toyahvale, and there disposed of to Shultz, Gleim & Epsy, and included in the shipment they made to Ft. Worth, is positively controverted by the testimony of Epsy, who was a disinterested witness, and the truth of whose testimony was not denied by any witness or circumstance in evidence. The possibility so suggested by appellees cannot be given the force of evidence.

Again, appellees insist that the failure of witnesses Bellows, Lake, and Norred, all of whom took part in the negotiation of the sale from Marrs & Lake to Reynolds in Ft. Worth, to testify that they saw any V brand on any of the cattle so sold to Reynolds, and the absence also of any testimony to the same effect from Roy Berry, who put the S brand on the cattle so purchased by Reynolds in Ft. Worth, were circumstances which tended to refute the contention made by plaintiff that some of the cattle included in that purchase were branded with a V brand. It does not appear from the record that any of those witnesses were interrogated upon that subject, and we know of no rule which would make an absence of such testimony from them a circumstance which should be weighed as evidence against the plaintiff.

Appellees further cite the testimony of Martin and the witness Ed Lisenby to the effect that, soon after the controversy first arose between Martin and Stovall over the title of the steers, Ben G. Reynolds told those witnesses he did not know whether any of the steers bought by him in Ft. Worth from Marrs & Lake had a V brand on them or not, and that the boy, Newt Craig, who was then in the employment of Reynolds, and who had been a caretaker of the animals sold to Stovall, also made a statement to the same effect, coupled with the further statement that the cattle sold to Stovall by Reynolds had been shipped from Amarillo. That testimony was introduced by the defendants to discredit the testimony of Reynolds and Newt Craig to the effect that the cattle sold by Reynolds to Stovall, branded V on the jaw, were purchased in Ft. Worth from Marrs & Lake. Aside from the testimony of those two witnesses, the testimony of J. W. Craig, who also saw the cattle which were purchased by Reynolds in Ft. Worth, and who had every opportunity to know the brand of those cattle, was direct and positive that some of them did have the V brand on the jaw, and no effort was made to impeach the credibility of that witness, who appears to have been disinterested. Nor was there any testimony whatsoever to show that any of the cattle purchased by Reynolds in the vicinity of his ranch had a V brand on them. The mere possibility that those cattle might have had a brand cannot be given force as evidence.

Furthermore, the earmark upon the cattle in controversy, which was an underbit, was as much a mark of identification as were the V brands. That mark, unquestionably, was Medley's, and not Martin's, mark, and notwithstanding any brands on the cattle proved conclusively that those animals were never branded by and stolen from Martin, which was his only theory of defense to plaintiff's suit, unless it had been originally a slit in the ear and afterwards changed to an underbit by some thief, who had stolen the cattle from Martin and made the change for the purpose of destroying evidence of the theft. The only direct and specific proof offered by defendants to show that such a change had been made amounted to nothing more than expert testimony that it could easily have been accomplished, and that the cut necessary to effect it would likely so heal within a period of three weeks or a month that it could not be distinguished from a cut several months old. In other words, such testimony was merely to the effect that it was possible that such a change had been made in the earmark, and not that it had been done, and proof of such a possibility furnished no evidence of the theft.

[8, 7] In order to overcome plaintiff's prima facie proof of title, which was unquestionably established, it was incumbent upon de-

defendants to identify the cattle as included in those stolen from Martin, and in order to do this the burden was upon them, not only to show that the V brand was placed on them by Martin, but also that the earmark had been changed by the thief from a slit to an underbit, since, according to defendant's own proof, Martin's cattle were not only branded with a V brand but had the slit, and not an underbit, in the ear. The evidence offered by defendants to sustain the conclusion sought to be established that the V brand had been placed on the cattle by Martin, and not by Medley, consisted of certain circumstances, which in no manner referred to the supposed change in the earmark, in connection with presumptions drawn directly therefrom. And even though it could be said that such circumstantial evidence and presumptions constituted proof sufficient, prima facie, to sustain the conclusion that the V brand on the cattle was Martin's brand, without the necessity of building other presumptions upon those presumptions, yet under the rule of evidence referred to in the original opinion it would not be permissible to build upon the conclusion so established, the further conclusion that the thief who stole the cattle had made the change in the earmark in order to conceal the theft.

After a very careful review of the testimony and of the arguments advanced in support of the motion for rehearing, we have concluded that same should be overruled; and it is so ordered.

Motion overruled.

ARNOLD et ux v. SCHARFF. (No. 8867).\*

(Court of Civil Appeals of Texas. Ft. Worth.  
April 20, 1918. Rehearing Denied  
Nov. 9, 1918.)

**1. DEEDS §155—CONDITION SUBSEQUENT—COLLATERAL AGREEMENT.**

Where warranty deed in exchange of properties conveyed fee simple title, but collateral written agreement provided grantees should reconvey if within fifteen years title to property received by grantor from them should fail, such collateral agreement merely ingrafted on deed a condition subsequent, on happening of which grantor would be entitled to reconveyance, and did not prevent vesting of title and right to possession in grantees subject only to defeat on happening of condition.

**2. DEEDS §168—CONDITION SUBSEQUENT—NECESSITY FOR ELECTION TO DEFEAT ESTATE.**

If conveyance of an estate is made on condition subsequent, the estate is defeated only at the election of the parties who can take advantage of the breach, and not on the mere happening of the condition.

**3. DEEDS §166—CONDITION SUBSEQUENT—WAIVER.**

A party entitled to right of entry because of breach of a condition subsequent may waive performance by an actual release of the condition or by an express license.

**4. DEEDS §166—CONDITION SUBSEQUENT—WAIVER OF RIGHT OF RE-ENTRY—RELIEF FROM OBLIGATION TO RECONVEY.**

Where a conveyance was made on condition subsequent, by written collateral agreement, that grantees should reconvey if title to property they conveyed to grantor should be defeated within 15 years, and, such condition having happened, grantor sued for reconveyance, and subsequently contracted to release property from her claim if a grantee, an attorney, should successfully defend a criminal case, which he did, grantor not only waived her right of re-entry for breach of condition, but expressly relieved grantees from obligation to reconvey.

**5. CONTRACTS §108(2)—PUBLIC POLICY.**

Contract by an attorney, grantee in a deed on condition subsequent, successfully to defend a criminal case in consideration of the grantor's releasing him from his obligation to reconvey the property to her on happening of the condition, grantor being first wife of defendant in criminal case, *held* not void as against public policy, particularly where defendant's second wife acquiesced.

**6. DEEDS §166—CONSIDERATION—RELEASE.**

Services of an attorney, grantee in a deed on condition subsequent, in successfully defending a criminal prosecution against grantor's former husband, with assent of present wife, *held* sufficient consideration to support grantor's contract to release to attorney her claim to reconveyance of property arising out of happening of condition subsequent.

**7. DEEDS §168—CONDITION SUBSEQUENT—RIGHT OF ENTRY FOR CONDITION BROKEN—EXECUTION PURCHASER.**

Only the grantor and his heirs have a right to enter on condition broken, and they lose their rights if they convey away their reversion, so that a purchaser of the land on execution sale under judgment against the grantor gained no right of entry.

**8. EXECUTION §272(2)—SALE—NOTICE TO PURCHASER OF POSSESSOR'S RIGHTS.**

Actual possession of land by grantees by deed on condition subsequent put purchaser at execution under judgment against grantor on inquiry as to rights under which grantees claimed.

Appeal from District Court, Tarrant County; Bruce Young, Judge.

Suit by Minnie Scharff against Pete Arnold and wife, wherein Max K. Mayer intervened. From a judgment for the intervenor, defendants appeal. Reversed and rendered.

John L. Poulter, of Ft. Worth, for appellants.

Wray & Mayer, of Ft. Worth, for appellee.

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Writ of error refused March 12, 1919.



CONNER, C. J. The record in this case discloses the following material facts. In an exchange of properties between appellants and Minnie Scharff, the latter on May 12, 1910, executed a warranty deed conveying to the appellants the south one-half of the north one-half of block 12, Edwards Heirs addition to the city of Ft. Worth. At the same time the Arnolds executed a written contract reciting that—

“As part of the consideration received by the said Mrs. Scharff from the said Arnolds for the south one-half of the north one-half of block 12, Edwards Heirs addition to the city of Ft. Worth, Mrs. Scharff received certain land described as follows: ‘The east 50 feet of lot 1, block 11, Daggett’s Second addition to the city of Ft. Worth, Tarrant county, Texas. \* \* \*’ In accepting this property the said Mrs. Scharff was not quite satisfied with the title, and was not willing to accept same as part of the consideration in the sale from her to the said Arnolds. Therefore, as a further consideration for the exchange, it is agreed on the part of Pete and Mrs. May Arnold that the property known as the south one-half of the north one-half of block 12, Edwards Heirs addition to the city of Ft. Worth, Tarrant county, Texas, shall not vest absolutely in them until after the expiration of fifteen years from this date. Should Mrs. Scharff’s title not be disturbed or she not lose the land known as the east 50 feet of lot 1, block 11, Daggett’s Second addition within fifteen years, then the title to the property conveyed to the Arnolds by her shall vest absolutely in them; but should the said Mrs. Scharff lose the said property known as the east 50 feet of lot 1, block 11, Daggett’s Second addition to said city, within fifteen years, then in that event the title to the south one-half of the north one-half of block 12, is to revert in her, and the said Arnolds obligate and bind themselves to reconvey said property to her.”

This contract, together with the deed to the Arnolds, was duly acknowledged, and both instruments were duly recorded. In a suit thereafter instituted in which the heirs of one Lucinda Clark were claimants, Mrs. Scharff on, to wit, January 27, 1913, suffered a judgment of ouster dispossessing her of the said lot received by her from the Arnolds. Later, and after Mrs. Scharff had been dispossessed of the property received from the Arnolds, on, to wit, July 10, 1913, Mrs. Scharff instituted this suit in the form of trespass to try title against Pete and May Arnold to recover the said south one-half of the north one-half of block 12, Edwards Heirs addition conveyed to the Arnolds as stated.

The record discloses no further action until November 12, 1913, upon which date Minnie Scharff entered into a contract in writing, duly witnessed and executed, but never acknowledged or recorded, which recites that—

It “was made for the employment of Pete Arnold as attorney at law to secure his service as attorney for Charles Miller, who is

charged with robbing the express or interurban office, or assisting in robbing said office, of \$750. \* \* \* Wherefore the said Minnie H. Scharff agrees to release the property of Pete Arnold and May Arnold as a fee for the said Charles Miller, who is under bond to appear in the district court, who is charged with robbery. Said property is situated in Tarrant county, Tex. Said deed was executed on the 12th day of May, 1910, and recorded on the 14th day of May, 1910, in Tarrant county, Tex., in volume 335, p. 470, wherein the said Minnie H. Scharff holds claim against said property which she is to release to said Pete Arnold for his said service as attorney at law. Now, provided the said Pete Arnold does not get said Charles Miller clear or beat his case, in that event this document is null and void.”

The Miller referred to in the contract was the divorced husband of Mrs. Scharff, then living with his second wife. The evidence shows that the second wife had also employed attorneys to represent Miller, and that she was cognizant of and made no objection to the above contract by Mrs. Scharff. It further appears that there was a trial of the said Miller, and that he was convicted, but the judgment of conviction was later set aside and a new trial granted. Thereafter, at a date not clearly shown in the evidence, Pete Arnold secured an affidavit from the principal prosecuting witness, which exculpated Miller, and the case was thereupon and thereafter voluntarily dismissed by the county attorney on the ground that he was without sufficient evidence to convict.

The record fails to disclose the execution of any formal release by Mrs. Scharff to the Arnolds of her claim to the property in controversy, or to show that the suit against the Arnolds by Mrs. Scharff was dismissed. There is nothing in the record, however, to show that after the dismissal of the case against Miller that Mrs. Scharff took any active part in a further prosecution of this suit against the Arnolds. It seems that the suit remained pending without action of any kind until on the 3d day of July, 1917, when Max K. Mayer intervened in the suit, claiming title to the property as his own under an execution issued out of the county court of Tarrant county, Tex., on the 17th day of March, 1916, by virtue of a judgment in favor of J. S. Jackson against Mrs. Minnie Scharff for the sum of \$41.25. It was alleged in the plea of intervention that said execution had been duly levied upon the property last mentioned, and that by virtue thereof it had been duly sold by the sheriff to the said Max K. Mayer for the sum of \$45, he being the highest and best bidder therefor, and that by virtue of these proceedings the sheriff had duly conveyed to him the property. The intervenor further adopted all the allegations of the plaintiff’s pleadings as his own, and further alleged that he purchased the property in good faith

for a valuable consideration, without any notice of any of the matters set up in the defendant's answer. The defendants, appellants here, answered the plea of intervention with a plea of not guilty and pleading specially the contract with Mrs. Scharff for the employment of Pete Arnold, alleging that the services had been performed as therein contracted for, and, further, that at the date of the conveyance of Mrs. Scharff on the 12th day of May, 1910, it was provided by Mrs. Scharff in a contract then made that appellants should go into immediate possession of the property conveyed to them, and that for any improvements made by them the Arnolds should be compensated by Mrs. Scharff, in the event the property ever had to be surrendered by the Arnolds in accordance with the terms of the contract hereinbefore mentioned.

Upon the trial the evidence without dispute established the facts substantially as we have recited them, and it is also further undisputed that Max K. Mayer was one of Mrs. Scharff's attorneys in the original institution and prosecution of Mrs. Scharff's suit against the Arnolds for the recovery of the property in controversy. Nor is there a dispute in the evidence that the Arnolds placed upon the property received by them of Mrs. Scharff permanent and valuable improvements of the value of about \$1,200 in accordance with the contract of Mrs. Scharff that they might so do and therefor receive compensation. It is also true that Max K. Mayer testified as a witness on the trial. He testified that he knew both appellants, and had known Mrs. Scharff for 15 years; that he had known Mrs. Scharff intimately for the last 10 years, and knew her financial condition on the 12th day of November, 1914; that she was then insolvent and had been prior thereto. He failed to deny, however, knowledge of the several contracts of Mrs. Scharff as hereinbefore cited. He also failed to deny knowledge of the fact, which was also established by the undisputed testimony, that Pete and May Arnold had gone into possession of the property in controversy soon after its conveyance to them by Mrs. Scharff in 1910, and had continuously remained in possession up to the time of the trial.

Upon the state of facts and pleadings above recited the court gave a peremptory instruction to the jury to find in favor of the intervenor, Max K. Mayer. Upon return of the verdict of the jury in accord with this instruction judgment was entered in intervenor's favor against both the Arnolds and Mrs. Minnie H. Scharff for the title and possession to the property conveyed to the Arnolds on May 12, 1910, and the Arnolds have appealed.

[1, 2] While the appellee, by brief, vigorously maintains the propriety of the court's peremptory instruction and the correctness of the judgment, we are at a loss to determine upon what theory or principle the judg-

ment as rendered can be supported. It seems clear to us that the deed of Mrs. Scharff to the Arnolds, dated May 12, 1910, vested in them the legal title, and that the contract of the Arnolds contemporaneously executed had the effect only of ingrafting upon the deed a condition subsequent, upon the happening of which Mrs. Scharff would be entitled to a reconveyance. In defining an estate upon condition it is stated in section 271 of Tiedeman on Real Property that—

"This estate is one which is made to vest, to be enlarged or defeated, upon the happening or not happening of some event. If the estate is to be created or enlarged upon the performance of the condition, and not before, it is called a condition precedent; if the condition is to defeat an estate already vested, it is a condition subsequent."

To hold that the contract of the Arnolds to reconvey the property to Mrs. Scharff in the event Mrs. Scharff should lose the title to the lots accepted by her in exchange for the lots in controversy had the same effect to vest any title in Mrs. Scharff would be to leave the title to the Arnolds in abeyance, and thus to contradict the terms of the grant to them. The record shows, as stated, that the deed to them was a warranty deed, and we must assume that it contained all of the terms necessary for the passing of a fee-simple title, and the written contract executed contemporaneous therewith cannot be given the effect of nullifying the terms of the grant. On this subject it is said in 8 R. O. L. § 168, under the title Deeds, that—

"A condition subsequent, forfeiting the title to the grantor in case of breach, is not of itself repugnant to the granting clause, but where an estate is given, a restriction destructive thereof is void. A fortiori, a collateral agreement, whether prior to or contemporaneous with the deed, cannot, if not incorporated in the deed, operate to limit the estate granted, nor directly bind or limit the use of the property conveyed."

Again, referring to Tiedeman on Real Property, § 277, it is said on this subject:

"If it is a condition precedent, the failure to perform will prevent the estate from taking effect. But if it is a condition subsequent, the estate is defeated only at the election of the parties who can take advantage of the breach."

Further quoting in the same section the author says that, as a general rule, "only the grantor and his heirs have a right to enter upon condition broken, and they lose their rights if they should convey away the reversion in them. The right of entry is not an estate, not even a possibility of reverter; it is simply a chose in action."

We will not further cite authorities in support of the conclusion that the Arnolds, by the deed to them of May 12, 1910, acquired the legal title and right of possession to the property in question subject only to be

defeated upon the happening of the condition subsequently mentioned in the contemporaneous contract. We think the authorities from which we have quoted sufficiently illustrate our conclusion and state the law as so well established that it will be readily accepted without further citation of authority.

[3, 4] It follows that the title in the Arnolds was not ipso facto divested by the happening of the contingency upon which they agreed to reconvey the property in controversy to Mrs. Scharff. She, however, had clearly the right to institute suit for the recovery of such property, and upon proof of the breach of the condition subsequent or happening of the contingency specified in the contract, which is undisputed, she would, of course, have been entitled to recover had nothing further appeared and had she continued the prosecution of her suit. But it seems to be well settled by the authorities (see Tiedeman on Real Property, § 278) that a party who is entitled to the right of entry because of a breach of a condition subsequent may waive performance by an actual release of the condition or by express license. If so, and we do not doubt the proposition, it would seem clear that in the case before us Minnie H. Scharff, not only waived her right of re-entry, but expressly relieved the Arnolds from the obligation to reconvey to her. As stated, it is undisputed that she made a written contract to that effect upon a sufficient and lawful consideration.

[5, 6] Pete Arnold was a lawyer, and it is undisputed that he appeared and defended Miller at the trial at which he was convicted, and later further aided the defense of Miller by securing the affidavit of the principal prosecuting witness, presenting it to the proper authority, and was present when the case against Miller was dismissed. Appellee insists that such contract is void as against public policy, but we do not see just why it should be so held. Miller had been the former husband of Mrs. Scharff. The circumstances of the divorce are not shown in the record; for aught that the record shows Mrs. Scharff may have yet retained affection for her former husband, and we know of no reason, especially in view of the acquiescence of Miller's second wife, why the services of Pete Arnold as contracted for and as actually performed will not constitute a sufficient consideration to support Mrs. Scharff's contract to release her claim arising out of the happening of the contingency specified in the contract made by the Arnolds at the time of Mrs. Scharff's deed to them. In fact the record suggests that after Mrs. Scharff made the contract with Arnold for his services she no longer pressed the suit to recover the property; but, as before stated, nothing thereafter seems to have been done in the way of prosecuting the suit until after appellee filed his plea of intervention, and so far

as the record shows Mrs. Scharff thereafter took no personal interest in the prosecution of the suit. At all events we think that after the execution of this contract, followed as it was by the performance of the services contracted for, Mrs. Scharff at least was thereafter precluded from maintaining a right of entry upon the property in question, and we do not think the intervenor, appellee here, has shown himself to be in a more favorable position.

[7, 8] Mr Tiedeman says (section 277) in the work from which we have heretofore quoted that, as a general rule, "only the grantor and his heirs have a right to enter upon condition broken, and they lose their rights if they should convey away the reversion in them." If this be the law, and we at present have no reason to doubt it, the intervenor could not take advantage of the breach of the condition subsequent upon which reliance is made, nor is he, as is insisted, in the position of a purchaser in good faith without notice of the title in the Arnolds. All of the instruments affecting her title were of record, save only the contract of Mrs. Scharff for the employment of Pete Arnold in the defense of Miller. Intervenor entirely failed to testify that he was without knowledge of that contract or of any of the contracts at the time of his purchase at the execution sale. We are authorized, therefore, to assume that he did have knowledge of the full right of the Arnolds. Moreover, it is undisputed, as stated, that the Arnolds were at all times involved in this controversy in the actual possession of the property, and, as has many times been held in this state, such possession put appellee upon inquiry as to the rights under which the Arnolds claim.

We accordingly conclude without further discussion, and without adverting to some other questions presented in the record, that the judgment below is erroneous, and that upon the undisputed facts of the case the judgment should be reversed, and here rendered for appellants.

Reversed and rendered.

DILLON v. WHITLEY. (No. 8959.)

(Court of Civil Appeals of Texas. Ft. Worth. Feb. 22, 1919.)

1. MUNICIPAL CORPORATIONS §587(1) — STREET IMPROVEMENT—ACTION ON CERTIFICATES—PETITION.

Petition, in action on paving and curbing certificates issued by city, alleging it adopted a special charter pursuant to Acts 33d Leg. c. 147 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 1096a to 1096i), that the street in front of defendant's property was paved and curbed, and the certificates issued therefor, all in compli-

ance with the powers given in the act and charter, *held* not subject to demurrer or exceptions.

**2. MUNICIPAL CORPORATIONS**  $\Leftrightarrow$ 568(3) — STREET IMPROVEMENTS—ACTION ON CERTIFICATES—PROOF OF OWNERSHIP.

There was *prima facie* proof of plaintiff's ownership, claimed in his petition, of the certificate for curbing, issued by the city to another, sued on; it having at the trial been in his possession and introduced in evidence without objection.

**3. EVIDENCE**  $\Leftrightarrow$ 31—JUDICIAL NOTICE—CITY CHARTER.

By provision of Acts 33d Leg. c. 147, § 3 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1096c), when a city has adopted a charter as authorized therein and it has been recorded as therein provided, no proofs are required thereof, but judicial notice must be taken of it.

**4. APPEAL AND ERROR**  $\Leftrightarrow$ 907(5)—PRESUMPTION—DOCUMENTS.

Though there be no copy of a city's charter in the statement of facts, it will be presumed the trial judge had a copy before him from which he quoted the provisions shown in his findings of fact.

**5. APPEAL AND ERROR**  $\Leftrightarrow$ 907(5)—PRESUMPTION—DOCUMENTS.

Correctness of finding of trial judge as to contents of a city's charter will be presumed, in the absence of a showing by copy of the charter, or otherwise, of error in the finding.

**6. CONSTITUTIONAL LAW**  $\Leftrightarrow$ 290(4)—MUNICIPAL CORPORATIONS  $\Leftrightarrow$ 407(1)—DUE PROCESS OF LAW—STREET IMPROVEMENT—ASSESSMENTS.

Provisions of city charter, which vests a board with judicial functions to determine assessments for street improvements, that objection thereto, unless filed with the board before hearing is closed, shall be deemed waived, and that one failing within 10 days after closing of the hearing to institute suit to contest validity of the assessment shall be barred from contesting in any other proceeding, do not in case of one given notice deprive him of property without due process, in contravention of Const. U. S. Amends. 5, 14.

**7. MUNICIPAL CORPORATIONS**  $\Leftrightarrow$ 484(1) — STREET IMPROVEMENTS—CERTIFICATES—EVIDENCE OF INDEBTEDNESS.

Certificates issued by a city for street improvements are *prima facie* evidence of the amount of indebtedness due by a property owner.

Appeal from District Court, Palo Pinto County; J. B. Keith, Judge.

Action by Frank Whitley against J. B. Dillon. Judgment for plaintiff, and defendant appeals. Affirmed.

S. D. Goswick, of Mineral Wells, for appellant.

Ritchie & Cousins, of Mineral Wells, for appellee.

DUNKLIN, J. J. B. Dillon, who owned property in the city of Mineral Wells, has appealed from a judgment rendered in favor of Frank Whitley for the amount shown to be due according to certain certificates issued by the city commissioners of Mineral Wells for paving the street in front of Dillon's property and for constructing a curbing at the edge of the street. The paving was done by Whitley, and the curbing was constructed by J. W. McFarland, to whom the certificate therefor was issued and who transferred the same to Whitley.

A jury was impaneled, and special issues were submitted to them, but only two issues were submitted. In answer to one of those issues, they found that \$45 was a reasonable attorney's fee for the prosecution of this suit by the plaintiff; and, in answer to the other issue, they found that the improvements on the street which abutted defendant's property, consisting of the paving and curbing in question, did not enhance the value of the property in a sum equal to the sum charged for such improvements and represented by the certificates sued on.

In addition to those findings by the jury, the trial judge also filed findings of facts and conclusions of law made by him, which are as follows, to wit:

"Finding of Facts.

"(1) The city of Mineral Wells is incorporated under a special charter adopted under the provisions of the Enabling Act, chapter 147, Acts of the 33d Legislature.

"(2) The city of Mineral Wells issued certificates of special assessment in favor of Frank Whitley and in favor of J. W. McFarland to defray their proportionate part of the cost constructing a paving and a concrete curb and gutter on Parker street in the said city abutting a certain lot owned by the defendant as described in the pleadings.

"(3) At the date of acceptance of the bids of the said parties to do this work, one Matt Skeen owned a lot lying between defendant's property and Parker street as it was then platted, and that subsequent to the acceptance of such bids the city of Mineral Wells purchased the said lot from Matt Skeen and dedicated the same for street purposes, and made it a part of Parker street. That prior to such purchase the said lot owned by the said Skeen projected into Parker street so that the said street was 25 feet narrower at that point than it was to the north and to the south, and that by the purchase and dedication of said lot the said Parker street became a street of equal width for its entire length, and both sides of the street were made straight lines.

"(4) The work above mentioned on Parker street abuts the defendant's property. That 22 feet intervening between his property line and the edge of paving is left for park and sidewalk purposes and is of the same width at that point as is usual in the entire residence portion of the said city.

"(5) I find, as the jury found, that the said

property was not enhanced in value by the construction of said improvements.

"(6) Prior to the making of said assessments, this defendant was given notice of the city's intention to construct said improvements on Parker street abutting his property, was given notice of the amount to be assessed, and was given notice of the date and place at which he might appear and make objection to such assessment.

"(7) The city of Mineral Wells by its board of commissioners, after the hearing, affirmatively found that the said property was enhanced in value to the extent of the cost of said improvements.

"(8) The charter of the said city contains the following provisions:

"Any objections to the said assessment, or to the validity of any proceedings with reference to said improvements or any omission therein, shall be filed with the board of commissioners in writing before said hearing is closed, and shall be deemed waived unless so filed.

"At any time within ten days after the closing of said hearing, any one having an interest in property subject to assessment in any proceeding hereunder, or who may be subject to a personal liability for a part of the cost of improvements ordered by the board of commissioners, may institute suit in any court of competent jurisdiction to contest the validity in whole or in part, of said assessment or lien, or personal liability fixed by said proceedings, or the validity or regularity of any of said proceedings. Any person who shall fail to institute such suit within said ten days, or to diligently prosecute same to final judgment, shall be forever barred from contesting in any other proceeding said assessment, lien or personal liability, or the validity of any proceeding with reference to said improvement, and this bar and estoppel shall bind the heirs, assigns or personal representatives of such persons."

"(9) Said defendant did not file written objections with the board of commissioners, nor did he ever institute any suit for the purpose of testing the validity of the said assessment.

#### "Conclusions of Law.

"1. This court is bound to take judicial notice of the provisions of the charter of the city of Mineral Wells.

"2. The findings of the board of commissioners of the said city that the property was enhanced in value to the extent of the cost of the improvements is conclusive upon this court; the said findings not having been appealed from.

"3. The defendant having failed to file objections to the said action of the board of commissioners, and having failed to file a suit to test the validity thereof, is barred from setting up the same in this proceeding.

"Therefore judgment is rendered for plaintiff for certificates and interest and cost; attorney's fees not allowed."

By an act of the Thirty-Third Legislature, which was approved April 7, 1913, see Acts of the Regular Session, c. 147, p. 307 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 1096a to 1096i), a city having more than 5,000 inhabitants is authorized to adopt a special charter

with certain powers vested in such city by complying with certain specified requirements in the matter of holding an election for the purpose of determining the adoption of such charter, etc. By section 2 of that act it is provided that the proposed charter of the city shall be submitted to its qualified voters at an election to be held at a time fixed, and that such a charter may be adopted by a majority of the qualified voters. By section 3 of the act it is provided that upon the adoption of such a charter it shall be the duty of the mayor or chief executive officer of the city to certify an authenticated copy of the charter to the secretary of state, whose duty it shall be to file and record the same in his office. It is also made the duty of the city secretary to record the charter at length upon the records of the city in a separate book to be kept in his office for such purpose. Section 3 of the act also contains the following provision:

"When said charter or any amendment thereof shall be recorded as herein above provided for, it shall be deemed a public act and all courts shall take judicial notice of same and no proof shall be required of same."

Section 4 of the act reads, in part, as follows:

"That by the provisions of this act it is contemplated to bestow upon any city adopting the charter or amendment hereunder the full power of local self-government and among the other powers that may be exercised by any such city, the following are hereby enumerated for greater certainty: \* \* \*

"To have exclusive dominion, control and jurisdiction in, over and under the public streets, avenues, alleys, highways and boulevards, and public grounds of such city and to provide for the improvement of any public street, alleys, highways, avenues or boulevards by paving, raising, grading, filling, or otherwise improving the same and to charge the cost of making such improvements against the abutting property, by fixing a lien against the same, and a personal charge against the owner thereof according to an assessment specially levied therefor in an amount not to exceed the special benefit any such property received in enhanced value by reason of making any such improvement and to provide for the issuance of assignable certificates covering the payments for said cost, provided that the charter shall apportion the cost to be paid by the property owners and the amount to be paid by the city, and provided further, that all street railways, steam railways, or other railways, shall pay the cost of improving the said street between the rails and tracks of any such railway companies and for two feet on each side thereof. The city shall have the power to provide for the construction and building of sidewalks and charge the entire cost of construction of said sidewalks, including the curb, against the owner of abutting property, and to make a special charge against the owner for such cost and to provide by special assessment a lien against such property for such cost; to have the power to provide for the improvement of any such sidewalk

or the construction of any such curb by penal ordinance and to declare defective sidewalks to be a public nuisance. \* \* \*

"That the city may issue assignable certificates for the payment of any such cost against such property owners and may provide for the payments of any such cost in deferred payments, to bear interest at such rate as may be prescribed by the charter not to exceed eight per cent. That the city may adopt any other method for the opening, straightening, widening or extending of its streets as herein provided for as may be deemed advisable and charge the cost of same against the property and the owner specially benefited in enhanced value and lying in the territory of said improvement that its charter may provide. That the authority to adopt any other method shall include the manner of appointing commissioners, the manner of giving notice and the manner of fixing assessments or providing for the payment for any such improvement."

[1, 2] According to allegations in plaintiff's petition, the city of Mineral Wells adopted a special charter in accordance with the requirements of that act, and the street in front of defendant's property was paved and curbing constructed, and the certificates sued on were issued for such work, all in compliance with the powers given in the act and the charter adopted thereunder. Accordingly, all assignments of error to the action of the court in refusing to sustain defendant's general demurrer and numerous special exceptions addressed to the petition are overruled. We overrule the assignment attacking the finding of the court that plaintiff was the owner of the certificate issued by the city to McFarland for curbing. The finding is challenged upon the proposition that there was no evidence to support it. Upon the trial the certificate which was in plaintiff's possession was introduced in evidence, and the defendant made no objection to such proof. Plaintiff had claimed ownership of it in his petition. Under such circumstances, we think that there was prima facie proof of ownership.

[3-5] By another assignment the trial court's finding of charter provisions of the city of Mineral Wells is challenged upon the ground that the charter was not introduced in evidence, and hence there was no proof to sustain such finding. As shown by the provision quoted above from section 3 of the act of the Thirty-Third Legislature, the courts are required to take judicial notice of a charter adopted in compliance with the provisions of the act and no proof of such charter is required. While a copy of the charter is not contained in the statement of facts, we must presume that the trial judge had such a copy before him from which he quoted the provision shown in his findings of facts. Neither by bill of exception nor in any other manner has a copy of the charter been presented to this court, and we know of no method of acquiring information of the contents of the

charter except to send for a copy of it which we do not feel called upon to do; and in the absence of any showing here that the trial judge erred in his finding, referred to, with respect to the contents of the charter, the correctness of that finding will be presumed; and accordingly the assignment now under discussion, as well as another assignment, addressed to certain testimony of the city secretary with respect to the contents of the minutes of the city commissioners, is overruled, the objection to the testimony of the city secretary being based upon the absence of proof of the charter.

[6] Several other assignments are presented, to all of which objections are made by appellee because the same are not in compliance with the rules for briefing, for different reasons. Some of those objections, at least, appear to be valid, but we shall not undertake to discuss or pass upon them. In a general way and in a manner not very clear and definite, those assignments present the contention that the action of the court in rendering a judgment in plaintiff's favor, notwithstanding the finding by the jury that the improvements for which the certificates were issued did not enhance the value of the property in a sum of money equal to the sum charged for said improvements, amounted to a taking of his property without due process of law, and was contrary to the decision in *Hutcheson v. Storrie*, 92 Tex. 685, 51 S. W. 848, 45 L. R. A. 280, 71 Am. St. Rep. 884. As shown by the trial court's findings, the board of commissioners gave to the defendant notice of the city's intention to construct the improvements abutting on his property, including notice of the amount to be assessed, and of the date and place at which he might appear and make objections to the assessment; and upon hearing the board of commissioners affirmatively found, that the property was enhanced in value to the extent of the cost of the improvements. The trial judge further found that the defendant filed no objections to the board of commissioners to such assessment and instituted no suit to test the validity of the assessment as required by the charter of the city. In his brief appellant admits that he was served with notice of the time and place set for the hearing of objections to the assessment and that he filed no objections thereto. It thus appears that by the charter of the city the board of commissioners was vested with judicial functions to hear and determine the amount of assessments to be made against appellant's property, and that the board did determine that question adversely to the claim now asserted by the appellant, and that he was duly served with notice to appear at such hearing but made default, and also failed to prosecute the remedy provided by the charter for judicial relief against such assessment. Under such circumstances, we are of the opinion that the assessment made by the board of commis-

sioners was final and binding upon the appellant as found by the trial judge, and that such charter provisions were not in violation of the fifth and fourteenth amendments to the federal Constitution, prohibiting a state from depriving any person of property without due process of law. See R. C. L. vol. 6, p. 446, § 442, p. 454, § 451, and p. 456, § 452.

[7] We are of the opinion that the certificates themselves were prima facie evidence of the amount of the indebtedness due by appellant. See *Taylor v. Boyd*, 63 Tex. 533; *Withers v. Crenshaw*, 155 S. W. 1189.

For the reasons indicated, all assignments of error are overruled, and the judgment is affirmed.

**WHITESIDES et al. v. WOOD et al.**  
(No. 6131.)

(Court of Civil Appeals of Texas. Austin.  
March 12, 1919.)

**1. APPEAL AND ERROR ⇨781(1)—REVIEW—MOOT QUESTION—COSTS.**

Appellate courts will not retain jurisdiction of an appeal to determine supposed rights, when the subject-matter of the suit has terminated, merely to decide the question of costs, but appeal will be dismissed.

**2. APPEAL AND ERROR ⇨74—REVIEW—INTERLOCUTORY ORDER.**

In action to enjoin sale of property upon ground that judgment on which order of sale was issued was not a final judgment, the Court of Civil Appeals will not entertain appeal from interlocutory order denying application for temporary injunction, after sale has taken place and the subject-matter of such appeal has ceased to exist, to determine question of finality of the judgment, since such question can be raised on appeal from the final judgment.

**3. APPEAL AND ERROR ⇨781(2)—REVIEW—MOOT QUESTION—INTERLOCUTORY ORDER—INJUNCTION TO RESTRAIN SALE.**

An appeal from an interlocutory order denying application for temporary injunction to restrain sale of property will be dismissed, where sale has taken place; it being impossible to afford relief sought, and there being nothing for court to decide except a moot question.

**4. COSTS ⇨238(1)—APPEAL—MOOT QUESTION.**

Where appeal from order refusing to grant temporary injunction to restrain sale of property under order of court was perfected after sale had taken place and the question had become moot, appeal will be dismissed and costs taxed against appellant.

Appeal from District Court, McLennan County; Erwin J. Clark, Judge.

Action by Margaret Whitesides and another against N. Wood and others. From an or-

der and decree refusing to grant temporary writ of injunction, plaintiffs appeal. On motion to dismiss appeal. Appeal dismissed.

Taylor, Forrester & Stanford, of Waco, for appellants.

W. L. Eason, of Waco, for appellees.

BRADY, J. This case is before this court on an appeal from an order and decree of the district court of McLennan county, refusing to grant appellants a temporary writ of injunction. The original petition was filed January 29, 1919, and the application for injunction was set down for hearing for February 1, 1919. Appellants applied for the writ of injunction to restrain a sale of certain property claimed to be the homestead of appellants, Margaret and Richard Whitesides, under what was alleged to be a void judgment, in that the judgment had never become final; and it was alleged that the order of sale was therefore a nullity. The sale sought to be enjoined was advertised to take place February 4, 1919, and the injunction was refused by the trial court after hearing, on February 1, 1919.

Appellants' appeal bond was filed on February 8, 1919, and the transcript contains but two assignments of error; the first being to the effect that the trial court erred in refusing to grant the temporary injunction prayed for, because the facts alleged in appellants' petition and admitted by appellees showed that appellants were entitled to such relief; and, the second, that the court erred in refusing to grant the temporary injunction, because the judgment on which the order of sale was issued was not a final judgment.

Appellees have filed their motion to dismiss this appeal, on the ground that the appellants now present only a moot question for this court's determination.

It appears from the record that the sale sought to be enjoined was to take place on February 4, 1919, and that the appeal was perfected four days after the sale was advertised to take place. Appellees accompany their motion to dismiss with the order of sale and the return of the sheriff, showing that the property was sold by the sheriff to N. Wood, one of the appellees, on February 4, 1919; and they also attached the sheriff's deed, which was filed for record in the office of the county clerk on February 6, 1919. It is therefore claimed that the subject-matter of this appeal has ceased to exist, and that there now remains nothing for this court to determine, except the mere matter of costs.

[1] We are of the opinion that the above contention must be sustained. The relief sought in the application for a temporary injunction was restricted solely to the restraining of the sale of the property; and, the sale having already been consummated, it

is obvious that no order this court could enter would afford such relief. To decide whether the trial court properly or improperly refused to grant the injunction would now be to determine a mere abstraction. It has been early settled in this state that the appellate courts will not retain jurisdiction of an appeal to determine supposed rights, when the subject-matter of the suit has terminated, merely to decide the question of costs. *Lacoste v. Duffy*, 49 Tex. 768, 30 Am. Rep. 122; *Electric Park Co. v. San Antonio Baseball Ass'n*, 155 S. W. 1189; *Tel. Co. v. Galveston Co.*, 59 S. W. 589; *Ansley v. State*, 175 S. W. 470; *McMillan v. Kelch*, 16 Tex. 150; *Jackson v. Daugherty*, 26 S. W. 1116; *Johnson v. Scott*, 111 S. W. 167.

It is suggested in appellants' brief and reply to the motion to dismiss that, while this proceeding was instituted primarily to enjoin the sale, it also had for its object the declaring void of the former judgment, and the further relief of having the original cause stand for trial on the docket, and the rendition of a proper and final judgment; and that the appeal should not be dismissed, but that this court should decide whether the former judgment was final or not.

[2] We cannot agree to this contention. The appeal is purely from an interlocutory order, denying an application for an injunction; and, in the present situation, the finality of the judgment upon which the order of sale was issued becomes immaterial. The sale having taken place, and the subject-matter of the suit, in so far as the injunction is concerned, having ceased to exist, we cannot properly go into the question of whether such judgment was final or not. As far as the record discloses, and presumably, this case has not been tried upon its merits, and still stands upon the docket of the lower court for trial. Appellants suggest that they would be without remedy, if this appeal should be dismissed; but such would not be the result. If the court should refuse to set aside the former judgment, upon the final hearing of this cause, the question of the finality of such judgment could properly be raised on appeal; and, if the appellate court should be of the opinion that the judgment was not final, it would so hold, and the cause would stand for trial until final judgment should be entered.

[3] This is not a case where the appeal is from a judgment which itself is not final, and therefore would require the dismissal of the appeal; in which instance it has been held that, while the appeal should be dismissed, the trial court should proceed to try the case and enter final judgment. An appeal from the interlocutory order, denying the temporary injunction, is authorized by statute, and the decree is, for the purposes of appeal, treated as final. Our action in dis-

missing this appeal is not based on any want of finality in the order appealed from, but solely upon the consideration that it would now be impossible to afford the relief sought in the application for injunction; and there is therefore nothing left but a moot question.

[4] It appears that, at the time appellants perfected this appeal, not only had the date for the sale passed, but it had taken place, and a deed to one of the appellees from the sheriff had been filed for record, and appellants had at least constructive notice that they could no longer hope for relief enjoining the sale. Therefore the appeal will be dismissed, at the cost of appellants.

Motion granted.

#### LANCASTER et al. v. WHITTLE. (No. 2067.)

(Court of Civil Appeals of Texas. Texarkana. March 6, 1919.)

##### 1. CARRIERS ⇐228(5)—INJURIES TO STOCK—DAMAGES.

In action against a carrier for injuries to horses, allowance of damages by reason of extra feed and pasture paid for by shipper on account of injuries was not supported by evidence, where there was no testimony what cost to feed horses would have been had they not been injured.

##### 2. EVIDENCE ⇐568(7)—OPINION—WEIGHT.

In action by shipper against a carrier for injuries to horses and expense for extra feed, testimony of shipper that he would not have been at any expense for feed because he would have sold them to a certain person had they been uninjured was shipper's opinion merely, and therefore without probative force.

##### 3. CARRIERS ⇐229(1)—INJURY TO HORSES—MEASURE OF DAMAGES.

In action by shipper against a carrier for injuries to horses, shipper cannot recover both the difference in market value of horses and money paid for feed expended while the horses were recovering from injuries.

Appeal from District Court, Van Zandt County; Joel R. Bond, Judge.

Suit by W. C. Whittle against Lancaster and Wight, receivers of the Texas & Pacific Railway Company. Judgment for plaintiff, and defendants appeal. Judgment reformed and affirmed.

Appellee's suit was against appellants as the receivers of the Texas & Pacific Railway Company for damages he claimed he suffered because of injury to certain horses shipped by him over said company's line of railway from Ft. Worth to Grand Saline. On special issues submitted to them the jury found that the horses were injured as the result of negligence on the part of appellant,



and because of the injury were worth, when they reached Grand Saline, \$425 less than they would have been worth but for such injury; and they further found that appellee had to expend \$150 more for feed for the horses while they were recovering from injuries they suffered than he would have had to expend had they not been injured. On the findings the court rendered judgment in appellee's favor against appellants for \$575.

J. A. Germany, of Wichita Falls, for appellants.

Nat M. Crawford, of Grand Saline, for appellee.

**WILLSON, C. J.** (after stating the facts as above). The contention made by appellant that the finding of the jury that there was a difference of \$425 in the market value of the horses "at the time and condition in which they arrived at their destination and and what their reasonable market value would have been had they arrived without injury or delay" seems to be based on testimony of appellee that he expected one Stephens, of Oklahoma, to meet him in Grand Saline and buy the horses when they reached that place and that he would not have been able to sell them there had Stephens not bought them, because they had no market value there. The contention ignores the testimony of the witness Nance that the horses had a market value in Grand Saline, and that they were worth \$700 or \$800 less on that market than they would have been worth but for the injury to them, and the testimony of the witnesses Lindsey and Slaton to practically the same effect.

[1-3] The contention made that the finding of the jury that "the reasonable and necessary expense for extra feed and pasture paid by plaintiff caused by the injury to the horses" was \$150 was not warranted by the testimony before them will be sustained. As we view the record there was no testimony showing what the cost to appellee of feeding the horses would have been had they not been injured, and therefore there was no basis for the finding that the extra cost of feeding them, due to the injury they suffered, was the sum found by the jury. The testimony of appellee that he would not have been at any expense for feed for them because he would have sold them to one Stephens had they been uninjured when they reached Grand Saline plainly was his opinion merely, and therefore without probative force. *Henry v. Phillips*, 105 Tex. 450, 151 S. W. 533. There was no other evidence that Stephens would have purchased the horses on their arrival at Grand Saline had they been uninjured. It did not even appear that Stephens was in Grand Saline at the time or after the time the horses reached that place. On the contrary, the testi-

mony indicated that he was not then in Grand Saline, and that appellee expected, after the horses reached that place, to go to Emory, where he supposed Stephens was, and take him to Grand Saline to look at the horses. We think the judgment, in so far as it was for the \$150 extra expense incurred in feeding the horses, was wrong for another reason also. The amount was included in the sum representing the difference found by the jury in the market value of the horses in Grand Saline had they arrived there uninjured and their market value there injured as they were, and the recovery awarded appellee of both that difference and the \$150 paid by him for feed was a double recovery to the extent of said \$150. *Railway Co. v. Foster*, 89 S. W. 450; *Railway Co. v. Tuckett*, 25 S. W. 150.

The judgment will be so reformed as to adjudge a recovery in appellee's favor against appellants of \$425 (instead of \$575), and interest thereon from October 9, 1917, and as so reformed will be affirmed.

DENMAN et al. v. PYLE et al. (No. 6047.)

(Court of Civil Appeals of Texas. Austin.  
March 12, 1919.)

**1. APPEAL AND ERROR ⇐230—NECESSITY OF OBJECTIONS BELOW—TRIAL—INSTRUCTIONS.**

In view of Rev. St. 1911, art. 1971, as amended by Acts 33d Leg. c. 59, § 3 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1971), a formal bill of exceptions to the charge of the court is not required on appeal, but it is necessary that objections thereto shall be presented to the court before the charge is read to the jury; otherwise the objection is waived.

**2. APPEAL AND ERROR ⇐500(4) — REVIEW—RECORD—OBJECTION BELOW.**

Treating a document found in the transcript as an objection to the court's charge, directing a verdict for one of defendants, plaintiffs, appellants, are not entitled to have such act of the court reviewed, where it does not appear the objections filed were ever presented to the judge.

**3. APPEAL AND ERROR ⇐230—FUNDAMENTAL ERROR—WAIVER BY FAILURE TO COMPLY WITH STATUTE.**

Failure to comply with Rev. St. 1911, art. 1971, as amended by Acts 33d Leg. c. 59, § 3 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1971), relating to exceptions, waives all errors in a charge or instruction given to the jury, including fundamental as well as lesser errors.

Appeal from District Court, Bell County;  
F. M. Spann, Judge.

Suit by R. P. Denman and another against O. P. Pyle, A. P. Williams, and B. O. Sims, Jr. From so much of the judgment as trans-

fers their cause of action against the last-named defendant from the district court of Bell county to the district court of Kleberg county, plaintiffs appeal. Affirmed.

Sam D. Ware, of Belton, and J. H. Evetts, of Temple, for appellants.

Claude Pollard, of Houston, and E. H. Crenshaw, Jr., of Kingsville, for appellees.

**KEY.** C. J. R. P. Denman and E. B. Kelso brought this suit against O. P. Pyle, alleging that he resided in Bell county, and A. P. Williams and B. O. Sims, Jr., alleged to reside in Kleberg county. The defendant Sims filed a plea of privilege, claiming that the court had no jurisdiction of his person, and that he was entitled to a change of venue to Kleberg county as to the cause of action asserted against him. The trial court gave a peremptory instruction, directing the jury to find in Sims' favor on his plea of privilege, which the jury did, upon which verdict judgment was rendered, transferring the plaintiffs' suit against Sims to the district court of Kleberg county.

The case between the plaintiffs and the other defendants was submitted to the jury upon special issues, and upon the verdict returned, judgment was rendered for the plaintiffs, from which neither party has appealed. The plaintiffs have appealed from so much of the judgment as transfers their cause of action against the defendant B. O. Sims, Jr., from the district court of Bell county to the district court of Kleberg county.

[1] The correctness of that judgment depends entirely upon the correctness of the charge of the court upon that phase of the case; and appellants are in no position to complain of that charge, because of their failure to comply with the provisions of article 1971 of the Revised Statutes, as amended by Act 33d Leg. c. 59, § 3 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1971). That article was considered by our Supreme Court in *Railway Co. v. Dickey*, 108 Tex. 126, 187 S. W. 184, and it was there held that, while the article as amended does not require a formal bill of exception to the charge of the court, it does require that in order to complain of such charge on appeal, it is necessary that objections thereto shall be presented to the court before the charge is read to the jury; and it is there declared that all objections not so made and presented shall be considered as waived.

[2] The transcript contains the following document:

"Come now the plaintiffs and except to the following paragraphs of the court's charge, to wit:

"To paragraph — of the court's charge the plaintiffs except for the following good and sufficient reasons, to wit:

"First. The defendant O. P. Pyle is a necessary and proper party to said suit and resides in Bell county, Tex.

"Second. The pleadings and the evidence show that O. P. Pyle and A. P. Williams were part-

ners in the transaction of the sale of land described in plaintiffs' petition.

"Third. The pleadings and evidence show that the defendants O. P. Pyle and A. P. Williams were acting as agents for the said B. O. Sims, Jr., in the sale of said lands, and that the plaintiffs are alleging, and have presented evidence to prove, that all defendants acted in concert in selling said lands, and that all are primarily liable for the commissions for selling said land, and that said B. O. Sims, Jr., promised and agreed to pay said money to plaintiffs herein.

"Fourth. Because, the court having jurisdiction or venue of a necessary or proper party, the question of the liability of the nonresident party was a proper question to be submitted to the jury, under proper instructions from the court, and was not such a question as could be decided by the court. J. H. Evetts, Sam D. Ware. Filed Jany. 29, 1918. E. E. Upshaw, District Clerk, Bell Co., Texas."

Treating the document quoted as an objection to the court's charge directing a verdict for the defendant Sims, still appellants are not entitled to have that action of the court reviewed, because it does not affirmatively appear that the document referred to was ever presented to the trial court. The statute requires that such objections shall be presented to the trial judge before the charge is read to the jury; but in this case it is not made to appear that the objections, which were filed, were ever presented to the judge.

Appellants have presented several assignments of error, but they are all predicated upon the alleged error in the court's charge directing a verdict for the defendant Sims, and they must all be overruled.

[3] The contention that the action of the court complained of constitutes fundamental error does not aid appellants' cause. A failure to comply with the statute referred to results in a waiver of any error that can be waived, though such error may be fundamental. We see no reason why a litigant may not waive any error in a charge or instruction given to the jury, regardless of the importance or result of the error. The statute is as comprehensive as it could well be made; and, as it contains no exceptions, we think it must be construed to include fundamental as well as other kinds of error in a charge. The Legislature had the power to so frame the law, and the fact that one of the results is to deprive appellate courts of the discretion they formerly had to reverse cases on account of fundamental error in the trial court's charge, though not complained of on appeal, is no reason why the statute should not be enforced. The Legislature, having the power to enact the law in the form it has been enacted, and there being no ambiguity about its meaning, its wisdom should not be a matter of concern to the courts.

No reversible error has been pointed out, and the judgment is affirmed.

Affirmed.

(133 Ark. 78)

**BUDD v. BURNETT et al. (No. 148.)**

(Supreme Court of Arkansas. March 17, 1919.)

**1. JUSTICES OF THE PEACE §=122(2) — DEFAULT JUDGMENT—ENTRY ON DAY NOT AUTHORIZED—SUMMONS.**

Default judgment of justice of the peace entered February 22d was void, where summons, directing defendant to appear March 3d, was not served until February 26th; judgment having been entered on day not authorized by summons and inconsistent with its mandate.

**2. JUSTICES OF THE PEACE §=202(2)—CERTIORARI—MERITORIOUS DEFENSE—PLEADING.**

Petition for certiorari to quash judgment of a justice of the peace, alleging that petitioner, the judgment debtor, was not, when sued, nor at any other time, indebted to the judgment creditor, stated a meritorious defense to the action before the justice.

**Appeal from Circuit Court, Polk County; J. S. Lake, Judge.**

Petition for writ of certiorari to quash the judgment of a justice of the peace by J. D. Budd against L. N. Burnett and others. From judgment dismissing the petition, petitioner appeals. Reversed, and cause remanded for new trial.

**Prickett & Pipkin, of Mena, for appellant.  
R. T. Powell, of Mena, for appellees.**

**HART, J.** This is a proceeding by J. D. Budd in the circuit court to quash the judgment of a justice of the peace against him in favor of C. B. Lyons. The proceeding was heard in the circuit court upon the petition for the writ of certiorari, the transcript of the record of the justice of the peace and the motion of C. B. Lyons to dismiss the writ of certiorari. The circuit court sustained the motion and dismissed the petition. Budd has appealed.

The transcript of the justice of the peace shows that on the 16th day of February, 1915, C. B. Lyons filed before the justice an account for labor against J. D. Budd for \$36.03. A summons was issued by the justice returnable on the 3d day of March, 1915. The return of the constable shows that it came to his hands on the 17th day of February, 1915, and was served by him on the 26th day of February, 1915, by delivering a true copy to J. D. Budd. The justice's transcript further shows that judgment by default against Budd in favor of Lyons was rendered on the 22d day of February, 1915, for \$36.03 and costs; that on the 22d day of July, 1915, a writ of garnishment was issued on said judgment against the First National Bank of Mena, Ark., and that on August 7, 1915, an execution was issued on said judgment and delivered to the constable of the township.

The above facts are also set up in the pe-

tion for the writ of certiorari. The petition also sets up that the plaintiff did not know that there was a judgment against him in said justice court until July 22, 1918, when the writ of garnishment was served on the First National Bank; that he had a complete defense to said action instituted against him by Lyons in the justice court; and that he was not at that time, nor at any other time, indebted to C. B. Lyons in any sum whatever.

[1] The circuit court erred in not granting the writ of certiorari. It appears from the transcript of the justice of the peace, and as well from the allegations of the complaint, which are not denied, that the default judgment against Budd was entered on the 22d day of February, 1915. The summons in the case was not served until the 26th day of February, 1915, and directed him to appear on March 3, 1915. Therefore the judgment is illegal and void; for it was entered upon a day not authorized by the summons, and inconsistent with its mandate, and consequently on a day when the defendant was not bound to appear in court. *Woolford and McKnight v. Harrington*, 2 Ark. 85, and *Levy v. Ferguson Lumber Co.*, 51 Ark. 317, 11 S. W. 284.

The doctrine laid down in many cases that a judgment by default, entered by a justice of the peace on a summons served an insufficient number of days before the return day, is merely erroneous and not void has no application under the facts presented by the record. The reason for the holding in such cases is that from the moment of the service of the process the court has such control over the litigants that all its subsequent proceedings, however erroneous, are not void, and therefore cannot be attacked collaterally. See *Kerr v. Murphy et al.*, 19 S. D. 184, 102 N. W. 687, 69 L. R. A. 499, 8 Ann. Cas. 1138, and case note.

[2] Here the record shows that the judgment was rendered before the summons was served. The complaint alleged that Budd was not at the time he was sued, nor at any other time, indebted to Lyons. This constituted a meritorious defense to the action. Therefore the transcript of the record of the justice of the peace shows that the judgment was absolutely void, and the remedy against it by certiorari was complete. *Knight v. Creswell*, 82 Ark. 330, 101 S. W. 754, 118 Am. St. Rep. 74.

The principles of law above announced were recognized and applied in *Nelso v. Freeman*, 206 S. W. 667. There the relief by certiorari was denied because the party seeking the relief had appeared before the justice of the peace within 30 days after the rendition of the judgment against him for the purpose of quashing the judgment. He failed

to appeal from the judgment of the justice, refusing to do so; and the court held that his failure to appeal from the adverse judgment barred him from seeking the relief which he might otherwise have obtained.

Here the facts are essentially different. Budd alleges that he did not know of the judgment against him in the justice court until July 22, 1915, when the time for appeal had expired; and this allegation is not denied. It follows that the judgment must be reversed, and the cause remanded for a new trial.

(138 Ark. 181)

WESTERN CLAY DRAINAGE DIST. et al.  
v. DAY et al. (No. 149.)

(Supreme Court of Arkansas. March 17, 1919.)

1. APPEAL AND ERROR ¶843(1)—QUESTIONS DETERMINED—PRIVATE LITIGATION.

It is not the practice of the Supreme Court to search out and decide all the questions which might be said to be presented by a particular record, but in private litigation the court is content to pronounce judgment only on questions on which a decision is invoked.

2. DRAINS ¶17—LOANS BY DISTRICT DIRECTORS—VIOLATION OF STATUTE—PERSONAL LIABILITY.

Directors of a drainage district, who elected to loan its funds on terms fixed by themselves rather than those fixed by Acts 1907, p. 890, pursuant to which the district was organized, are personally liable for the loans.

3. TRIAL ¶377(2)—REOPENING CASE—DISCRETION OF COURT.

No abuse of discretion was shown in the failure of the court below to reopen the case after submission for decision to consider testimony by deposition taken without authority.

4. APPEAL AND ERROR ¶837(10)—REVIEW—TESTIMONY NOT BEFORE TRIAL COURT.

The Supreme Court cannot consider on appeal testimony which was not properly before the court below.

5. DRAINS ¶19 — DRAINAGE DISTRICT — EMPLOYMENT OF ATTORNEY—ACCEPTANCE OF SERVICES.

Though board of directors of drainage district was not properly in session when contract for employment of attorney was made, but district continued to accept the attorney's services as if a valid contract therefor had been made, it became bound to pay their value.

6. DRAINS ¶20 — DISTRICTS — ACTION AGAINST OFFICERS—PROPER PARTIES.

In suit by landowners against drainage district directors on account of money illegally loaned to themselves and others, owners having alleged that a sum was loaned the attorney for district, asking judgment against directors for having loaned it, the attorney was a proper party.

7. ATTORNEY AND CLIENT ¶166(3)—ATTORNEY FOR DRAINAGE DISTRICT — AMOUNT OF FEE—SUFFICIENCY OF EVIDENCE.

Allowance by chancery court to an attorney for a drainage district who conducted litigation to a successful issue, held not contrary to a preponderance of the evidence as to the amount of a proper fee.

Appeal from Clay Chancery Court; Archer Wheatley, Chancellor.

Suit by D. P. Day and others against D. Hopson and others, individually and as directors of the Western Clay Drainage District, wherein G. B. Oliver, made a defendant by amendment of the complaint, filed answer and cross-complaint against the drainage district. From the decree, the drainage district and others appeal. Affirmed.

Appellees, D. P. Day and other landowners in the Western Clay drainage district, brought this suit against D. Hopson, Joseph McCracken, and J. H. Magee, individually, and as directors of the drainage district, for the purpose of charging the directors with personal liability for various sums of money derived from the sale of the bonds of the district which had been loaned by said directors to themselves and to other persons in violation of the law. There was a prayer for an accounting of the sum so loaned and for judgment against the directors. An amendment to this complaint was filed in which the names of the persons who had borrowed this money was alleged, and these persons were made parties defendant, pursuant to the prayer of the amendment to the complaint, although no judgment was prayed against any of the persons named in the amendment. Among the persons so named in the amendment was G. B. Oliver, who filed an answer and cross-complaint against the drainage district. In this answer Oliver admitted having borrowed the sums alleged to be due in the complaint, but by way of cross-complaint against the drainage district alleged that the drainage district was indebted to him in the sum of \$2,500 for professional services. His cross-complaint was so amended as to allege the sum due for services to be \$3,500. The appellant drainage district filed a motion to strike out the name of Oliver as a party defendant, and also a motion to strike out the cross-complaint of Oliver and a demurrer to his answer and cross-complaint, all of which were overruled and exceptions were saved by the drainage district. The drainage district then filed its answer to the cross-complaint of Oliver, in which liability in any sum for services rendered was denied.

The drainage district was organized pursuant to an act of the General Assembly of 1907 (Act No. 368, Acts 1907, p. 890) and the

amendments thereto, and D. Hopson, A. B. McKinney, and H. H. Williams were appointed directors of said district. McKinney and Williams, upon the expiration of their terms, were succeeded by appellants McCracken and Magee. The act authorized the directors to divide the district into subdistricts, and pursuant to this authority five of these subdistricts were organized. The act provided that the directors might issue bonds for the purpose of raising the necessary funds to construct the proposed improvement in any subdistrict, and that only the lands in a particular subdistrict should be liable for the bonded indebtedness incurred in constructing the improvement in that subdistrict. The act further provided that none of these bonds should be sold for a price less than 95 cents on the dollar. Subdistrict No. 1 was organized, and \$100,000 in bonds were issued for its account, and the records of the district show that these bonds were sold for 93 cents, which was \$2,000 less than the minimum price for which they could legally have been sold. It was explained, however, by the directors of the district that the bonds had in fact been sold for 95 cents, and that \$2,000 was allowed the purchaser for having the bonds printed and for certain other expenses incident to their issuance. Later four other subdistricts were organized and bonds were issued for the account of each of them, so that for the entire district bonds in excess of \$400,000 were issued.

The act creating the district authorized the directors to loan the money of the various subdistricts until needed to pay the cost of the proposed improvements, and to take as security therefor first mortgage bonds on real estate. After selling the bonds the directors proceeded to make loans of money to themselves and to numerous other parties. These loans appear to have been made without regard to the requirements of the act authorizing them, and the directors seek rather to defend their good faith than the legality of their actions.

Upon the filing of the suit by the landowners the directors and certain of the borrowers began to comply with the law, either by repaying the loans or by giving the mortgages required by law, so that at the time of the final hearing most of the money had been legally accounted for. It appears, however, that certain loans were made of funds belonging to two of the subdistricts which had not been repaid or secured as required by law, and as to these subdistricts no relief as prayed was granted the landowners for the reason stated by the court below that none of them owned land in these subdistricts, and were not therefore interested in those funds. The court, however, found the balances due to the subdistricts in which the lands of the plaintiffs were situated, and rendered judgment against

those borrowers and the directors personally. There was no controversy as to the sum loaned Oliver, who offered to pay the balance due by him after deducting a fee for legal services which he claimed. The court fixed Oliver's fee at \$2,000, and both Oliver and the district have appealed from this allowance. The court also held that the cause of action against the directors for the \$2,000 representing the price at which the bonds of subdistrict No. 1 had been sold below the minimum price fixed by law was barred by the statute of limitations. The directors have appealed from the decree fixing personal liability against them for the sums of money loaned in violation of the law, and from the allowance of the fee to Oliver; and the director McCracken makes the separate defense that he was not a member of the board at the time the loans were made. Other facts will be stated in the opinion in connection with the discussion of the points stated, above.

F. G. Taylor, of Corning, for appellants.  
J. F. Gautney, of Jonesboro, and J. L. Taylor and G. B. Oliver, both of Corning, for appellees.

SMITH, J. (after stating the facts as above). A very forceful argument is made in the brief of counsel for the landowners to the effect that the court below erroneously held the cause of action for the recovery of the \$2,000 item to be barred by the statute of limitations, and that the court was also in error in holding that the landowners bringing this suit had no right to call the directors to account for the loans of money belonging to the subdistricts in which they owned no land. These landowners, however, prayed no cross-appeal; and, as no one else raises these questions, we dispose of them by saying that they are not properly presented for our decision.

[1] In this connection, it might be said that the drainage district, which has appealed and which could therefore raise these questions, has not done so. It is not the practice of this court to search out and decide all the questions which might be said to be presented by a particular record. In private litigation the court is content to pronounce judgment upon those questions only upon which a decision is invoked.

[2] Both Hopson and McCracken have appealed from so much of the decree of the court below as holds them personally liable for the loans of money made in contravention of the statute. But we think the decree in this respect should be affirmed. The act prescribed the terms upon which the funds of the district might be loaned, and if the directors wished to escape any personal liability on that account they should have complied with the law in making these

loans. Inasmuch as they elected to loan the money upon terms fixed by themselves rather than upon the terms prescribed by law, the loans must be treated as if they were unauthorized by law and the directors held responsible for any loss thus incurred. Director McCracken seeks to escape this liability by saying that he was not a director when the loans were originally made. But it affirmatively appears that he was present at a director's meeting at which the landowners requested the directors to bring suit or to authorize suits to be brought to recover the unlawful loans, and McCracken refused to consent to this action upon the ground that such suits would result in a receivership for the entire district; and further that he thereafter consented to the renewal of various loans as they matured, without taking the security required by the law.

[3, 4] It is very earnestly insisted on behalf of the drainage district that the court below should have stricken the answer and cross-complaint of Oliver from the files, and that the fee finally allowed him was excessive. And upon his cross-appeal Oliver insists that the fee allowed was inadequate. In support of his contention that the fee allowed him was inadequate Oliver insists that we should consider the testimony taken in his behalf and found in certain depositions which have been brought up by certiorari. The cause appears, however, to have been submitted to the court for decision on the 25th of June, 1918, and the depositions were taken between that date and July 18th, the date on which the court below pronounced a final decree. The court had previously fixed the time within which the testimony should be taken, and had apportioned a given number of days to each of the parties. This time had expired some days before the cause was submitted, and during the allotted time much testimony was taken, and it does not appear that the court was requested to extend the time for further proof before taking the case under submission, and no abuse of discretion is shown in the failure of the court below to reopen the case for the purpose of considering testimony which was taken without authority. As the testimony was not properly before the court below, we cannot consider it now.

[5, 6] The point is made that the board of directors of the district was not properly in session when the contract for Oliver's employment was entered into. This point is answered, however, by saying that thereafter the district continued to accept Oliver's services as if a valid contract therefor had been made, and we proceed to consider the value of these services as shown by the testimony taken on that issue. Before doing so, however, we take occasion to say that no error was committed in refusing to strike

Oliver's answer and cross-complaint from the files. The complaining landowners had alleged in their amended complaint the sum of money loaned Oliver, and there was no controversy about the correctness of the sum alleged to have been loaned him; and, while the landowners did not ask judgment against Oliver for this sum, they did ask judgment against the directors for having loaned Oliver the money stated, and it therefore appears that in the proceeding to which Oliver was made a party judgment was prayed against the directors for the money loaned Oliver. So that, even if Oliver were not a necessary party, he was a proper party to have before the court in adjudicating the liability of the directors for money loaned him; and, while the directors against whom the judgment was asked on account of their loan made to Oliver were the parties who asked that the cause of action as against Oliver be dismissed, we think no abuse of discretion is shown by the failure of the court to dismiss the cause as to Oliver.

[7] Oliver took the depositions of seven lawyers on the question of the fee he was entitled to charge, and all these witnesses placed the fee at a larger sum than the charge made. On behalf of the district the testimony of eight lawyers was taken, all of whom placed the fee at a smaller sum than Oliver sought to charge. The testimony of the attorneys in Oliver's behalf was taken in response to a hypothetical question prepared by him, and that in behalf of the district upon a hypothetical question prepared by the attorney for the district. These questions were lengthy, and will not be restated here; but upon a comparison of the two hypothetical questions we are of the opinion that the question propounded by Oliver presents more fully than the other the facts in the case upon which the opinion of the attorneys should have been based.

Briefly restated, these facts are as follows: This court, in the case of *Caton v. Western Clay Drainage District*, 87 Ark. 8, 112 S. W. 145, upheld the validity of the organization of this drainage district and the assessment of the benefits thereunder. Later, in the case of *Martin v. Reynolds*, 125 Ark. 163, 188 S. W. 4, we decided that a special statute creating a certain drainage district was void on its face for the reason that it made an unauthorized discrimination in the property to be assessed for taxation to pay for the improvement authorized. The section of the statute condemned in the last-cited case was an exact copy of a section of the act creating the Western Clay drainage district. Thereafter the landowners who brought this suit, together with other landowners of the district, employed counsel to resist the collection of further assessments of benefits against the lands in this drainage district. It was shown that these

landowners had agreed to pay these attorneys a given per cent. of the assessments then remaining unpaid in the event that the proposed litigation was conducted to a successful issue. The fee thus contracted for would have approximated \$10,000. At that time the district had been in operation for nine years, and had issued and sold bonds to the amount of \$419,000, and practically all of its work in four subdistricts had been completed by the expenditure of more than \$300,000, and about 145 miles of ditches and 25 miles of levees had been constructed. It was shown by the testimony of the engineer of the district that the annual cost of maintenance of the completed work was \$3,000 to \$5,000, and that the assessed and actual benefits of the improvement to the property in the district largely exceeded their cost, and that their value depended on their maintenance and upkeep. Oliver conducted this litigation to a successful issue, as appears from the decision of this court in the case of *Curtis v. Hopson*, 127 Ark. 344, 191 S. W. 951, and we cannot say that the action of the chancellor in allowing a fee of \$2,000 for the services performed was contrary to the preponderance of the evidence in the case, or that a larger fee should have been allowed, and the allowance of that fee will therefore be affirmed.

No reversible error appearing, upon a consideration of the whole record, the decree of the court below will be affirmed.

(138 Ark. 68)

**CHAPIN v. QUISENBERRY et al.**  
(No. 146.)

(Supreme Court of Arkansas. March 17, 1919.)

**JUDICIAL SALES** §31(1) — **INADEQUACY OF PRICE — CIRCUMSTANCES PREJUDICIAL TO OWNER—REFUSAL OF CONFIRMATION.**

Where, on sale of realty by court commissioner, property brought a grossly inadequate price, having been worth about \$1,500, and successful bid having been for \$805 only, and the sale was attended with circumstances working out a harsh result against the interests of the owner, though the purchaser himself was guilty of no fraud or misconduct, court was justified in refusing confirmation.

Appeal from Benton Chancery Court; Ben F. McMahan, Chancellor.

Proceeding for confirmation of sale of realty by Court's Commissioner, by J. L. Chapin against B. W. Quisenberry and others. From decree refusing confirmation, petitioner appeals. Affirmed.

Appellant pro se.

Duty & Duty, of Rogers, for appellees.

**McCULLOCH, C. J.** This appeal is from a decree refusing confirmation of the sale of real estate made by the court's commissioner. The grounds of the decision in refusing confirmation were that the price for which the property sold was grossly inadequate, and that appellee was misled and deterred from attending the sale by a statement of the attorney for the plaintiffs in the decree under which the sale was made to the effect that he would bid the amount of the decree. Appellant was the purchaser at the sale, and \$805 was the amount of his bid. He was not a party to the original action in which the decree was rendered, and that decree was in favor of John M. Davis, as state bank commissioner, in control of the assets of the defunct Bank of Rogers, for recovery of the sum of \$1,807.83, and in favor of John Schaap & Sons Drug Company for \$281.70. The decree was for foreclosure of liens in favor of those parties against the property in controversy, which was a house and lot in Rogers, Ark.

The testimony shows that the fair market value of the property was about \$1,500. Several witnesses testified on that subject, and their estimates of value range from \$1,200 to \$2,000. The court could have reached the conclusion from this testimony that the property was worth at least \$1,500, or perhaps \$1,600. The testimony also shows that the attorney for the plaintiffs in the original litigation stated to the attorney for appellee, Quisenberry, who was defendant in the original suit, against whom the liens were asserted, that he would attend the sale and bid the amount of the original decrees, which aggregated about \$1,600, and that said appellee and her attorney, supposing that the property would thus be made to bring at least \$1,600, were induced to remain away from the sale. There was also testimony to the effect that the statement of the attorney for the original plaintiffs was communicated to another person, who contemplated attending the sale and bidding, but refrained from doing so in reliance on the statement that plaintiffs would bid as much as \$1,600.

We have a case, therefore where the property brought a grossly inadequate price, and also where there were circumstances attending the sale which worked out a harsh result against the interests of the owner of the property. Appellant himself was guilty of no fraud or misconduct, but he purchased the property at an inadequate price, and that, together with the circumstances which produced the hardship on the owner of the property, was sufficient to justify the court in refusing confirmation.

The facts of the case bring it within the rule announced by this court in the following cases: *Stevenson v. Gault*, 131 Ark. 397, 199 S. W. 112, Ann. Cas. 1918E, 433; *Hawkins v. Jones*, 131 Ark. 478, 199 S. W. 549; *Moore v.*

McJuddkins, 206 S. W. 445. Under these circumstances, we cannot say the chancellor erred in refusing confirmation of the sale. Affirmed.

HUMPHREYS, J., not participating.

(138 Ark. 166)

EARL v. ELLISON et al. (No. 138.)

(Supreme Court of Arkansas. March 10, 1919.)

1. ACTION  $\S$ 50(3)—APPEAL AND ERROR  $\S$ 1039(9), 1040(10)—HARMLESS ERROR—MISJOINDER OF CAUSES OF ACTION.

Where 17 parties, as plaintiffs, sued defendant for damages growing out of the sale of seed oats, all the sales being made at the same time, for the same price, and under identical contracts, each plaintiff alleging in a separate count his cause of action, it was not prejudicial error for the court to overrule a demurrer for misjoinder and a motion to require plaintiffs to elect to dismiss as to all except one of the plaintiffs, since the court, in the exercise of a reasonable discretion, under Acts 1905, p. 798, might have consolidated the actions if they had been separately brought.

2. PLEADING  $\S$ 377—NECESSITY OF PROOF—DAMAGES—FAILURE TO DENY.

In view of Kirby's Dig. § 6137, providing that allegations of value or of amount of damage shall not be considered as true by the failure to controvert them, it was error to render judgment for plaintiffs in a suit for damages arising from the sales of worthless oat seed, on their verified allegations as to the amount of damages without proof thereof.

Appeal from Circuit Court, Conway County; A. B. Priddy, Judge.

Action by Ruff Ellison and others against R. D. Earl, doing business as Earl Bros. & Co. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Seventeen parties, the appellees, as plaintiffs, instituted this action in the justice court, against R. D. Earl, doing business under the firm name of Earl Bros. & Co., the defendant.

Each of the plaintiffs, in a separate count, set up that on or about the 1st day of February, 1917, he purchased from the defendant a certain quantity of Burt oats for seed; that he told the defendant that he wished the oats for seed; that the defendant "falsely and fraudulently stated to the plaintiff that he would guarantee said oats to be the genuine Burt oats, and that they would germinate; that plaintiff, relying upon said guaranty, purchased said oats and planted same; but they would not germinate and were entirely worthless, and were not the genuine Burt oats; that said representations were false and untrue." Each of the plain-

tiffs, in each of the separate counts, designated the number of bushels of oats purchased by him and the amount of damages he had sustained, by reason of the alleged false representation, on account of the worthless oats, and also the amount of damages he had sustained in loss of rent, time and expense in preparing the soil and sowing the oats, and prayed judgment for damages. All of the plaintiffs joined in a prayer for judgment for damages for the aggregate amount of the sums paid by each of them for the oats, and also for the aggregate amount of the damages sustained by them for the loss of time, and expense in preparing the soil and planting the oats, and in the loss of rent.

The case was appealed to the circuit court. The defendant filed a special demurrer, in which he set up that there was a misjoinder of parties plaintiff and a misjoinder of causes of action, and that the court was therefore without jurisdiction. The demurrer was overruled. The defendant then filed a motion to require the plaintiffs to elect as to each cause of action and as to which plaintiff should prosecute the suit, and that the cause of action as to all other plaintiffs be dismissed. The motion was overruled. The defendant elected to stand upon his demurrer and motion, and refused to plead further.

"Thereupon," as the record recites, "this cause coming on to be heard, same was submitted to the court upon the complaint of the plaintiffs, which was sworn to and verified by the plaintiffs, and, the court being well and sufficiently advised, doth find that the plaintiff, Ruff Ellison, is entitled to judgment against the defendant in the sum of \$36.80."

Then follows consecutively a recital, naming each of the other plaintiffs, and the amount of the judgment to which he was entitled, and a judgment in his favor for that sum. The recital concludes:

"It is further ordered and adjudged that each of the above-named plaintiffs have and recover of and from the defendants all their costs in this suit, laid out or expended, for which let execution issue."

The appellant duly excepted to the ruling of the court in overruling his demurrer to the complaint and his motion requiring the plaintiffs to elect, and in rendering judgment against him, and from the judgment rendered prosecutes this appeal.

Calvin Sellers and W. P. Straft, both of Morrilton, for appellant.

Edward Gordon, of Morrilton, for appellees.

WOOD, J. (after stating the facts as above). [1] First. The court did not err in overruling the demurrer nor in overruling the motion to require the appellees to elect to



dismiss the complaint as to all except one of the plaintiffs. Act 339 of the Acts of 1905, p. 798, provides:

"When causes of action of a like nature or relative to the same question, are pending before any of the circuit or chancery courts of this state, the court may make such orders and rulings concerning the proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

The several causes of action in the single complaint in separate counts, in which each plaintiff is named, grew out of precisely the same character of contract entered into on the same day for the purchase of the same kind of oats and at the same price; the only difference in the several contracts being in the amount of oats purchased. While the difference in the quantity of oats purchased by each of the several plaintiffs and the difference in the loss of rent, time, and expense in preparing the soil and sowing the oats necessarily caused a difference in the measure of damages for each of the several plaintiffs, nevertheless, there was such a similarity in the nature of the causes of action as to bring the several causes strictly within the provisions of the above statute.

The purpose of the statute, as expressed therein, is "for avoiding unnecessary costs or delay in the administration of justice." It can readily be seen that the time of the court would be greatly conserved and the expense of litigants and taxpayers would be considerably reduced by combining these several causes of action into one for the purpose of trial. The language, "may consolidate said causes when it appears reasonable to do so," shows that a broad discretion was intended to be conferred upon trial courts in applying the statute in order to effectuate its advantageous purposes.

Our statute for the consolidation of causes, *supra*, is almost a literal copy of section 921, R. S. (U. S. Comp. St. § 1547).

In *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285-298, 12 Sup. Ct. 909, 38 L. Ed. 706, there was a single plaintiff who brought a cause of action against several defendants, in which the defense to the cause of action was the same. The trial court consolidated the actions for trial "because they appeared to the court to be of like nature and relative to the same question, because it would avoid unnecessary costs and delay, and because it was reasonable to do so, and was within the discretionary power of the court, under section 921 of the Revised Statutes."

The Supreme Court of the United States in approving the order of consolidation for trial said:

"The learning and research of counsel have produced no instance in this country, in which such

an order, made in the exercise of the discretionary power of the court, unrestricted by statute, has been set aside on bill of exceptions or writ of error."

The same ruling would be applicable, of course, where there were several plaintiffs against one defendant. See *Rose Mfg. Co. v. Whitehouse Mfg. Co. et al.* (C. C.) 193 Fed. 69.

In evoking the sound discretion of the court, each case must depend largely upon its own peculiar circumstances to determine whether the discretion of the court has been reasonably exercised.

If separate suits had been brought by each of the appellees against the appellant, it is manifest that the court under the above statute would not have abused its discretion in ordering the suits consolidated for trial. Such being the case, it was not prejudicial error to refuse to require the appellees to elect to proceed separately in the trial of the cases. There was not enough difference in the testimony upon which each of the appellees relied to produce inextricable confusion, and therefore the court was justified in its ruling. See *Waters-Pierce Oil Co. v. Van Elderen*, 84 Ark. 556, 106 S. W. 947; *Mahoney v. Roberts*, 86 Ark. 130, 110 S. W. 225; *Ashford v. Richardson*, 88 Ark. 128, 113 S. W. 808; *St. L. I. M. & S. Ry. Co. v. Raines*, 90 Ark. 484, 119 S. W. 286; *American Ins. Co. v. Hayne*, 91 Ark. 51, 120 S. W. 825; *Fidelity Phenix Fire Ins. Co. v. Friedman*, 117 Ark. 77, 174 S. W. 215; *Beatrice Creamery Co. v. Garner*, 119 Ark. 564, 179 S. W. 160.

[2] Second. After the demurrer and the motion to elect were overruled, the appellant stood upon his pleadings and refused to plead further, and the court proceeded thereupon to render judgment for the several plaintiffs, appellees, in the amounts severally claimed by them in their complaint.

One of the grounds of the motion for new trial is:

"That the court erred in rendering judgment against the defendant in this cause."

"Allegations of value, or of amount of damage shall not be considered as true by the failure to controvert them." Section 6137, *Kirby's Digest*.

The court erred in rendering judgment in favor of the appellees on the allegations of their complaint as to the amount of damages, without proof as to the amount of such damages. *Derrick v. Cole*, 60 Ark. 394-399, 30 S. W. 760; *Greer v. Newbill*, 89 Ark. 513, 117 S. W. 531; *Greer v. Strozler*, 90 Ark. 161, 118 S. W. 400.

For the error indicated, the judgment is reversed, and the cause is remanded for new trial.

SMITH, J., concurring.

(138 Ark. 98)

**GREER v. JOYCE** (No. 147.)

(Supreme Court of Arkansas. March 17, 1919.)

**1. JUSTICES OF THE PEACE**  $\S$  174(15)—**SET-OFF OR COUNTERCLAIM—TIME FOR PLEADING.**

In view of Kirby's Dig. § 4682, providing that set-offs not presented in the justice court cannot be allowed on appeal in the circuit court, it was error for a circuit court, in a case appealed from a justice court, to deny plaintiff's motion to strike a set-off first filed in such circuit court.

**2. APPEAL AND ERROR**  $\S$  1175(6)—**RENDERING FINAL JUDGMENT—ADMISSION IN PLEADING.**

Where defendant admits owing plaintiff the amount sued for, and defendant was not entitled to a set-off claimed by him, by reason of having failed to present it in the justice court, judgment will be entered for the amount due plaintiff.

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Action by M. H. Greer against A. Z. Joyce. From a judgment for plaintiff in justice court, defendant appealed to circuit court, where defendant had judgment, and from such judgment and an order denying his motion to strike a set-off, plaintiff appeals. Reversed and rendered.

Brundidge & Neefly, of Searcy, for appellant.

J. N. Rachels, of Searcy, and W. A. Barnett, of Okmulgee, Okl., for appellee.

**WOOD, J.** The appellant filed an account in the justice court against the appellee for the sum of \$26. Service was had upon the appellee, and judgment was rendered against him by default.

Appellee appealed to the circuit court. There he filed a set-off in the sum of \$50. Appellant moved to strike the set-off, which was overruled. Appellant duly saved exceptions to the ruling.

The appellee admitted that he owed the amount sued for, but contended that the amount was set off by his claim and that appellant was due him a balance of \$24. The cause was sent to the jury, and a verdict and judgment were rendered in favor of the appellee in the sum of \$24. This appeal is duly prosecuted.

[1] The court erred in overruling appellant's motion to strike the set-off. Set-offs not presented in the justice court cannot be allowed on appeal in the circuit court. Kirby's Digest, § 4682; Texas & St. L. R. Co. v. Hall, 44 Ark. 375; St. L., I. M. & S. R. Co. v. Richter, 48 Ark. 349, 3 S. W. 56; 3 Crawford's Digest, 3101. See, also, Woolvorton v. Freeman, 77 Ark. 284, 91 S. W. 190; Rail-

road v. Young, 85 Ark. 444, 109 S. W. 831; Hines v. Stephens, 90 Ark. 518, 119 S. W. 664.

[2] For the error indicated, the judgment is therefore reversed. As the appellee admits that he is due appellant the amount claimed, it follows that judgment must be entered here for that sum, and it is so ordered.

(138 Ark. 33)

**CHERRY v. KIRKLAND** (No. 134.)

(Supreme Court of Arkansas. March 3, 1919.)

**1. TRIAL**  $\S$  11(2)—**TRANSFER OF CAUSES TO CHANCERY COURT—ACCOUNTS.**

Where account involved in suit consisted of two debit items and about a page of credit items, covering only a short period of time and growing out of and relating to one transaction, and was not a running account, involving mutual items of debit and credit, and was not intricate and complicated, trial court properly refused to transfer cause to chancery court.

**2. LANDLORD AND TENANT**  $\S$  291(4)—**UNLAWFUL DETAINER—RIGHT OF ACTION—GRANTEE OF LANDLORD.**

Under Kirby's Dig. § 8630, a grantee or assignee of a landlord may institute a suit for forcible entry and detainer.

**3. GOOD WILL**  $\S$  6(1)—**SALE—FALSE REPRESENTATIONS—DAMAGES.**

The good will of a business is a tangible thing, and is an asset, the sale of which, if induced by fraud, entitles the buyer to damages.

Appeal from Circuit Court, Marion County; John I. Worthington, Judge.

Suit by Mattie V. Kirkland against J. J. Cherry. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Allyn Smith, of Cotter, and Williams & Seawel, of Yellville, for appellant.

J. A. Comer, of Little Rock, for appellee.

**HUMPHREYS, J.** Appellee instituted suit against appellant on the 2d day of August, 1917, in the Marion circuit court, for forcible entry and unlawful detainer of lot 7, block 4, and lots 8, 9, and 10, block 7, in the town of Rush, all in section 11, township 17 north, range 15 west, in said county, upon which she had constructed a store building, bungalow, hotel, warehouse, and pool room, and for rents and damages. Appellee alleged ownership, right of possession, failure of appellant to pay rent after demand, and refusal to quit after notice.

Appellant answered, denying appellee's ownership, right of possession, right to rent, or that he unlawfully detained the property, and by way of further defense filed a cross-bill, specifically alleging that his possession

of the store building was under written lease, incorporated in a contract for the purchase of goods and the good will of the business conducted in said building; that the sale of stock and good will was induced by representations that the stock was free from incumbrance and that the daily cash sales of the business ran from \$200 to \$500 per day; whereas, the business was indebted between \$3,000 and \$4,000, which destroyed appellant's credit and sales, in a measure, and the good will of little value and practically worthless, because the daily sales did not exceed \$25 or \$30; that, on account of these misrepresentations, he was damaged \$2,000, which he paid for the good will, and \$3,000 for loss of time, clerk hire, and depreciation in the value of the goods. Appellant also alleged that appellee was indebted to him in the sum of \$1,079.05, balance due on account attached to the cross-bill as an exhibit. Every material allegation in the cross-bill was denied by appellee.

The appellant filed a motion, before trial, to transfer the cause to the chancery court, and renewed it at the conclusion of the evidence, assigning as a reason for the transfer that the adjustment of a complicated account was involved as an issue in the case. The motion was denied, over the objection and exception of appellant.

The cause was submitted to a jury on the pleadings, oral and documentary evidence, and instructions of the court. The jury returned a verdict in favor of appellee for \$269, and judgment was rendered for said amount and for possession of the property, from which an appeal has been prosecuted to this court under proper proceedings.

[1] Appellant first insists that the court erred in refusing to transfer the cause to the chancery court. The account attached consisted of two debit items and about a page of credit items, covering only a short period of time, and growing out of and relating to one transaction. It is neither a running account, involving mutual items of debit and credit, nor is it intricate and complicated. For this reason, we think a jury could determine the matter as accurately as a master. The court did not err in retaining the cause.

Again, it is contended by appellant that appellee is not in a position to bring suit for forcible entry and detainer under the statutes of this state. The evidence disclosed that appellee was the owner of the lots and building at the time the stock of goods and good will of the business were sold to appellant. In September thereafter, appellee sold and conveyed the property to her husband, O. D. Kirkland. After that time appellant recognized O. D. Kirkland as his landlord, and attorned to him as such landlord, until the 1st day of January, 1917. On the 23d day of December, 1916, O. D. Kirkland, in a divorce settlement with his wife, reconvey-

ed the property by quitclaim deed to her. Appellee testified that in January, 1917, appellant called at her home in Little Rock, at which time she stated to him that the property belonged to her, and that he would have to account to her for the rent from that time on. Appellant admitted that, when he called on appellee in Little Rock, she talked to him about the rents coming to her, and about a settlement which she and Mr. Kirkland were about to make, but said that he told her at the time that he did not expect to pay any more rents until she complied with her contract (referring to the contract for the sale of the goods). On February 2, 1917, appellee wrote appellant a letter, which he received, of which the following is a part:

"Mr. Kirkland and I have made a settlement and the rents are mine; also the balance on the warehouse money. I wish you would send me a check for rents, and as much on the warehouse goods as you can, so I can get all bills paid as soon as possible. Send either to Mr. Clayton or Mr. Comer, my attorneys, or to me."

[2] Appellant did not then question, and, as we understand it, does not now question, that appellee was the owner of the property. Appellant's contention is that the rights of a conventional landlord to institute suit for forcible entry and detainer do not pass to his grantee by deed, unless the tenant recognizes the grantee as landlord by attornment or otherwise. Appellant cites *Reay v. Cotter*, 29 Cal. 168, in support of his contention. By the statutes of California, the remedy of forcible entry and detainer is conferred upon the landlord only. Under the peculiar wording of the California statute, the court held that the remedy did not pass to the successors in estate to the landlord. The statute of this state is broader, and confers the action of forcible entry and detainer upon any person having the right to the possession of the property. Of course, the relationship of landlord and tenant must exist as a basis for the institution of this action; but the statute is broad enough to include the conventional or original landlord, his grantee, or assigns in estate. Section 3630, Kirby's Digest. Under the facts in this case, appellee had a right to institute this character of action.

[3] It is also insisted that the court erred in excluding from the jury the issue tendered, and evidence offered in support thereof, of whether the sale of the good will of the business was induced by misrepresentations as to the amount of daily sales. It was alleged that appellant was induced to pay \$2,000 for the good will of the business by representing that the daily cash sales ran from \$200 to \$500; whereas, the daily cash sales only amounted to \$25 or \$30. Appellant offered proof tending to establish this allegation, which was excluded by the court. Appellant also requested an instruction pre-

senting that issue to the jury, which was refused by the court. The court took the position that the good will of a business was not a thing the sale of which could be induced by fraud. We think the good will of a business is a tangible thing; that it is a valuable asset. We see no difference between the good will of a business and any other valuable asset possessed by it. The good will of a business has been recognized in the law as an asset subject to sale and purchase. 1 Page on Contracts, § 374; Bloom v. Home Insurance Agency, 91 Ark. 367, 121 S. W. 293. The good will of a business, being a thing of value and subject to sale and purchase, may be induced by false and fraudulent representations, just as the sale and purchase of any other property may be so induced.

For the error in excluding this issue from the jury, the judgment is reversed and remanded for a new trial.

(128 Ark. 175)

**MEMPHIS, D. & G. R. CO. v. THOMPSON.**  
(No. 150.)

(Supreme Court of Arkansas. March 17, 1919.)

**1. RAILROADS ⇨348(1) — CROSSING ACCIDENT—NEGLIGENCE—EVIDENCE.**

Evidence, in action for death of plaintiff's intestate at a crossing, that the train was run at high speed around a curve onto the crossing from behind a hill, and that defendant's employees failed to sound the whistle or ring the bell, *held* sufficient legal evidence of negligence to support a verdict for plaintiff.

**2. RAILROADS ⇨346(1)—DEATH AT CROSSING—NEGLIGENCE—PRESUMPTION.**

Where it is conclusively proved that one who was riding on a wagon driven by another was killed in a collision by a train at a railway crossing, a presumption of law arises that the railway company was negligent.

**3. RAILROADS ⇨350(13) — ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE — JURY QUESTION.**

Where deceased, riding in a wagon driven by another, was killed at a crossing when a train coming around a curve at great speed without signal, from behind a hill, collided with the wagon, the question of his contributory negligence was for the jury.

**4. DEATH ⇨99(5) — DAMAGES — EXCESSIVE JUDGMENT.**

Judgment for \$1,200 in favor of administrator of deceased, a farmer 22 years of age, for the benefit of the next of kin, *held* not excessive, where decedent's father, feeble and aged, was unable to work his farm alone and had arranged with his son to farm the place and support the family from the proceeds thereof.

**5. DEATH ⇨58(2) — ACTION FOR CAUSING DEATH—DAMAGES FOR PAIN AND SUFFERING OF DECEASED.**

A judgment of \$300 for pain and suffering by deceased cannot stand, where plaintiff administrator failed to show that deceased actually underwent conscious pain and suffering prior to his death.

Appeal from Circuit Court, Garland County; Scott Wood, Judge.

Action by W. G. Thompson, administrator of Braden Thompson, deceased, against the Memphis, Dallas & Gulf Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed in part, and in part reversed.

J. W. Bishop, of Nashville, for appellant.  
Calvin T. Cotham, of Hot Springs, for appellee.

**HUMPHREYS, J.** On January 15, 1918, appellee, as administrator, for the benefit of both the estate and next of kin of Braden Thompson, deceased, instituted suit against appellant in the Garland circuit court, to recover damages on account of the killing of Braden Thompson on January 1, 1918, at a point where appellant's railroad crossed a public road in Garland county, near the Gardner ferry or bridge. It was alleged in the complaint that appellant's employees wrongfully, carelessly, and negligently ran its passenger train across said public road crossing at an unusual speed, and failed to ring the bell or sound the whistle or to give any other warning of its approach, and failed to keep a constant lookout for persons about to cross the track at the public crossing; that appellee's intestate was bruised, mangled, and mutilated as a result of the injuries received from the train when it struck him, and died within a few minutes in great pain and mental anguish; that, at the time his intestate was killed by the train, he was 22 years of age, and was appellee's main dependence for labor on his farm; that, on account of the wrongful killing of his intestate, he was damaged, as father and next of kin, in the sum of \$5,000; and that the estate of his intestate was damaged in the sum of \$15,000.

Appellant filed answer denying all material allegations in the complaint, and alleged, as a further defense, that, at the time of the injury, appellee was seated in a wagon drawn by a pair of mules and driven by Alexander Mahan; that they suddenly drove upon the track, immediately in front of the approaching train, without looking and listening, and without using the means at their command to ascertain the approach of the train.

On the 12th day of June, 1918, the cause was submitted to a jury upon the pleadings,

appellee's evidence, and instructions of the court. The jury returned a verdict in favor of W. G. Thompson, administrator, for the benefit of next of kin, in the sum of \$5,000, and a verdict in favor of W. G. Thompson, as administrator, for the benefit of the estate, in the sum of \$5,000. Upon the same day, judgment was rendered in accordance with the verdicts. Appellant was not present at the trial, but appeared on June 14th and requested and was granted until June 22d to file a motion to set aside the judgment and for a new trial. On that date, appellant filed its motion setting up that it was not present at the trial and not represented by counsel for the reason that it was led to believe that the cause would not be tried until after the primary election; that it had a meritorious defense to the cause of action, setting it out; and that the evidence was insufficient to support the verdict and judgment. Thereafter, appellee filed a response to the motion denying all material allegations therein. On the 13th day of July, 1918, the motion was submitted to the court upon affidavits and testimony. The court declined to vacate the judgment and grant defendant a new trial upon remittitur by appellee of his judgment as administrator, for the benefit of the estate, to the sum of \$300, and his judgment as administrator, for the benefit of the next of kin, to the sum of \$1,200, and modified the original judgment to conform to the amounts as thus reduced. From the final judgment, under proper proceedings, an appeal has been prosecuted to this court.

We deem it unnecessary to set out even a summary of the evidence introduced by appellant in support of the motion to vacate, and by appellee in support of his response thereto, for the reason that appellant does not now contend in his argument and brief that the court erred in refusing to vacate the judgment. It is contended, however, by appellant that the undisputed evidence disclosed: First, that the death of appellee's intestate was not caused by the negligence of the appellant's employes; second, that the death of appellee's intestate was caused by his own negligence; and, third, that the judgment was excessive, even after the remittitur.

[1, 2] 1. The evidence tended to show that appellant's train was behind time; that it approached the crossing, where the fatal accident happened, at a high rate of speed; that the employes failed to sound the whistle or ring the bell; that the train came around the curve onto the crossing from behind a hill; that it struck the wagon broadside, in which Braden Thompson was riding, and carried his body about 100 feet west and deposited it a few inches to the north of the track where it was found badly bruised and broken. The train came to a stop 550

yards west of the crossing. Under these facts, appellant must be held on appeal to have injured and killed Braden Thompson through the negligent acts of its employes, because there is some legal evidence tending to establish negligence on their part. *Malone v. Collins*, 112 Ark. 269, 165 S. W. 641. Again, the killing was proved beyond question, so the law will indulge the presumption that it was negligently done. *St. L., I. M. & S. R. Co. v. Evans*, 80 Ark. 19, 96 S. W. 618; *Huddleston v. St. L., I. M. & S. R. Co.*, 90 Ark. 378, 119 S. W. 280; *Kansas City Southern R. Co. v. Drew*, 103 Ark. 374, 147 S. W. 50.

[3] 2. On the morning of January 1, 1918, Braden Thompson, who was walking to Hot Springs to make out his questionnaire, was overtaken by Alexander Mahan, who invited him to ride. He took his seat beside Mahan in the wagon, and they proceeded along the public road toward town. When within 30 feet of the point where the railroad crossed the public road, Mahan looked in the direction from which the train came, and continued to look while going on, but did not see the train until his mules crossed the track and the front wheels of his wagon had crossed the first rail. He then hollered to his mules and slashed them in an effort to push them across the track, having gone too far to get them back. He saved himself by jumping. As the front wheels crossed the track, Braden Thompson said, "There comes the train," and Mahan thought that he jumped about the same time he himself did. The train came onto the public road crossing around a curve and from behind a hill which prevented Mahan or Braden from seeing the train until they were upon the track. This proof, taken in connection with the fact that there was proof tending to show that the whistle was not blown or the bell rung as the train approached the public road crossing, and the fact that the train was behind time and running at a great rate of speed, was sufficient to carry the question of contributory negligence to the jury. *St. L., I. M. & S. R. Co. v. Martin*, 61 Ark. 549, 33 S. W. 1070; *Missouri & North Ark. Rd. Co. v. Clayton*, 97 Ark. 347, 133 S. W. 1124; *St. L., I. M. & S. R. Co. v. Hutchinson*, 101 Ark. 424, 142 S. W. 527.

[4, 5] 3. The evidence is sufficient to sustain the judgment of \$1,200 in favor of appellee, as administrator for the benefit of the next of kin of Braden Thompson, deceased. On account of sickness and old age, appellee was unable to work and manage his farm. He had made arrangements with his son to look after the place and farm it, with the understanding that the family should receive support out of the proceeds therefrom. The family consisted of himself, wife, and two younger children. The young man had been residing at home, was unmarried, industrious, and competent to manage and

work the farm. There were 35 acres of the farm in cultivation, and it would produce between \$500 and \$800 annually in crops. It cannot be said that the judgment of \$1,200 in favor of appellee, as administrator for the benefit of the next of kin of deceased, was excessive. The judgment, however, of \$800 in favor of appellee, administrator for the benefit of the estate of Braden Thompson deceased, was not warranted by evidence. In order for appellee, in his representative capacity as administrator for the benefit of the estate of Braden Thompson, deceased, to sustain a recovery for more than nominal damages, it was necessary to have shown that his intestate underwent conscious pain and suffering prior to his death. *St. L., I. M. & S. R. Co. v. Dawson*, 68 Ark. 1, 56 S. W. 46. Appellee did not meet this burden. Alexander Mahan was the only witness to the killing. His testimony on this point was that, when the train struck the wagon, Braden Thompson was in the act of jumping; that he found him in a few seconds, 100 feet west of the crossing, near the track, lying on his stomach, his legs broken and twisted, and arms doubled around: that, as he approached him, he heard him struggle two little struggles; that he never spoke a word, was pale, and dead, so far as he could judge. For aught the evidence showed, appellee's intestate was killed instantly or rendered unconscious when struck by the train. To say otherwise would be mere conjecture. For failure to show, by direct or circumstantial evidence, conscious pain or suffering prior to the death of appellee's intestate, the \$800 judgment cannot stand.

The judgment for \$1,200 is therefore affirmed, and the judgment for \$300 is reversed, and the action of appellee, as administrator for the benefit of said estate, is dismissed.

(138 Ark. 81)

#### JONES v. BLYTHE. (No. 145.)

(Supreme Court of Arkansas. March 17, 1919.)

#### 1. CHATTEL MORTGAGES $\S$ 172(2) — REPLEVIN—SET-OFF.

Neither Kirby's Dig. § 6869, nor Acts 1917, p. 1441, authorizes a counterclaim in replevin suits to recover possession of personal property for purpose of foreclosing mortgages or deeds of trust, only authorizing a set-off against mortgage indebtedness.

#### 2. COURTS $\S$ 169(5) — JURISDICTION — AMOUNT IN CONTROVERSY.

The total amount of set-off authorized by Kirby's Dig. § 6869, in replevin suits to recover possession of personal property for purpose of foreclosing mortgages or deeds of trust determines jurisdiction of court to hear it, and if amount is in excess of jurisdictional amount

of court, then it cannot be pleaded as a set-off, unless excess above jurisdictional amount is relinquished.

Appeal from Circuit Court, Logan County; Jas. Cochran, Judge.

Suit by W. E. Jones against Joe Blythe. There was verdict in favor of plaintiff for part of the relief demanded, and he appeals. Reversed and remanded.

Sid White, of Paris, for appellant.

Kincannon & Kincannon, of Booneville, for appellee.

MCCULLOCH, C. J. Jones sued Blythe in replevin before a justice of the peace to recover possession of a stallion which he had sold to Blythe, and there was a balance of \$200 unpaid on the purchase price, as evidenced by notes aggregating that amount, secured by a mortgage on the horse. The suit was instituted to recover possession of the horse for the purpose of foreclosing the mortgage. The trial before the justice of the peace resulted in a verdict in favor of the plaintiff, and an appeal was prosecuted to the circuit court.

Blythe pleaded, in defense, an alleged breach of warranty in the sale of the horse as to his qualities for breeding purposes. Unliquidated damages were set up as resulting from the alleged breach of warranty. On the trial of the cause before a jury there was no dispute as to the unpaid balance of the purchase price of the horse, but there was substantial evidence tending to establish a warranty by the plaintiff as to the qualities of the horse, and a breach of the warranty and the amount of damages resulting therefrom. The court in its instructions to the jury, after outlining the issues, declared the law as follows:

"If you find for the plaintiff, Jones, you will find a judgment for the amount of the notes not paid and for the possession of the horse. But if you find for the defendant, that is, that there was a warranty, and that within a reasonable time after Blythe found that there was a breach of the warranty he offered to return the horse, then you should find for the defendant the amount of the damages suffered by reason of the breach of said warranty."

This instruction was given over the objection of the plaintiff, who properly saved his exceptions. The jury returned the following verdict:

"We, the jury, find for Blythe \$225.00, and horse to be returned to plaintiff."

The verdict of the jury was inconsistent with the instruction of the court, as well as the testimony adduced in the cause, and should not have been accepted by the court. The statute governing trials of cases of this

kind, that is to say, replevin suits to recover possession of personal property for the purpose of foreclosing mortgages or deeds of trust, provides that—

"The defendant or defendants in said action shall have the right to prove or show any payment or payments or set-off under such \* \* \* mortgage, deed of trust or other instrument, and judgment shall be rendered for the property or the balance due thereon, and the defendant may pay the judgment for the balance due and costs within ten days and satisfy the judgment and retain the property." Kirby's Digest, § 6869.

Under this statute the defendant had the right to show that the plaintiff was indebted to him in an amount sufficient to set off the mortgage debt, and in that case the verdict should have been wholly in favor of the defendant. But this verdict finds for the defendant in an amount of damages in excess of the mortgage debt, and yet finds for the plaintiff for the return of the horse. The two features of the verdict are absolutely inconsistent with each other when tested by the statute. Whether the jury meant to assess the damages of the defendant at \$225 in excess of the mortgage debt, or whether it was meant to assess the damages at that sum and to return the horse to the plaintiff to hold under his mortgage, we need not inquire, for in either event the verdict would not be correct, for, as before stated, if the mortgage debt was discharged by payment or set-off, then there should be no judgment in plaintiff's favor for the return of the horse.

This calls for a reversal of the judgment and a remand of the cause for a new trial, but we deem further discussion of other matters essential to the proper guidance of the court in the proceedings on the remand.

[1] The pleadings do not appear in the record, and we cannot determine definitely what amount of damages was claimed by the defendant, or whether the same was claimed by way of counterclaim or set-off. We assume, however, from the language of the court's instruction that the claim was presented in the form of a counterclaim and not a set-off, and from the form of the verdict we might assume that the defendant's claim was in excess of the jurisdiction of the justice of the peace, which is fixed in the Constitution at the sum of \$300 in actions on contract. The statute already quoted above does not authorize a counterclaim in this kind of an action. It only authorizes proof of payment or set-off for the purpose of determining whether or not the debt has been discharged in full, or, in case of partial discharge, the amount of balance due. *Neal v. Brandon*, 74 Ark. 320, 85 S. W. 776. Nor does the act of 1917 (page 1441) authorize a counterclaim in this kind of an action. We held in the case of *Smith v. Glover*, 205 S. W. 891, that under the recent statute

counterclaims can be presented only in actions for the recovery of money, and not in actions for the recovery of specific property. An action for the recovery of specific personal property for the purpose of foreclosing a mortgage on the property is not one for the recovery of money, even though the statute hereinbefore quoted provides for proof of payment or set-off, and for an ascertainment in the judgment of the amount of balance, if any, due on the mortgage debt. The statute only changed the law with respect to the judgment in regard to the alternative recovery in case the property be not delivered. Under the old form of action the alternative judgment was for the value of the property, while under the statute quoted the alternative judgment should be for the balance due on the debt. The action is still, however, one for the recovery of specific property, and although the plea of set-off is authorized, the counterclaim is not except by way of extinguishment or reduction of the mortgage debt. There cannot be a recovery over of any excess.

[2] Even as to the plea of set-off, which is expressly authorized by statute in this kind of an action, the total amount of the set-off determines the jurisdiction of the court to hear it, and if the amount is in excess of the jurisdictional amount of the court, then it cannot be pleaded as a set-off unless the excess above the jurisdictional amount is expressly relinquished. *Kilgore Lumber Co. v. Thomas*, 95 Ark. 43, 128 S. W. 62. The correct rule is stated in one of the encyclopedias as follows:

"The rule is that a claim, to be available as a set-off, counterclaim, or reconvention, must be such that the court entertaining the action in which the cross-demand is interposed would, if defendant had brought an original action upon his cross-demand, have had jurisdiction thereof as to subject-matter, amount, or territorial limitations, and a set-off exceeding the jurisdictional amount of the court cannot be brought within the jurisdictional amount by a credit for plaintiff's demand; but defendant may waive a portion of his demand so as to bring it within the jurisdiction of the courts." 34 Cyc. p. 646.

Our decision in the case of *Kilgore Lumber Co. v. Thomas*, supra, sustains that rule, and there are other decisions of this court on that subject which also sustain it. We held in *Neal v. Brandon*, supra, that the judgment of the court in a replevin case determining the amount of balance due on a mortgage debt constituted an adjudication of that question which was binding on the parties in subsequent litigation. Now, if the adjudication was final as to the amount due under the mortgage, then it necessarily results that the amount of the claim to be adjudicated must be within the constitutional jurisdiction of the court, and the whole of the claim must be considered in determining

the jurisdiction, unless there be a remission of the amount in excess of the jurisdiction of the court.

Reversed and remanded for a new trial.

(138 Ark. 10)

KANSAS CITY SOUTHERN RY. CO. v.  
AKIN. (No. 129.)

(Supreme Court of Arkansas. March 3, 1919.)

**1. APPEAL AND ERROR §664(2)—RECITALS OF RECORD—STRIKING OF PARAGRAPH OF ANSWER.**

The recitals of the record proper control bill of exceptions on the question whether the whole of a paragraph of the amended answer was stricken.

**2. LIMITATION OF ACTIONS §183(5)—ANSWER — DENIAL OF ALLEGATIONS OF COMPLAINT—NONSUIT.**

Defendant's answer, alleging that plaintiff's cause of action had long since been barred by the statute of limitations of three years of the state, and denying that plaintiff had a right to bring and maintain the suit, did not constitute a denial of the allegations of the complaint, as to nonsuit in the federal court, of a suit on the same cause of action brought within time, and the bringing of the present suit within less than a year of the date of nonsuit, as allowed by Kirby's Dig. § 5083.

**3. LIMITATION OF ACTIONS §118(1)—"COMMENCEMENT OF SUIT"—FILING OF COMPLAINT AND ISSUANCE OF SUMMONS.**

Under Kirby's Dig. § 6033, as to what is a commencement of an action, a suit was commenced when the complaint was filed in the office of the circuit clerk, and the summons was issued thereon.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Commencement of Action.]

**4. LIMITATION OF ACTIONS §30 — STATUTE OF LIMITATIONS—INJURY TO PASSENGER.**

A cause of action against a railroad for personal injuries to a passenger is barred, by Kirby's Dig. § 5064, in three years.

**5. LIMITATION OF ACTIONS §130(6)—TOLLING STATUTE AFTER NONSUIT.**

Pendency in federal court of suit against carrier by rail for injuries to a passenger tolled the general statute of limitations of three years, Kirby's Dig. § 5064; and, when nonsuit was taken in the federal court, and present suit begun in state court within one year after nonsuit, the passenger had the right to maintain it under section 5083, though three-year limitation had not expired when nonsuit was taken.

**6. APPEAL AND ERROR §930(1)—REVIEW—EVIDENCE AFTER VERDICT FOR PLAINTIFF.**

After verdict for plaintiff, the Supreme Court must give the evidence its strongest probative force in favor of plaintiff.

**7. EVIDENCE §553(1)—EXPERT OPINION—HYPOTHETICAL QUESTIONS.**

Hypothetical questions were proper, where there was testimony tending to prove the facts on which they were grounded.

**8. DAMAGES §208(2)—PERSONAL INJURY—PROXIMATE CAUSE—QUESTION FOR JURY.**

Conflicting testimony as to whether injury to plaintiff was proximate cause of tuberculosis in a part of his body, he having previously had his arm amputated for tuberculosis, held to raise question for the jury.

**9. APPEAL AND ERROR §1064(4)—HARMLESS ERROR—VERBAL ERRORS IN INSTRUCTIONS.**

Where errors in the instructions, if any, were merely of verbiage, which could readily have been corrected if attention of court had been specifically called to them, charge having correctly declared law, and fully submitted issues, and there having been testimony to sustain the verdict, judgment will not be reversed.

Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

Action by F. M. Akin against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Jas. B. McDonough, of Ft. Smith, for appellant.

Oglesby, Cravens & Oglesby, of Ft. Smith, for appellee.

WOOD, J. This appeal is from a judgment in favor of appellee against appellant in the sum of \$3,000.

On the 4th day of April, 1918, the appellee filed in the circuit court of Sebastian county his complaint against the appellant, in which he alleged, in substance, that on August 28, 1914, he was a passenger on appellant's train from Joplin, Mo., to Ft. Smith, Ark.; that through the negligence of appellant the coach in which he was riding, with other cars, was derailed and overturned, by reason of which he was thrown with great force and violence to the opposite side of the car, and was mashed, cut, and bruised on his head, face, back and legs, thereby causing him great physical and nervous shock, by which he was rendered unconscious and sustained great and permanent injuries and caused great pain and suffering; that there had been tubercular bacilli in his system for some time prior thereto, but at the time he received the injuries he was in good health and the tubercular germs were encapsulated, innocuous, and inactive. That as a result of the bruises produced by his injuries his strength and vitality were greatly affected, and by reason of his injuries the tubercular germs became active, and tuberculosis developed in his spermatic cords and testicles; that on account of said tubercular condition a surgical operation had to be performed, resulting in the re-



moval of his testicles; that by reason of the injuries and the results thereof above described he had suffered great physical pain and mental anguish and humiliation, and had been damaged in the sum of \$3,000, for which he prayed judgment; that prior to August 28, 1916, he brought suit in this court against appellant for the cause of action and injuries herein sued for, which suit was dismissed by nonsuit without prejudice on April 7, 1917, in the United States District Court, to which it was removed, and this suit is now brought within less than one year from date of said nonsuit and dismissal for the same cause of action. The clerk's certificate shows that summons was issued on the 4th day of April, 1918, and returned duly served on the appellant on the 9th day of April, 1918.

On the 27th day of April, 1918, appellant answered, denying the material allegations of the complaint as to negligence and as to the injuries alleged and the damages sustained. Paragraph 5 of the answer was as follows:

"The defendant alleges that the plaintiff in this case brought suit herein for the same alleged cause of action set forth in the complaint herein, and said cause was tried in the United States District Court, Western District of Arkansas, Ft. Smith Division, and all of the evidence in said cause was heard on both sides. At the conclusion of all of the evidence, and after all the evidence had been introduced, a motion was made by the defendant to direct a verdict in favor of the defendant, in so far as the plaintiff claimed any damages resulting from the development of tuberculosis in his body. After that motion had been argued by both sides, and after the court had taken the same under advisement, the court held that the motion must be sustained. Thereupon and thereafter, and not until then, the plaintiff asked leave to take a nonsuit. This defendant denies that said nonsuit was taken without prejudice, and alleges that the trial of said cause in said United States court was a final determination and final settlement of all matters between the plaintiff and the defendant, growing out of the same alleged cause of action, and the same facts, and that therefore the cause of action which the plaintiff now sets forth in his complaint is res adjudicata.

"Defendant further alleges that by reason of the suit in said United States court, in costs and necessary expenses, in defending said suit, the defendant expended therein the sum of \$1,200. The defendant alleges that it is entitled to recover from plaintiff said sum of \$1,200 as costs and expenses, incident to the trial of said cause in said United States court."

Paragraph 6 was in part as follows:

"The defendant alleges that the alleged cause of action of the plaintiff has long since been barred by the statute of limitations of three years of the state of Arkansas. In that connection the defendant alleges that the plaintiff, in the year 1917, brought a suit on this same cause of action in the state of Oklahoma in the district court within and for Le Flore county, state of Oklahoma, and thereafter dismissed that suit. The defendant denies that the plaintiff has a right to bring and maintain this suit, and

alleges that the statute of limitations of the state of Arkansas has barred the same; and denies that the dismissal of the suit in the United States District Court gave the plaintiff the right to bring and maintain another suit in the state court within one year thereafter; but alleges that said alleged cause of action set forth in the complaint is fully and completely barred by the statute of limitations of the state of Arkansas.

"Premises considered, the defendant prays judgment against the plaintiff in the sum of \$1,200.00, costs and expenses, expended in the United States District Court for the Western District of Arkansas, and also for all costs in this action laid out and expended."

On the 21st of June, 1918, the appellee filed a demurrer to appellant's plea of res adjudicata set up in the fifth and sixth paragraphs of its answer.

And, also, on the same day, the appellee filed the following motion:

"Comes the plaintiff, F. M. Akin, and moves the court to strike the following from paragraph 5 of defendant's answer: 'Defendant further alleges that by reason of the suit in said United States court, in costs and necessary expenses in defending said suit, the defendant expended therein the sum of \$1,200. The defendant alleges that it is entitled to recover from the plaintiff said sum of \$1,200, as costs and expenses, incident to the trial of said case in said United States court.'

"And further to strike from its answer its prayer for judgment of any amount exceeding the costs taxed in the case in which judgment was rendered against plaintiff in said suit in said United States court for costs; defendant not being entitled to recover any other sum."

On June 26, 1918, the following order was entered of record:

"Comes defendant by its attorney, J. B. McDonough, and files answer herein; plaintiff's demurrer to the fifth and sixth paragraphs of defendant's answer heretofore filed on June 21, 1918, this day noted of record. Plaintiff's motion to strike certain language from paragraph 5 of defendant's answer heretofore filed on June 21, 1918, this day noted of record. And the court, being well and sufficiently advised in the premises, doth sustain said motion as to paragraph 5, and defendant excepts, and doth overrule said motion as to paragraph 6, and plaintiff excepts.

"Plaintiff moves to strike language between brackets in paragraph 6, which said motion is by the court sustained, and defendant excepts."

On the same day, June 26, 1918, an amended answer was filed, which omitted that part of paragraph 5 of the answer to which the above and foregoing motion to strike was directed.

Paragraphs 6 and 7 of the amended answer contained all that was embraced in paragraph 6 of the original answer except the prayer for judgment against the plaintiff in the sum of \$1,200, costs and expenses in the United States District Court for the Western District of Arkansas.

The bill of exceptions shows that after the amended answer was filed the appellee renewed his demurrer and motion to strike paragraphs 5 and 6 from the answer. The court overruled the demurrer and motion to strike except as to certain language set forth in the bill of exceptions. The bill of exceptions further shows that—

"There was no ruling, one way or the other, on the motion to strike out a part of paragraph 5, as the same was omitted in the amended answer which was filed June 26, 1918."

The bill of exceptions, after setting out the amended answer, contains the following recital:

"Thereupon the plaintiff renewed and filed anew the demurrer above mentioned and motion to strike paragraphs 5 and 6 from said complaint above set forth. The court, treating said demurrer both as a demurrer and a motion to strike, sustained the same as to paragraph 5, and struck out said paragraph 5 from said complaint."

First Appellant contends that the cause of action was barred by the statute of limitations as shown on the face of the complaint. True the complaint alleges that the injury was done on August 28, 1914, and the filing of the complaint and the issuing of the summons shows that this suit was instituted April 4, 1918, more than three years after the cause of action had accrued; but the complaint alleges that—

"Prior to August 28, 1916, plaintiff brought suit in this court against defendant for the said cause of action and injuries herein sued for, which suit was dismissed by nonsuit without prejudice on April 7, 1917, in the United States District Court, to which it was removed, and this suit is now brought within less than one year from the date of said nonsuit and dismissal for the same cause of action."

[1] The appellant, in paragraph 5 of its amended answer, admitted that the appellee had brought this suit "for the same alleged cause of action set forth in the complaint herein," and that a nonsuit and dismissal was taken in the United States District Court, but denied, in paragraph 6, "that the dismissal of the suit in the United States District Court gave the plaintiff the right to maintain another suit in the state court within one year thereafter," and alleged that the said cause of action "was completely barred by the statute of limitations." But counsel for appellant contends that paragraph 5 of the amended answer, supra, was stricken out, and that therefore the burden was upon the appellee to support the allegations of his complaint as to the nonsuit in the federal court. The recitals of the record proper show that certain language was stricken from paragraph 5 of the original answer as set out in the motion to strike; but the language containing the admission as to the nonsuit for the same cause of action was not stricken from

paragraph 5 of the original answer, and the language containing this admission was brought, as the bill of exceptions shows, into paragraph 5 of the amended answer. While the recital of the bill of exceptions shows that the court sustained the motion "as to paragraph 5 and struck out said paragraph 5 from said complaint," yet, when this recital is taken with the further recital in the bill of exceptions that "there was no ruling, one way or the other, on the motion to strike out a part of paragraph 5, as the same was omitted in the amended answer which was filed June 26, 1918," it is obvious that the whole of paragraph 5 of the amended answer was not stricken out, and the prior recital to that effect had reference to the language of paragraph 5 of the original answer, which was stricken out on motion of the appellee as shown by the order of the court to that effect entered on the judgment roll or record proper, which is controlling.

[2] The language in paragraph 6, to wit, "That the alleged cause of action of the plaintiff has long since been barred by the statute of limitations of three years of the state of Arkansas," and the further language, to wit, "This defendant denies that the plaintiff has a right to bring and maintain this suit," does not constitute a denial of the allegations of appellee's complaint as to nonsuit in the federal court of a suit on the same cause of action for which this suit was brought, and the bringing of this suit within "less than one year from date of said nonsuit." We conclude, therefore, that the pleadings show that the present suit was instituted within one year after the nonsuit in the federal court of a suit based on the same cause of action.

[3] The present suit was commenced when the complaint was filed in the office of the circuit clerk and the summons was issued thereon. The indorsement and notation of the clerk shows that the complaint was filed, and the summons was issued on the 4th day of April, 1918. Section 6083, Kirby's Digest; *Burleson v. McDermott*, 57 Ark. 229, 21 S. W. 222; *Railway v. Shelton*, 57 Ark. 459, 21 S. W. 876; *Barker v. Cunningham*, 104 Ark. 627, 150 S. W. 153.

Section 5083 of Kirby's Digest gives a plaintiff who has suffered a nonsuit the right to commence a new action "within one year after such nonsuit suffered."

[4] But for this statute appellee's cause of action would have been barred within three years from August 28, 1914. See section 5064, Kirby's Digest; *Emrich v. Little Rock Traction & Electric Co.*, 71 Ark. 71, 70 S. W. 1035; *St. L., I. M. & S. Ry. Co. v. Mynott*, 83 Ark. 6, 102 S. W. 380.

[5] The pendency of the suit in the federal court for the same cause of action had the effect to toll the general statute of limitations of three years, and when nonsuit was taken in the federal court and the pres-

ent suit was begun for the same cause of action within one year after such nonsuit, appellee had the right to maintain the same under the express provisions of section 5083 of Kirby's Digest, supra.

The language of the statute is exceedingly comprehensive. There are no restrictions to causes of action begun in the state courts. There is nothing to indicate a purpose to so confine it. The language is broad enough, and was doubtless so intended, to cover any action in any court having jurisdiction within the state.

The doctrine applicable here, which is supported by practically all the modern authorities upon the subject, is forcefully stated in the case of *Gassman v. Jarvis* (C. C.) 100 Fed. 146, 147, as follows:

"The state court possesses original jurisdiction of all such causes of action. The removal of the case, and its subsequent dismissal untried and undetermined, cannot, under any known rule of law, be held to be a merger of the cause of action; nor can the removal and dismissal of the cause be pleaded in abatement of the new suit brought in the state court. When a cause of action removed into a court of the United States is dismissed therefrom without any trial or determination of the merits, the right of action still remains in full force and vigor, unaffected thereby, and the party having such right of action may bring suit thereon in any court of competent jurisdiction, the same as though no previous suit had been brought."

*Stevenson's Adm'r v. Illinois Central R. Co.*, 117 Ky. 855, 79 S. W. 767, 4 Ann. Cas. 890, and case note; *McIver v. Florida Central Ry. Co.*, 110 Ga. 223, 36 S. E. 775, 65 L. R. A. 437; *Hooper v. Atlanta, K. & N. Ry. Co.*, 106 Tenn. 28, 60 S. W. 607, 53 L. R. A. 931; *Baltimore & Ohio R. R. Co. v. Larwill*, 83 Ohio St. 108, 93 N. E. 619, 34 L. R. A. (N. S.) 1195; *Southern Ry. Co. v. Miller*, 217 U. S. 209, 30 Sup. Ct. 450, 54 L. Ed. 732; 9 R. C. L. 212, 213; *Carr v. Howell*, 154 Cal. 372, 97 Pac. 885. See, also, *Dressler v. Carpenter*, 107 Ark. 353, 155 S. W. 108.

The appellant contends that this nonsuit statute (section 5083, Kirby's Digest) cannot toll the general statute of limitations because the three years had not yet expired at the time the nonsuit was taken, and there was some time remaining before such expiration in which appellee might have brought this suit. The nonsuit statute very plainly says that "the plaintiff may commence a new action within one year after such nonsuit suffered." The limitation of one year, therefore, cannot be construed to apply to causes only where the time of limitation under the general statute shall have expired at the date of the dismissal. As said in *Love v. Cohn*, 93 Ark. 215, 124 S. W. 259, this statute, "instead of shortening the period of limitation, really extends the period provided by the general statute of limitation applicable to the cause of action." See, also,

*Dressler v. Carpenter*, supra; *Knox v. Henry et al.*, 8 Kan. App. 313, 55 Pac. 668; *Meekins v. Norfolk & S. R. R. Co.*, 131 N. C. 1, 42 S. E. 333; *Bates v. S. D. & C. R. R. Co.*, 12 Ohio St. 620.

Second. The appellant contends that there was no evidence tending to prove that the injuries received in the wreck were the proximate cause of the tuberculosis which thereafter developed and became active in appellee's body, for which he alleged, and was allowed to recover, damages. The appellant, in several of its prayers for instructions, requested the court to withdraw from the jury the issue of damages alleged to have accrued to appellee from tuberculosis caused from the injuries received by reason of the derailment. The court refused these prayers, and appellant now insists that this ruling was erroneous.

Over the objection of appellant the following hypothetical question was propounded to four physicians, who qualified as experts:

"Q. In June, 1904, the plaintiff had his right elbow scraped for tuberculosis. He was not relieved, and in August, 1906, the arm was amputated above the elbow on account of the tuberculosis in that joint. He made a good recovery from the operation, and was in good health up till August 28, 1914, at which time he weighed 165 pounds, his normal and usual weight, and had no active tuberculosis. In August, 1914, while riding on a train, the coach in which he was riding was derailed, while he was asleep, and while it was being overturned he was thrown from his seat to the opposite side of the car in or on the parcels rack, by which he was injured on his head and other parts of the body to the waist line. And he received at the time a bruise on the right groin, beginning about here (indicating) and extending about four inches up the groin about the width of my two fingers. Both of his legs between his ankles and his knees were bruised and skinned so that his underclothing stuck to the flesh for about 16 hours. He didn't know of the injury to his shins above described till after he had been taken back into one of the cars as heretofore stated. When he attempted to extricate himself from the position in which he had been thrown, he was in a dazed condition, and somewhat nauseated. He extricated himself from this position and walked with difficulty to the end of the overturned coach, during which time he was suffering severe pain, and about the time he attempted to get out of the door of the car he became unconscious or fainted, and when he recovered from this condition he was lying on the railroad embankment, from which place he was removed to a coach near the coach which was derailed. While in this car he suffered intense pain, became nauseated, and it was then that he discovered the injuries below his knees. He was carried to Ft. Smith, arriving there about 4 or 5 o'clock p. m. of that day. He received a bruise on his back and on his groin, and afterwards suffered severe pain from the injury to the groin. He received a severe shock, nervous shock as well as the injuries above described. He was in bed about four or five days, during

all of which time he suffered severe pains, and at times was forced to get up on account of pains and then go back to bed. While sitting up he suffered as much pain as while sitting or lying down. His urination, which was normal before the accident, became frequent, causing him to go to the toilet five or six times each night. That he began to lose weight soon after the accident and injuries described which he never regained, and was 25 pounds lighter at the time of the operation for the removal of the first testicle. At said operation the testicle was found by examination and incision after removal to contain tuberculosis nodules, and was in a caseous or cheesy condition. He doesn't know whether there was any injury to his testicles at the time of the accident. He discovered no bruises on the scrotum, and felt no pain in the testicles at the time of the accident. In December afterwards he felt an occasional pain in his groin where it was injured, or where it had been bruised. He noticed no pain in his testicles till about June, 1915, when there was pain, a sort of pulling down pain. In July following the testicle became enlarged to the extent that it was in the way, and the pain was more continuous. In August following, which was just one year after the accident, he had his testicle which was on the same side that the groin was bruised removed, and when removed it was found full of tubercular nodules and in a caseous or cheesy condition. In April, 1916, another operation was performed, removing a part of the spermatic cord. When removed it was found to be full of tubercular nodules and in a caseous cheesy condition. In July, 1916, the other testicle became affected and was removed, and when removed was found in a caseous cheesy condition. He received no injury from the time of the accident in the railroad wreck up to the time of the operation, and suffered no illness or symptoms except those produced by the accident before described. But never recovered his normal condition after the accident and before the operation. Now Doctor, assuming those facts to be true as stated, give your opinion as to whether the injury received in the railroad accident caused or produced the tubercular condition of his testicles or spermatic cord or either of them."

The witness answered that the injuries caused the condition of tuberculosis found in the appellee's testicles and spermatic cord at the time of the operation, when same were removed. Some of these witnesses further testified, in answer to questions:

"That tuberculosis was not like any other disease. It does not run on schedule time. Tubercular bacilli lie in the latent condition for different lengths of time; sometimes they manifest themselves within a few weeks, and sometimes a year. No one can say that they manifest themselves in a certain time. They are not like typhoid bacilli or the smallpox germ."

They further testified that any injury to a person which impaired his physical condition, causing him to lose in weight, vitality, and strength, would tend to cause the inactive bacilli to become active. The witnesses answered, further, that any excitement or nervous shock which would cause

the condition of a person to become "de-vitalized, to lose his strength and vigor and his vitality," would set inactive tubercular bacilli into activity; that where a person had the bacilli of tuberculosis in his system that had become arrested, if such person received an injury that affected his general physical condition and impaired his vitality, such injury would hasten or aggravate an attack of tuberculosis.

[6, 7] Giving the evidence its strongest probative force in favor of the appellee, which the court must do, there was testimony tending to prove the facts upon which the hypothetical questions were grounded. These questions conformed to the rule announced in *Taylor v. McClintock*, 87 Ark. 243-294, 112 S. W. 405; *Arkansas Midland Ry. Co. v. Pearson*, 98 Ark. 399, 135 S. W. 917, 34 L. R. A. (N. S.) 817; *Ford v. Ford*, 100 Ark. 518, 140 S. W. 993; *Williams v. Fulkes*, 103 Ark. 196, 146 S. W. 480; *Williams v. Cantwell*, 114 Ark. 542, 170 S. W. 250; *Scullin v. Vining*, 127 Ark. 124, 191 S. W. 924.

The appellant propounded substantially the same question to some experts introduced in its behalf, and also other hypothetical questions based upon the testimony in its most favorable light from the viewpoint of appellant, and the answer to these questions was in effect that the injuries caused by the wreck did not cause the tuberculosis afterwards developed in appellee's testicles.

[8] Counsel for appellant contends that the issue as to the proximate cause of the tuberculosis in the testicles of appellee was put at large in the realm of speculation and conjecture by the testimony of the experts.

Now as to whether or not the appellee was afflicted with active tuberculosis in his arm, which was arrested by amputation in 1906; and whether or not the germs of tuberculosis may be arrested, become encapsulated, inactive, and innocuous, and remain in this condition in the system for several years, and then, by reason of some injury to the person, be revived and become active and hurtful, are questions which would require scientific knowledge for their correct solution. These are matters beyond the grasp of the ordinary layman, but peculiarly appropriate for expert knowledge and opinion. Because the experts differ in their opinions upon the same state of facts, assuming them to be true, is no reason for relegating to the realm of conjecture and speculation the issue as to whether or not the injury was the proximate cause of the tuberculosis thereafter developed in appellee. The theory upon which all expert testimony rests is that, where facts are established with reference to the subject-matter of inquiry which the common observation and experience of the jury would not enable them to correctly understand and interpret, then they may have the benefit of the opinions of those who, by reason of their special study

and learning, have peculiar knowledge of the subject. Roger's Expert Testimony, p. 19, § 6. Because experts differ in their opinions as to the conclusion to be drawn from the facts proved does not render the ultimate result to be determined by the jury one of speculation or conjecture. In such cases the question is one not of conjecture and speculation on the part of the jury, but rather a question of the weight and credit to be given to the conflicting opinions of experts. As is said in *Ruling Case Law*, vol. 11, p. 578, § 10:

"Each party has the right to lay before the jury the scientific inferences properly deducible from the facts which he claims to have proved, subject to the contingency that the jury shall find such facts to be as claimed. \* \* \* The solution of this problem which has been worked out by the courts is to permit counsel to put to the expert, after his competency has been established, a question in which the things that counsel claims to have proved are stated as an hypothesis, and the witness is asked to state and explain the conclusion which in his opinion results."

If the experts differ in their opinion as to results, then it is the province of the jury to determine which has reached the correct conclusion. A contrary doctrine would result in the elimination of the opinions of all experts, unless they happened to be of one mind, and abrogate the rule of evidence permitting the introduction of such testimony.

Applying these principles to the facts of this record, it was therefore an issue for the jury as to whether or not the injuries produced by the alleged wreck were the proximate cause of the tuberculosis for which the appellee claimed damages, and the court did not err in refusing prayers for instructions which sought to withdraw that issue. "Where fair-minded men might honestly differ as to the conclusion drawn from the facts, whether controverted or uncontroverted, the question at issue should go to the

jury." *St. L., I. M. & S. Ry. Co. v. Fuqua*, 114 Ark. 112, 119, 169 S. W. 786, 788.

The doctrine announced by this court in the case of *M., D. & G. R. R. Co. v. Steel*, 108 Ark. 14, 156 S. W. 182, *Ann. Cas.* 1915B, 198, is applicable here. See, also, *St. L., I. M. & S. Ry. Co. v. Steel*, 129 Ark. 521-527, 197 S. W. 288; *Reiff v. Interstate Business Men's Acc. Ass'n*, 127 Ark. 254-259, 192 S. W. 216; *Biddle v. Jacobs*, 116 Ark. 82, 172 S. W. 258; *Sterling A. Coal Co. v. Strobe*, 180 Ark. 435, 197 S. W. 858; *Hurley v. New York & Brooklyn Brewing Co. et al.*, 13 App. Div. 167, 43 N. Y. Supp. 259.

Counsel for appellant presents many assignments of error in the rulings of the court in granting and refusing prayers for instructions.

The injury occurred in the state of Oklahoma. The issue of negligence was sent to the jury under instructions which declared the law in substantial compliance with the statute of Oklahoma and in conformity with the doctrine announced by the Supreme Court of that state. See, *St. L. & S. F. R. R. Co. v. Posten*, 31 Okl. 821, 124 Pac. 2; *Lusk et al. v. Wilkes (Okl.)* 172 Pac. 929, *L. R. A.* 1918E, 518; section 800, *Revised Laws Okl.* 1910.

[9] Only a general objection was reserved at the trial to the rulings of the court, and we find no inherent defect in any of the instructions. The errors, if any, were merely those of verbiage, which could have readily been corrected if the attention of the court had been specifically called to same. The charge of the court taken as a whole on this issue and on the issue as to the proximate cause of the tuberculosis in the testicles of appellee correctly declared the law, and fully and fairly submitted these issues to the jury, and there was testimony to sustain the verdict.

We find no error in the rulings of the court in the admission or rejection of testimony. The judgment is therefore affirmed.

**RYBERG v. LITTLE et al. (No. 19551.)**

(Supreme Court of Missouri, Division No. 1.  
March 1, 1919. Rehearing Denied  
March 28, 1919.)

**APPEAL AND ERROR ¶639(1)—REVIEW—DEFECTIVE ABSTRACT OF RECORD.**

Where abstract of record proper fails to show that motion for new trial was filed, and other like defects are present, consideration of matters of exception is precluded, and judgment will be affirmed; no question being raised on the pleadings or judgment.

Appeal from Circuit Court, Lawrence County; Carr McNatt, Judge.

Action by Charles A. Ryberg against Emma Little and another. Judgment for defendants, motion for new trial overruled, and plaintiff appeals. Affirmed.

W. Cloud and W. H. Bickers, both of Pierce City, for appellant.

**BLAIR P. J.** The abstract of the record proper fails to show a motion for new trial was filed. Other like defects are present. Respondent makes the point that this precludes the consideration of matters of exception. The rule is well settled. No question is raised on the pleadings or judgment.

Affirmed.

All concur.

(277 Mo. 255)

**GRISWOLD v. HAAS. (No. 19082.)**

(Supreme Court of Missouri, in Banc. March 15, 1919.)

**1. PRINCIPAL AND AGENT ¶155(4)—LIABILITY OF UNAUTHORIZED AGENT—CONTRACTS.**

If one represents himself as the agent of a disclosed principal and attempts to contract in the name of such principal without authority or in excess of his authority, he becomes liable to the third party, not on the contract unless it contains apt words to bind himself, but for breach of the express or implied covenant of authority or, in a proper case, in an action of fraud and deceit.

**2. PRINCIPAL AND AGENT ¶155(4)—LIABILITY OF UNAUTHORIZED AGENT—CONTRACTS—DAMAGES.**

In action against agent for damages, in that agent represented himself as having authority to contract when he did not have such authority, measure of recovery is damage suffered by breach of warranty of authority, and, where contract consisted of agreement to purchase property at a certain price, the unpaid part of contract price was not proper measure of damages, where plaintiff retained property and introduced no evidence as to its value.

**3. PRINCIPAL AND AGENT ¶164(2), 175(3)—RETROACTIVE EFFECT OF RATIFICATION.**

One may ratify act of another who undertook without proper authority to act as his agent, and such ratification is retroactive.

**4. EVIDENCE ¶588 — CREDIBILITY OF WITNESSES.**

Trier of facts was not bound to find that all that a witness said was true; witness not being a party, and his testimony not being entirely consistent with itself.

**5. JUSTICES OF THE PEACE ¶174(3)—PLEADING—AMENDMENT.**

In action against one representing himself as an agent without authority, commenced before a justice of the peace, statement failing to negative defendant's agency, stating merely that disclosed principal denied such an agency, held amendable in circuit court.

Graves, J., dissents.

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by P. A. Griswold, Commissioner, against Max Haas. A judgment in favor of plaintiff was affirmed by the St. Louis Court of Appeals (191 Mo. App. 97, 177 S. W. 728), and the case was certified to the Supreme Court. Reversed and remanded.

See, also, 145 Mo. App. 578, 122 S. W. 781.

Henry H. Furth, of St. Louis, for appellant.

John B. Denvir, Jr., and P. A. Griswold, both of St. Louis, for respondent.

**BLAIR, J.** This cause was appealed to the St. Louis Court of Appeals. The judgment was affirmed. 191 Mo. App. 97, 177 S. W. 728. Judge Allen dissented and certified the cause here because he thought the decision in conflict with certain decisions of this court and the Kansas City Court of Appeals.

In 1907, respondent was, by the circuit court of the city of St. Louis, appointed commissioner to make a sale of certain bonds involved in litigation pending in that court. He duly offered the bonds for sale, and, appellant making the highest bid, they were knocked down to him at a price of \$276, \$15 of which was paid at the time. When respondent asked him who was the purchaser, appellant stated that he bought them for George F. McLain. Respondent, as commissioner, reported to the court the sale of the bonds to McLain, and that sale was duly approved. Later, respondent tendered the bonds to McLain and demanded the balance of the sale price, \$261. McLain refused to accept the bonds or pay the balance. This was reported to the circuit court, and respondent ordered to bring suit. Respondent had the bonds in his possession. He sued appellant Haas on the contract of sale. The case reached the Court of Appeals. Gris-

wold v. Haas, 145 Mo. App. 578, 122 S. W. 781. The statement averred a sale to Haas, and the suit was one to recover the purchase price. The court held there was "a fatal departure from the allegations of the petition." It held that respondent Griswold's testimony in that case disclosed "a sale to McLain, a report to the court of the fact of a sale to McLain, and an approval and confirmation by the court of a sale to McLain." The court said Haas had not, in that case, been "sued as agent, nor for deceit in pretending to be an agent when in fact he was principal." The court held, citing authorities, that the suit was one for goods sold and delivered, and that Haas could not be held in such an action; that where one "acts professedly for another, but without authority, he renders himself individually liable"; that the remedy is "for deceit or in assumpsit upon the express or implied warrant of authority. If he knowingly and falsely represents that he had authority to act, the former remedy is the appropriate one. If he makes the representation in good faith, then the latter remedy should be pursued." The court thereupon reversed the judgment outright.

Subsequently, respondent brought this suit. The petition or statement sets forth the proceedings authorizing the sale of the bonds and the time and terms of sale, and proceeds:

"Plaintiff further states that the defendant herein being the highest and best bidder for said bonds, the same were struck off and sold to him for the sum of \$276.00, and defendant then and there paid to plaintiff the sum of \$15.00 required on account of the purchase price of said bonds.

"That upon plaintiff inquiring who the purchaser was, the defendant stated that one G. F. McLain was.

"That thereafter, to wit, on the 1st day of July, 1907, said sale of said bonds made on the 21st day of February, 1907, was approved by said circuit court.

"That thereafter, to wit, on or about the 3d day of July, 1907, plaintiff made a tender of said bonds to said G. F. McLain and demanded of him the sum of \$261.00, the balance of the purchase price of said bonds.

"That said G. F. McLain denied that defendant was his agent or authorized to use his name or represent him in the purchase of said bonds, and refused to receive said bonds or to pay the balance of the purchase price thereof and has ever refused to do so.

"That plaintiff is now and has ever been ready to deliver said bonds upon the payment of the purchase price.

"That by reason of the premises plaintiff has been damaged in the sum of \$261.00, together with interest thereon from the 1st day of July, 1907.

"That on or before, to wit, the 14th day of January, 1908, the circuit court in said division No. 5 ordered plaintiff herein to institute legal proceedings to recover the balance of the purchase price of said bonds.

"Therefore, plaintiff prays judgment against

defendant in the sum of \$261.00 and interest from July 1, 1907, and for costs."

The trial court, on defendant's request, made the following finding of facts: It found facts showing respondent's authority to sell the bonds, the fact of sale, and that—

"At said sale defendant was the highest and best bidder, and thereupon said bonds were struck off to him for the price of \$276, and at said time defendant paid to plaintiff the sum of \$15 on account of said purchase. That on inquiry concerning the name of the purchaser defendant stated the purchaser was George F. McLain, and that subsequently the sale was duly approved by division No. 5 of this court.

"That after said plaintiff made a tender of said bonds to said McLain and demanded of him the balance of the purchase price, namely, \$261, and that said McLain repudiated the agency of defendant.

"The court further finds that defendant was not authorized to purchase said bonds for said McLain, and therefore was not the agent of said McLain in said purchase; and that after said sale said McLain did not recognize and approve defendant's purchase of said bonds as his agent.

"The court further finds that there is due on account of said purchase by defendant the sum of \$276, less \$15, the amount paid at the time."

The last sentence was subsequently modified as hereinafter pointed out.

The court rendered judgment against appellant for \$261. An appeal took the case to the Court of Appeals. The majority opinion holds that the measure of damages was the difference between the amount bid and the sum paid; that the value of the bonds was immaterial; and that the judgment was for the right party and should be affirmed.

It is to be kept in mind that respondent now has the bonds and, also, a judgment exactly equivalent to the unpaid portion of the bid made at the sale.

I. On the first appeal in the first suit (Griswold v. Haas, 145 Mo. App. loc. cit. 585, 122 S. W. 783), it was held that—

"The proper action in a case of this kind, where one falsely represents himself as agent, is not on the contract itself but against the agent for damages."

[1] The general rule, subject to exceptions not here involved, which is supported by reason and the weight of authority, is that, if one represents himself as the agent of a disclosed principal and attempts to contract in the name of such principal without authority or in excess of his authority, he becomes liable to the third party; not on the contract, unless it contains apt words to bind him, but for breach of the express or implied covenant of authority, or, in a proper case, in an action of fraud and deceit. The decisions in this state are in accord with this rule. *Wright v. Baldwin*, 51 Mo. 269; *Lingenfelder v. Leechen*, 134 Mo. loc. cit. 63, 34 S. W. 1089; *Hotel Co. v. Furniture Co.*,

73 Mo. App. loc. cit. 139. In *Myers Tailoring Co. v. Keeley*, 58 Mo. App. loc. cit. 495, appears an expression which might seem contrary to this rule. The appearance of conflict disappears when it is noted that the agent in that case contracted in his own name. It therefore results that the applicable rule of law and a previous adjudication between these parties precludes a recovery by respondent against appellant on the contract.

[2] II. In a case like this, the measure of recovery is the damage suffered by breach of the warranty of authority. *Wright v. Baldwin*, 51 Mo. loc. cit. 272; *Gestring v. Fisher*, 46 Mo. App. loc. cit. 612, 613; *Lingenfelder v. Leschen*, 134 Mo. loc. cit. 64, 34 S. W. 1089.

Let it be assumed the statement states a cause of action under the rules just referred to. The trial court first found that—

"There is now due on account of said purchase by defendant the sum of \$276, less \$15, the amount paid at the time."

Subsequently, it changed this finding to read:

"The court further finds that plaintiff has been damaged in the sum of \$261."

This finding is attacked. Respondent does not contend the rules stated above are inapplicable, but concedes, in his argument, their applicability. His position is that the finding and judgment are right under these principles. There was no evidence offered tending to show the actual value of the bonds. There was no showing that the bonds are worth less than the amount bid for them. No evidence of the costs and expenses of the sale was tendered. In fact, no evidence of loss or damage was adduced. Respondent has the bonds, and he has the \$15 paid him by appellant. The recovery was permitted solely upon the showing that the bid was \$276 and only \$15 had been paid. In other words, recovery was allowed in an action for damages without any evidence that damage had been suffered.

If there was a valid contract of sale, this action for damages cannot be sustained at all. If there was no such contract, then respondent did not lose title to the bonds. There was no showing the bonds were worth less than the bid. If the bonds are worth anything, a recovery, under the statement, of the full difference between the bid and the amount paid, is wrong. There was no evidence of damage, and, consequently, no evidence to support any judgment against appellant.

[3, 4] III. Appellant urges that the evidence establishes as a matter of law that McLain ratified the contract. One may ratify the act of another who undertook, without proper authority, to act as his agent, and

such ratification is retroactive. *Lingenfelder v. Leschen*, 134 Mo. loc. cit. 64, 65, 34 S. W. 1089. The contention of appellant is that an express ratification was conclusively shown. This contention is founded upon the testimony of McLain, who was offered as a witness by respondent. His testimony is not entirely consistent with itself. The trier of the fact was not bound to find all that he said was true. The fact that respondent offered him did not necessarily require the court to believe him. He was not a party to the suit. Apparently, the court did not believe part of his testimony.

[5] IV. The suit was begun before a justice of the peace. The sufficiency of the statement is challenged. It is open to some objection. We think it amendable. One particular in which it fails is that it does not negative appellant's agency. It states merely that McLain denied such an agency. It can be reframed so as to meet the objection made in case there is another trial.

The judgment is reversed, and the cause remanded.

FARIS, WOODSON, and WILLIAMS, JJ., concur.

WALKER, J., concurs, except in paragraph 4.

GRAVES, J., dissents.

(277 Mo. 356)

STATE ex rel. GREENE COUNTY v. GIDEON, Mayor, et al. (No. 21234.)

(Supreme Court of Missouri, in Banc. Feb. 15, 1919. Rehearing Denied March 15, 1919.)

STATUTES § 121(7)—SUBJECT AND TITLE—LICENSES—AMENDMENT.

Laws 1917, p. 357, § 8, subd. 40, repealing and re-enacting Laws 1915, p. 345, which amended Laws 1913, p. 420, which in turn repealed and re-enacted Rev. St. 1909, c. 84, art. 3, is so far a departure from the original act, in requiring cities of the second class to pay certain dramshop license fees to the county, as to require specific mention of such a purpose in the title of the act, and hence is violative of Const. art. 4, § 28.

Blair and Williams, JJ., dissenting.

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Action by the State, on relation of Greene County, to compel J. J. Gideon, Mayor, and E. F. James and others, as Commissioners of the City of Springfield, to audit and pay the county certain money. Judgment for defendants, and relator appeals. Affirmed.



Warren L. White and Oliver J. Page, both of Springfield, for appellant.

Fred A. Moon, of Springfield, for respondents.

FARIS, J. The county of Greene, as relator, brought this action by mandamus in the circuit court of Greene county against the respondents herein, who constitute the mayor and the commissioners, respectively, of the city of Springfield; said city being under a commission form of government. Upon a trial nisi plaintiff lost, and after the conventional procedure has appealed.

The facts of the case are few and simple. In 1917 the Legislature amended a certain section of the chapter of the Revised Statutes of Missouri which governs cities of the second class, in such wise, it is averred and contended by appellant, as to require cities of the second class—such as the city of Springfield is—to pay to the county wherein such a city is located the sum of \$400 per annum for every dramshop license issued. This action is brought by Greene county for the purpose of compelling respondents to audit and pay to that county the sum of \$5,900, which is *ceteris paribus* its proportionate part of all the dramshop license taxes which were collected by the city of Springfield during the period embraced in this controversy. Respondents having refused to pay the above sum of \$5,900, which is conceded to be correct if the act under which the same is demanded is valid, Greene county instituted this action, and, as stated, having lost below, has appealed.

The defense, among others urged by respondents, as excusing their refusal to pay the amount demanded, is that the act under which appellant bottoms its demand for payment is unconstitutional. The grounds of unconstitutionality of the act of 1917 so urged by respondent are: (a) Because the act is in conflict with section 28 of article 4 of the Constitution, which provides that "no bill \* \* \* shall contain more than one subject, which shall be clearly expressed in its title;" (b) because said act violates sections 1 and 10 of article 10 of the Constitution, in that it levies a direct tax upon cities of the second class of \$400 per year for the benefit of the county in which a city of the second class is located, for each and every saloon license issued by such city; and (c) because, if such levy of the tax aforesaid is not in fact a tax, then the act of 1917 is a grant of the public money of the city by the Legislature to the county in which the city is located, contrary to sections 46 and 47 of article 4 of the Constitution of Missouri.

Other contentions, as forecast, are made, but since one of these at least has already been decided against respondent, and as in the view we take of the case mention of others is unnecessary, we content ourselves with the

above recital of respondents' contentions. We think the above facts, together with such others as we shall find it necessary to refer to in our discussion of the points made in the case, will be sufficient to an understanding thereof.

Appellant bottoms its right to demand from the city of Springfield payment of the sum here in dispute upon subdivision 40 of section 8 of "An act to amend an act approved on the 26th day of March, 1915, entitled, 'An act to amend section 8 of an act, approved on the 25th day of March, 1913, entitled 'An act to repeal article 3 of chapter 84 of the Revised Statutes of Missouri of 1909, with all amendments thereto, said article being entitled 'Cities of the second class,' and to enact in lieu thereof a new article providing for the government of cities of the second class,'" by repealing subdivision fortieth of said act and enacting a new subdivision in lieu thereof." Laws Mo. 1917, p. 357.

Subdivision 40, above referred to and herein relied on by appellant as furnishing its sole right to the money demanded from respondent city, reads thus:

"Fortieth.—To have the exclusive power to define, regulate, restrain, suppress, license and tax dramshops and to revoke dramshop licenses, and to regulate and control the giving or selling of intoxicating liquors at any place or places in such cities: Provided that for every dramshop license issued by a city of the second class it shall pay to the state the sum of \$400.00 per annum in quarterly installments; to the county, for county purposes, the sum of \$400 per annum in quarterly installments; and to any special road district in which said city may be located \$550 per annum in quarterly installments, and the balance shall be paid into the treasury of such city, for municipal purposes. Provided, further, that no special road district within which such county [city] may be located shall be entitled to any part of the amount paid by such city to the county." Laws 1917, § 8, p. 367.

It is clear that appellant is entitled to the money demanded and should prevail, if subdivision fortieth is valid. But respondent, admitting so much, urges that for numerous reasons said subdivision is invalid, because its provisions are in irreconcilable conflict with other provisions of the amended act, and because both its title and contents offend against express provisions of the Constitution.

In the view which we are constrained to take of this case we need burden the books with but one of respondents' contentions touching the unconstitutionality of the act. That one is that—

"It conflicts with that provision of the Constitution which reads: 'No bill \* \* \* shall contain more than one subject, which shall be clearly expressed in its title.'" Section 28, art. 4, Const.

Whether this contention is well taken may be demonstrated by a reference to the legislative history and career (the latter of which must be conceded to have been a veritable Comedy of Errors) of said subdivision 40.

In 1913 the Legislature passed an act entitled:

"An act to repeal article 3 of chapter 84 of the Revised Statutes of Missouri of 1909, with all amendments thereto, said article being entitled, 'Cities of the second class,' and to enact in lieu thereof a new article providing for the government of cities of the second class." Laws 1913, p. 420.

The above act contained in section 8 thereof a subdivision numbered fortieth, which, setting forth some of the powers of a city of the second class, read in full, thus:

"Fortieth. To have the exclusive power to restrain, suppress, regulate, license and tax dramshops, and to revoke dramshop licenses." Laws 1913, p. 434.

In 1915 the Legislature undertook to modify the thoroughgoing and exclusive power of licensing and taxing dramshops, which was conferred upon cities of the second class pursuant to the above-quoted provisions of the act of 1913, *supra*, by an amendment which added to said subdivision 40 certain further provisions designating the manner in which the money derived from licenses and taxes on dramshops should be divided. Laws 1915, p. 353. The latter provision was by this court declared unenforceable, for that no method or means was provided "to fix what part of the dramshop license shall be paid to the state and county, or to designate a means by which that part can be ascertained." State ex rel. v. Gideon, 273 Mo. 79, 190 S. W. 948.

Thereafter in 1917, as we state above, the act now before us in the instant case was passed by the Legislature. Laws 1917, p. 357 et seq. Obviously, this was done in an effort to correct the omission in the act of 1915 pointed out by us. State ex rel. v. Gideon, *supra*. In the beginning of our discussion we set forth in full both the title to the act of 1917, and subdivision 40 thereof, herein relied on. Even a casual examination of the title to this amendatory act shows that it makes no reference to the fact that it attempts to provide for the payment by all cities of the second class to the county wherein such a city is located of the sum of \$400 per year for each and every dramshop which such a city may see fit to license. Obviously such a provision is in diametrical

conflict with the provision of the act of 1913, whereby cities of the second class were given exclusive power to license and tax dramshops. For if, as the provisions of said subdivision 40 now require, the county in which a city of the second class is located is to collect from such city the sum of \$400 per year, and the state the further sum of \$400, and special road districts, if such there be, the further sum of \$550, but little is left of the so-called exclusive power to tax and license which the original act conferred upon cities of the second class. For while ostensibly possessing exclusive power to tax and license dramshops and to fix the rates thereof, this power is by the amendment curtailed by the necessity of fixing the license tax at not less than \$1,350 per year. It is too plain for argument that an amendment which thus either taxes a city for the benefit of the county, state, and special road district on each dramshop license which it issues, or makes such a city the agent of the county, state, and special road district for the collection of licenses and taxes on dramshops is (to say no more) so far a departure from and an ingrafting upon the original act of matters not germane thereto as to require specific mention of such a purpose in the title of the act. State ex rel. v. Revelle, 257 Mo. 529, 165 S. W. 1084; Williams v. Railroad, 233 Mo. 676, 136 S. W. 304; Shively v. Lankford, 174 Mo. loc. cit. 544, 74 S. W. 835; Woolf v. Taylor, 98 Ala. 254, 13 South. 688; Thompson v. Luverne, 125 Ala. 366, 128 Ala. 567, 29 South. 326; State ex rel. v. Gordon, 233 Mo. 333, 135 S. W. 929; Douglas v. Hayes, 52 Neb. 191, 71 N. W. 1023; Equitable Guarantee & Trust Co. v. Donahoe, 3 Pennewill, 191, 49 Atl. 372; State v. Parker Distilling Co., 236 Mo. 219, 139 S. W. 453. This was not done, and we think the contention of respondents that the title to the act of 1917 (Laws 1917, p. 357) is violative of section 28 of article 4 of the Constitution is well taken, and should be sustained.

Other grounds of alleged unconstitutionality of the act under consideration are urged, some of which may well prove to be well taken. But since the point discussed disposes of the whole case, no occasion arises to lengthen our views by a discussion of other points, even though such may seem upon a merely casual view to be well founded. It results that the case must be affirmed. Let it be so ordered.

All concur, except BLAIR and WILLIAMS, JJ., who dissent.

(277 Mo. 579)

CAPE GIRARDEAU-JACKSON INTERURBAN RY. CO. et al. v. LIGHT & DEVELOPMENT CO. OF ST. LOUIS et al. (No. 19235.)

(Supreme Court of Missouri, Division No. 1.  
March 1, 1919. Rehearing Denied  
March 28, 1919.)

1. MUNICIPAL CORPORATIONS  $\S$  680, 681(7)—STREET RAILROADS—STANDARD GAUGE SERVICE—RIGHT TO FRANCHISE.

Under Rev. St. 1909,  $\S$  9250, a city of the third class, could grant to a standard gauge railroad company organized under Rev. St. 1899, c. 12, art. 2, the right to construct and operate a street railroad within the city limits, such power of third-class cities not being limited by Rev. St. 1909,  $\S$  9493, 9494.

2. STATUTES  $\S$  212—CONSTRUCTION—KNOWLEDGE OF LEGISLATURE—PRESUMPTION.

It must be presumed that the Legislature had knowledge of the classification of cities of the state, as well as the different kinds of transportation required by each, and that that classification and those requirements influenced the passage of the acts approved March 26 and 30, 1887 (Rev. St. 1909,  $\S$  9250, 9493, 9494).

3. STATUTES  $\S$  225 $\frac{1}{4}$ —IN PARI MATERIA—CONSTRUCTION.

Rev. St. 1909,  $\S$  9250, applying only to cities of the third class, and sections 9493, 9494, sufficiently broad to apply to all cities, passed at the same session, are in pari materia, and it is the duty of the court to so construe the sections that all conflict is avoided, and full force and effect given to all.

4. SPECIFIC PERFORMANCE  $\S$  84—FULL PERFORMANCE BY PLAINTIFF—WHEN NECESSARY.

While ordinarily specific performance will not be decreed, unless plaintiff has fully complied with his part of the contract, his failure to perform after having been notified by words or conduct of defendant that further performance would be useless, will not prevent court from decreeing specific performance.

5. SPECIFIC PERFORMANCE  $\S$  84—PERFORMANCE BY PLAINTIFF—SUFFICIENCY.

In suit for specific performance of contract for purchase from plaintiffs of the stock, bonds, and properties of a standard gauge railroad company, held, that plaintiffs performed their part of the contract as fully as defendant's conduct would permit, and have at all times been and still are ready and able to perform, so that specific performance should be granted; damages being inadequate to compensate plaintiffs.

Appeal from Circuit Court, Cape Girardeau County; Frank Kelly, Judge.

Suit by the Cape Girardeau-Jackson Interurban Railway Company and others against the Light & Development Company of St. Louis and another. Decree for plaintiffs, and defendant named appeals. Affirmed.

This suit was instituted by the plaintiffs in the circuit court of Cape Girardeau county against the defendants for the specific performance of a written contract made by the defendants for the purchase of the stocks, bonds, and properties of the Cape Girardeau-Jackson Interurban Railway Company from plaintiffs. The contract will be presently set out in full. The trial resulted in a decree in favor of the plaintiffs, and the defendants duly appealed the cause to this court.

The record is unusually long, covering about 760 pages of printed matter. Since, however, the facts are practically undisputed, we will be saved the labor of wading through this great volume of evidence, except regarding some few details. The facts were substantially as follows:

The plaintiffs, on and prior to February 17, 1913, were the owners of all of the stocks, bonds, and properties of the Cape Girardeau-Jackson Interurban Railway Company, and on and prior to the same date the defendant, the Light & Development Company (the defendant Houck having no interest in the matter) was the owner of a majority, if not all, of the stocks and bonds of the Cape Girardeau Waterworks & Electric Light Company of Cape Girardeau, Mo. At that time the corporate franchise of the latter company was about to expire, and it was then asking for a new charter in the name of the Missouri Public Utilities Company, instead of the Cape Girardeau Waterworks & Electric Light Company. The defendant was and is a holding corporation, owning and operating waterworks, electric light, and power plants throughout southeast Missouri, with its principal place of business in the city of St. Louis, Mo.

The articles of association of the Cape Girardeau Interurban Railway Company were signed and acknowledged on the 4th day of October, 1902, filed in the office of the secretary of state, and certificate of incorporation issued October 16, 1902. The said articles of association of the said railway company recited: That the said railway company was organized under the provisions of article 2, chapter 12, of the Revised Statutes of 1899; that the said company was "formed for the purpose of constructing, maintaining and operating a standard gauge railroad in the city of Cape Girardeau, county of Cape Girardeau, and state of Missouri, and from the city of Cape Girardeau to the city of Jackson in the said county, and in said city of Jackson"; and the said articles of association further recited that "the approximate length of said railroad is 18 miles, situated wholly in the county of Cape Girardeau, in the state of Missouri."

The plaintiff, Cape Girardeau-Jackson In-

terurban Railway Company, had the right, under its franchise, and also had the power, to furnish heat, power, and light to the public. On January 4, 1913, the buildings and machinery of the street railway company had been damaged or destroyed by fire, which prevented the company from prosecuting its business. This, in fact, as I understand the record, was one of the inducing causes which led to the execution of the contract of purchase before mentioned.

On the 7th day of September, 1892, the city of Cape Girardeau, a city of the third class, by ordinance numbered 484 granted to William Penny and L. S. Joseph and their associates and assigns a franchise to build and operate a street railroad on certain streets, naming them, in that city. On October 14, 1892, Penny and Joseph accepted the franchise. Under this Ordinance 484 a street railroad was constructed and operated by horse power on the streets named in Cape Girardeau.

On September 30, 1902, the city of Cape Girardeau, by Ordinance No. 637, granted to James S. Lapsley and his associates and assigns a franchise "to construct, maintain and operate a street railway and an electric light, heat and power plant within the corporate limits of the city of Cape Girardeau." The preamble to this ordinance recites:

"Whereas, it is proposed by James S. Lapsley, his associates, or successors or assigns, or a corporation to be formed for the purpose, to construct, operate and maintain in the city of Cape Girardeau a street railway, and speedily thereafter to extend same to the city of Jackson, \* \* \* and operate and maintain a line of electric cars thereon, and also to construct, operate and maintain an electric lighting plant in the city of Cape Girardeau."

Section 1 of the ordinance names the streets and the distances on the streets the street railroad was to be operated. Section 11 of the franchise authorizes the grantee to construct, maintain, and operate an electric light, heat, and power plant within the corporate limits of the city, and to furnish heat and power and light during the life of the franchise, with a right to have the same renewed. Section 12 authorized Mr. Lapsley and his grantees to erect poles, lamps, wires, and fixtures upon, along, and over the streets of the city, with the right to extend the same. And section 13 provided that Lapsley and his grantees were authorized to contract with the city for furnishing light for municipal purposes.

Soon after obtaining this franchise from the city of Cape Girardeau, to wit, on October 4, 1902, Mr. James S. Lapsley, R. F. Walker, and others signed articles of association for the incorporation of the Cape Girardeau-Jackson Interurban Railway Company. The articles of association recite that the incorporators have associated themselves

together under article 2, chapter 12, of R. S. 1899, for the purpose of forming a "corporation" "to construct, operate and maintain a standard gauge railroad line for public use in the conveyance of persons, property, mail, express \* \* \* in the city of Cape Girardeau, county of Cape Girardeau and state of Missouri, and from the city of Cape Girardeau to the city of Jackson in said county." The "corporation" was capitalized at \$300,000, divided into 3,000 shares, each share of the par value of \$100.

Mr. Lapsley then sold and assigned to the Cape Girardeau-Jackson Interurban Railway Company the franchise granted to him by the city of Cape Girardeau, being Ordinance No. 637, for building, operating, and maintaining a street railroad within the corporate limits of the city of Cape Girardeau. Afterwards the Cape Girardeau-Jackson Interurban Railway acquired by purchase the franchise and horse railroad that was authorized and constructed under Ordinance No. 484 to William A. Penny and L. S. Joseph in 1892.

Up to 1904 or 1905 nothing had been done by the stockholders of the Cape Girardeau-Jackson Interurban Railway Company toward the construction or building of a street railway within the corporate limits of the city of Cape Girardeau. About that time William H. Harrison and John H. Himmelberger were induced to become interested in the enterprise. At that time all the stock in the Cape Girardeau-Jackson Interurban Railway Company was owned by William H. Miller, David A. Glenn, L. S. Joseph, Rodney G. Whitelaw, Robert W. Matteson, J. H. Himmelberger, R. E. Gurley, R. A. Ogle, and William H. Harrison, all residents and citizens of the city of Cape Girardeau, except Gurley and Ogle. The street railway company had no money or funds with which to start the work of construction. A meeting of the stockholders was held, and William H. Harrison was elected president of the company, and Rodney G. Whitelaw was elected secretary and treasurer.

The stockholders then entered into a written trust agreement, called on the trial and in this case a "pooling agreement," by and in which they jointly agreed that the entire stock of the street railway company should be deposited with the Southeast Missouri Trust Company of Cape Girardeau as trustee for the stockholders. The "pooling agreement" further provided that no one of the stockholders could or should sell his stock in the street railway company without the consent of all the other stockholders.

After this trust arrangement was made by the stockholders of the street railway company, the officers of the company made arrangements for the borrowing of \$80,000 or \$100,000 from a banking institution in St. Louis to commence the construction and building of a street railroad in the city of

Cape Girardeau. This loan was at first secured by a note executed by the street railway company, with guaranty, for its faithful payment, signed by each of the seven stockholders. A little later, to wit, on the 7th day of April, 1906, the street railway company authorized the issuing of \$300,000 of first mortgage bonds and the execution of a mortgage or deed of trust on all of its property, consisting of rolling stock, equipment, leases, lands, franchises, and "its line of railway as now constructed and operated in the city of Cape Girardeau, aggregating a distance of five miles in length, on the following named streets and alleys"—naming the streets and alleys over and upon which said railroad was constructed.

Three hundred thousand dollars of bonds were issued and deposited with the trustee, but only \$100,000 were certified to by the trustee. The other \$200,000 were left in the custody of the trustee. This \$100,000 of bonds were then deposited with the banking institution in St. Louis as collateral security to secure the loan, which then amounted to \$100,000. This loan was still evidenced by a note of the street railway company, and its payment was also guaranteed by the written guaranty of each of the seven resident stockholders above named. The other \$200,000 worth of bonds were deposited with the trustee, but have never been certified to by the trustee nor negotiated by the street railway company.

With this borrowed money the street railway company erected a power plant in the city of Cape Girardeau and constructed over the streets and alleys of said city a street railway system of over five miles in length. The street railway company was operating its railroad when, on January 5, 1913, its power plant and many of its cars and car barns were destroyed by fire. In the meantime Messrs. Gurley and Ogle had sold their interests in the road to the other stockholders, leaving D. A. Glenn, William H. Miller, L. S. Joseph, Rodney G. Whitelaw, Robert W. Matteson, J. H. Himmelberger, and William H. Harrison each holding a one-seventh interest in the stock.

The following is a brief history of the Light & Development Company, and its predecessor's interest in the city of Cape Girardeau, as disclosed by the evidence in this record:

In 1892 or 1893 the city of Cape Girardeau granted to the Cape Girardeau Waterworks & Electric Light Company, a Missouri corporation, franchises to construct and operate a system of waterworks and an electric light plant in said city, and had entered into contracts with the waterworks and electric light company for water and light, and the 20-year or charter rights of these companies were about to expire.

In 1913 the Missouri Public Utilities Com-

pany had acquired all the stock of the Cape Girardeau Waterworks & Electric Light Company, and was operating, at that time, both the waterworks and electric light plants in said city under contracts theretofore made with said city by said waterworks and electric light company. The Missouri Public Utilities Company was owned by the United States Public Service Company of Delaware, and the Light & Development Company of St. Louis, appellant, owned a controlling interest in the United States Public Service Company of Delaware. Neither of these controlling corporations were domiciled in Cape Girardeau. Neither of them had an office in the city of Cape Girardeau.

Under these conditions the appellant, in February, 1913, made overtures to the stockholders of the street railway company for the purchase of the stock and bonds and railroad of the Cape Girardeau-Jackson Street Railway Company. On the 17th day of February, 1913, defendant entered into the following contract of purchase with the plaintiffs:

"Agreement Between Stockholders of the Street Railway Company and the Street Car Company, and Light & Development Company.

"The object and purpose of this agreement is as follows:

"First. To make a temporary arrangement for the operation of the present street car system in the city of Cape Girardeau (as an emergency agreement) in order to keep the street car system in operation.

"Second. To fix the price, conditions, terms, and time and manner of purchase, and handling of all capital stock and bonds of said street railway company by the Light & Development Company.

"Therefore this agreement, made and entered into this — day of January, 1913, by and between D. A. Glenn, L. S. Joseph, R. W. Matteson, W. H. Miller, J. H. Himmelberger, Rodney G. Whitelaw, and W. H. Harrison, hereinafter referred to for convenience as stockholders, and Cape Girardeau-Jackson Interurban Railway Company, a corporation, hereinafter referred to for convenience as Street Railway Company, parties of the first part, and the Light & Development Company, a corporation, of St. Louis, Missouri, hereinafter referred to as Development Company, party of the second part, witnesseth:

"That the said parties of the first part, for valuable considerations this day received from said party, do hereby make and enter into the following agreement with said second party:

"Division 1 of This Contract.

"Section 1. The Light & Development Company shall operate the street car system in the city of Cape Girardeau temporarily as follows:

"(a) *Operating Expense*.—Expense of operating the present street car system in the said city, of Cape Girardeau shall be paid by the Development Company, it being understood that said Development Company is hereby given the right to use all of the machinery, equipment, and property of said street car system that it may require in operating said system, and to

that end is hereby given the right to remove any machinery or equipment of said Street Railway Company that said Development Company may require, from the plant of the Street Railway Company to the plant of the Cape Girardeau Waterworks & Electric Light Company (hereinafter referred to as Water and Light Company); and in the event of a failure to purchase all the capital stock and bonds of said first parties, as hereinafter provided for, then, and in that case, the Development Company shall return to the Street Railway Company all machinery and equipment, so taken as aforesaid, in as good condition as when received, usual wear and tear excepted. (For the purpose of identifying office and operating supplies an inventory is hereto attached and made a part of this contract.)

"(b) *Improvements.*—Any permanent rehabilitation, extension, addition, or improvement that may be required or made on said street car system shall first be approved by the president of said Street Railway Company; and in the event of a failure to purchase, as hereinafter provided for, the parties of the first part shall reimburse and repay to the Development Company all sums of money so laid out and expended by it.

"(c) *Repairs.*—The Development Company shall make the repairs necessary on the damaged building of the Street Railway Company to protect the machinery therein from being exposed to the weather, but shall not rebuild the car shed; said damage being caused and repair made necessary by reason of the fire of January 4, 1913.

"(d) *Debts.*—The Street Railway Company shall furnish a list of all the debts owing by the Street Railway Company, amounting to the aggregate sum of nineteen hundred and thirty-three and  $\frac{61}{100}$  dollars (\$1,933.61), the Development Company assumes and agrees to pay under this temporary arrangement of operation, in addition to the expense of repairs to be made, as hereinbefore set out; it being expressly understood and agreed between the parties hereto that this temporary arrangement is made upon the representation of said first parties that the Development Company shall realize in cash out of the assets of said Street Railway Company the sum of forty-three hundred and thirteen dollars (\$4,313), four thousand dollars (\$4,000) of said sum being on account of fire loss, which said amount is to be paid by said first parties to said second party with the understanding that the Development Company would be required to expend the estimated sum of twenty-five hundred dollars (\$2,500) to repair the damage on account of fire loss as aforesaid. Therefore it is expressly agreed that, if the amount actually expended by the Development Company on account of fire damage should be less than said estimated sum of twenty-five hundred dollars (\$2,500), then and in that case the Street Railway Company shall be entitled to and shall receive a credit for the difference between the amount actually expended on account of said repairs and the said sum of twenty-five hundred dollars (\$2,500). All other indebtedness of the Street Railway Company is to remain the debt and obligation of said Street Railway Company under this temporary arrangement for operating.

"(e) *Consideration.*—The Development Com-

pany shall receive the entire receipts derived from operating the said street car system, but shall receive no other or further pay for operating said system, except the said sum of forty-three hundred and thirteen dollars (\$4,313) for the purpose and in the manner hereinbefore set out.

#### "Division 2 of Said Contract.

"Fixing Price, Conditions, Terms, Time, and Manner of Purchase.

"Section 1. The Development Company shall purchase all of the capital stock and bonds of said Street Railway Company from said first parties upon the condition hereinafter set out.

"*Price.*—The Development Company agrees to purchase all of the capital stock and all of the bonds from the said stockholders, and said stockholders agree to sell the same at the price and sum of one hundred and fifty-three thousand dollars (\$153,000). Said purchase to be made and bonds to be disposed of upon the conditions, terms, at the time, and in the manner hereinafter set out.

"(2) *Terms, Manner of Payment, and Disposition of Bonds.*—In the event of the purchase under this agreement the terms shall be as follows:

"The sum of fifty-six thousand dollars (\$56,000) shall be paid in cash to said stockholders, and the sum of ninety-seven thousand dollars (\$97,000) in bonds of said Street Railway Company, with coupons on said bonds canceled up to and including the year 1914. And for the fifty-six thousand dollars in cash, paid as aforesaid by said Development Company, the said Development Company shall receive fifty-six thousand (\$56,000) in bonds of said Street Railway Company, with coupons canceled up to and including the year 1914.

"The said Development Company agrees to purchase from said stockholders, during the year 1915 and each year thereafter, at least fifteen thousand dollars (\$15,000) of said ninety-seven thousand dollars (\$97,000) in bonds, at par, until all of said ninety-seven thousand dollars (\$97,000) in bonds, paid to the stockholders as aforesaid, shall have been purchased from said stockholders. Said bonds to be purchased and taken up numerically, and all of said ninety-seven thousand dollars (\$97,000) in bonds shall be taken up first, and before the taking up and paying off of the fifty-six thousand dollars (\$56,000) in bonds taken over by said Light and Development Company, as hereinbefore set out. The remainder of said bonds of said Street Railway Company, namely, one hundred and forty-seven thousand dollars (\$147,000) are to be held in the treasury of said Street Railway Company by said Light and Development Company, with coupons canceled up to and including December 31, 1912, which said bonds shall be used for extensions and improvements of the Street Railway Company; it being understood that all the debts of said Street Railway Company, except said bonded indebtedness and the debts assumed by the Development Company under the operating agreement above set out, have been paid or assumed by said stockholders, and that the Development Company shall acquire said property free and clear of all claims, causes of action, debts, and obligations, except the debts specifically mentioned and assumed by the Development Company under this agreement.

"(3) *Conditional Contract of Purchase.*—It is expressly agreed by and between all the parties hereto that this shall be treated as a conditional contract of purchase, and that the Development Company shall not purchase said stock and bonds until after the following things have been done:

"The said stockholders shall obtain for, and in the name of, said Street Railway Company a legal and valid statutory franchise covering the statutory period authorising said Street Railway Company to construct, maintain, and operate its street car system in the city of Cape Girardeau, Missouri, which said franchise shall embrace the streets and impose the conditions imposed in the ordinance now held by the said Street Railway Company, and in the form of said ordinance except the conditions requiring an extension to Jackson, Missouri, and providing for telephone and lighting system shall be eliminated.

"It is also expressly understood and agreed that the Development Company will not purchase the stocks and bonds as above mentioned until after satisfactory franchises have been granted by the city of Cape Girardeau, Missouri, to the Cape Girardeau Waterworks & Electric Light Company, or its successors, for its water system, electric system, and gas system, and until after contracts have been renewed with said city to furnish water and light for said city of Cape Girardeau, Missouri.

"It is further agreed that within thirty (30) days after all of the above-mentioned franchises have been granted and accepted for the statutory period, and contracts made or renewed with said city for furnishing water and light to said city for the statutory period, that the Development Company shall take over and pay for said stock and bonds and settle for same at the price and in the manner and form hereinbefore set out.

"It is further agreed, by and between all the parties hereto, that if for any cause the said Street Railway Company or the said Water and Light Company, or either of them, should fail to obtain all or any one of the franchises above mentioned, or should fail to renew said contracts or either of them for water and light as above mentioned, before June 1, 1913, then this obligation to purchase shall become null and void, and have no force nor effect whatever as a contract requiring said Light and Development Company to purchase said stock and bonds, unless the same be extended by the Development Company to January 1, 1914, for the purposes and in the manner hereinafter set out.

"It is further expressly understood and agreed, by and between all the parties hereto, that in the event of a failure to acquire and obtain all or any one of the franchises or contracts hereinbefore mentioned, on or before June 1, 1913, then and in that case the Development Company is hereby given the privilege of extending the terms of this conditional contract of purchase to January 1, 1914; it being agreed that in case of any such extension all of the terms, conditions, and provisions of this agreement as to the purchase of said stock and bonds shall remain in full force and effect during such extension.

"It is further understood and agreed that in case of any such extension the operation of the street car system shall continue under the terms

of the temporary arrangement above set out during such period of extension of time.

"It being expressly understood, by and between all the parties hereto, that should the said Water and Light Company, or its successors, fail to get all or any one of the franchises above mentioned, or fail to get the contracts or either of them above mentioned, or should the Street Railway Company fail to get a franchise above mentioned on or before June 1, 1913, or in the event of an extension of time, as hereinbefore provided for therein, on or before January 1, 1914, then and in that case all of the terms and conditions of this contract referring to and respecting the purchase of the stock and bonds above mentioned shall become null and void, and the parties hereto shall have a settlement under this contract, and the operation of the street car system shall again be assumed and taken over by the parties of the first part in accordance with the terms and provisions of this contract.

"It is understood that the Development Company commenced operating the street car system, under the terms of the temporary arrangement embraced in division 1 of this contract, on Monday, January 13, 1913. It is further understood that nothing in this contract shall be so construed as to make it a contract of purchase by the Development Company until after the contracts and franchises, above mentioned, have been obtained, and that any extension of time for operating the said street car system, or to give time in which to obtain said franchises, shall not in any way change the status of the parties, nor affect any of the terms or provisions respecting the purchase.

"Executed in triplicate this 17th day of February, 1913."

Then follow the signatures of the parties.

In pursuance to the contract of February 17, 1913, the stockholders and city officials did use their influence and every lawful means at their command to secure, and did secure, for the defendant a "satisfactory franchise and contract" for the Missouri Public Utilities Company, the successor of the Cape Girardeau Waterworks & Electric Light Company.

On November 1, 1913, the city of Cape Girardeau granted to the Missouri Public Utilities Company, successor of the Cape Girardeau Waterworks & Electric Light Company, a new franchise to construct, maintain, and operate a waterworks system for supplying the city of Cape Girardeau and inhabitants thereof with water; also the right to construct, maintain, and operate an electric light and power plant for supplying the city of Cape Girardeau and inhabitants thereof and vicinity with light and power and the use of the streets and alleys to carry the same. This is Ordinance No. 1043.

Contracts were then made by defendant, through its subsidiary corporation, the Missouri Public Utilities Company, with the city of Cape Girardeau and its inhabitants, for water and light. These franchises and contracts were "satisfactory," and accepted by

the Missouri Public Utilities Company on December 20, 1913.

Before the passage of Ordinance 1043, the president of defendant visited the city of Cape Girardeau and assured members of the city council and others that, if the city of Cape Girardeau would grant to his corporation the renewal franchises for water and light, the appellant company would take over the street railway property under his contract of February 17, 1913, with respondents, just as soon as the city of Cape Girardeau gave his corporation renewal franchises and renewal contracts for the sale of light and water.

After the city had granted to appellant, through its subsidiary corporation, the Missouri Public Utilities Company, the franchises and contracts just above mentioned, the city undertook to and did give to the Cape Girardeau-Jackson Interurban Railway Company a new franchise for a street railway, in which (upon the demand of defendant under the contract) the Railway Company eliminated its right to construct, operate, and maintain a lighting, heating, and telephone system in said city, and also the right to extend an interurban railroad to Jackson in said county. This ordinance was passed on December 11, 1913.

The contract of February 17, 1913, between plaintiffs and defendant, was written by the latter's counsel. Ordinance No. 1046, granting to the Street Railway Company the right to operate a street railroad, and eliminating from it the privilege of selling light and power and a telephone system in the city of Cape Girardeau, was also written by counsel for the defendant.

Subsequent to the making of the contract of February, 1913, and prior to the introduction of Ordinance 1046 in the city council, it was claimed by the defendant that the Lapsley ordinance of 1902 was irregular, in that the abutting property owners had not petitioned or consented to the laying of the street railroad on the streets named. To obviate that difficulty in the proposed new ordinance then about to be introduced, the Street Railway Company procured the written consent of a majority of the abutting property owners to be filed in the city clerk's office as provided by statute. Counsel, in writing Ordinance 1046, made the city council find as a matter of fact that a majority of the property owners had signed said petition and had given their assent to the use of the streets over which the Street Railway Company was then operating, and over such streets as the Street Railway Company had the right to operate, but had not yet exercised. Counsel also, in writing that ordinance, makes the council—

"further find and declare that the Cape Girardeau-Jackson Interurban Railway Company is an incorporated company, organized under the laws of the state of Missouri, to construct, main-

tain, and operate a street railroad in the city of Cape Girardeau, and that it has now complied with the statutes of the state of Missouri requiring the written assent, permission, and petition of the owners of the land representing more than one-half of the frontage of the streets or parts thereon now used for its railroad and street car purposes, and is entitled to a valid and statutory franchise authorizing and permitting it to maintain and operate its said railroad as now located on the streets and parts of streets above set out."

**Section 5 of this new franchise states:**

"That there is hereby granted by the city of Cape Girardeau, Missouri, to be hereinafter designated as the grantor, for a period of twenty (20) years, unto the Cape Girardeau-Jackson Interurban Railway Company, its successors or assigns, to be hereafter designated as the grantee, the rights, privileges, and franchise as follows, to wit: To construct, operate, and maintain a street railway system to be operated by electricity upon, along, and over the streets, avenues, alleys, and other public highways in said city of Cape Girardeau, as follows, to wit."

Then follow the names of the streets and the distances of each that the Street Railway Company had the right to use.

In section 16 of said ordinance this language is used:

"It is understood that the grantee is not required to extend its interurban line to Jackson, as provided for in the original grant, nor shall it be required to install and operate the lighting and heating plant provided for in the original franchise."

**Section 17 of Ordinance 1046 is as follows:**

"It is understood by the grantor at this time that the grantee is contemplating and negotiating the sale of its property and franchise, and that under the provisions of section 20 of article 12 of the Constitution of the state of Missouri, the assent of the city council to make a transfer is required, and the grantor hereby consents to a transfer of the franchises, grants, and privileges and property held by the grantee, including the franchise herein granted."

This ordinance provides that the grantee or its successors or assigns shall file its written acceptance thereof within 10 days after the passage of this ordinance. The attorney for defendant, who wrote the contract of February 17, 1913, between plaintiffs and defendants, wrote the Ordinance 1043 for the renewal franchise of the Waterworks and Electric Light Company; also the Ordinance 1046 for the Cape Girardeau-Jackson Interurban Railway Company; also the acceptance for the Street Railway Company, its successors and assigns, and had it signed by W. H. Harrison, its president, and attested by Rodney G. Whitelaw, its secretary.

After the making of the contract of February 17, 1913, the General Assembly of the state passed what is known as the "Public Service Commission Law." On December 23,



1913, the defendant, through its subsidiary corporation, the Missouri Public Utilities Company, and its attorney, presented to the Public Service Commission, at Jefferson City, a petition praying authority to approve the electric light and water franchises granted by the city of Cape Girardeau and its contract made thereunder. Approval was granted.

On the same day and at the same time defendant presented a petition to the Public Service Commission in behalf of the Cape Girardeau-Jackson Interurban Railway Company, David A. Glenn, Rodney G. Whitelaw, R. W. Matteson, W. H. Miller, W. H. Harrison, John H. Himmelberger, and L. S. Joseph, and the Light & Development Company, praying said commission for its approval of the franchise granted to the Cape Girardeau-Jackson Interurban Railway Company, Ordinance 1046, for the construction and operation of a street railway in the city of Cape Girardeau, and for the sale of the stocks and bonds of said Cape Girardeau-Jackson Interurban Railway Company to the Light & Development Company of St. Louis. Among other things recited in their petition is the following:

**"Reasons for Sale.**

"(1) That the present owners of the capital stock and bonds of the Street Railway Company were the organizers of the Cape Girardeau-Jackson Interurban Company; that they obtained a franchise from the said city of Cape Girardeau to operate a street car system within said city of Cape Girardeau; that it was the intention, at the time of the organization of said company, to extend said line from the city of Cape Girardeau to the city of Jackson; that after considerable expense in their efforts to make the connecting line between said cities they found that the only feasible route for a street car line had been adopted by steam line, and the line connecting the two cities was abandoned; that the company continued to operate its system in the said city of Cape Girardeau until about January 1, 1913, from its own power house and power plant; that on or about said 1st day of January, 1913, the power house and power plant of said Street Railway Company were greatly damaged by fire; that the management of said Street Railway Company made a temporary and an emergency arrangement with the Light & Development Company (the company then operating the light plant in the city of Cape Girardeau) to keep the street car system in operation; that at the time of this temporary arrangement the stockholders of the Street Railway Company also contracted to sell and transfer to the Light & Development Company the capital stock and bonds of the Street Railway Company, the tentative agreement was entered into on January 13, 1913, and the papers were finally executed on the 17th day of February, 1913, with the agreement reciting that it was as of date January 13, 1913.

"That the Street Car Company had never paid any dividends, and, on the contrary, had been running at a loss during the whole period of operation of said system; that at the time of

the sale and transfer the Light & Development Company was a practical operating company engaged in the development of public service or public utility properties; that it was then operating the water and light properties in said city of Cape Girardeau; that the sellers knew the Light & Development Company to be a practical operating company, and also financially in a position to develop its property; that, owing to the fact that the property had been operated at a loss up to the date of the fire, the Street Railway Company found it necessary to make some arrangement for the sale of the property, and to insure the continued operation of the street car system found it necessary to make the temporary arrangement with the Light & Development Company to operate its cars.

"That the stockholders of the Street Car Company are all men engaged in business other than the operation of public utilities, and were unwilling to stand further personal losses on account of the street car property, and were unable to finance the property in the matter of making extensions and developing the property by selling the bonds of the company.

"That, on the other hand, the Light & Development Company is composed of an organization of practical operators, is in a position to finance its properties for the purposes of development, and can and will operate the same to better advantage, and more economically, than could be done by the management of the Street Car Company.

"That this sale and transfer is necessary in order to insure the continued operation of a street car system in the city of Cape Girardeau; that it is the opinion of the sellers that if the property is handled by experienced operators that it would be a valuable property; on the other hand, that any attempt to continue operations by the old company, under existing conditions, would render it necessary to abandon the system.

"That the Street Car Company had, prior to its sale to the Development Company, been endeavoring for some time to make disposition of its property and franchises; that this contract was made for the sale and transfer of the stocks and bonds prior to the creation of the Public Service Commission of the state of Missouri.

"That at the time of said contract the Street Car Company was required to obtain a statutory franchise from the city authorities and property owners of said city of Cape Girardeau.

"That the Light & Development Company was then negotiating with the city of Cape Girardeau for new franchises and contracts for water and light in said city; that the completion of the transfer of the stock and bonds was delayed and conditioned upon the granting of said franchises.

"That pending said contract of sale the Light & Development company organized the Missouri Public Utilities Company, and the water and light franchises and contracts were granted to the Missouri Public Utilities Company.

"That the Light & Development Company is now ready, willing, and able to carry out its contract of purchase of the stocks and bonds under the terms of its contract of purchase.

"That the contract for the sale and transfer of said stock, signed on the 17th day of February, 1913, is hereto attached and marked 'Exhibit B' and made a part of this application.

"That Ordinance No. 1046, entitled 'An ordinance granting to the Cape Girardeau-Jackson Interurban Railway Company, a corporation organized and existing under the laws of the state of Missouri, and domiciled in the city of Cape Girardeau, Mo., its successors or assigns, a franchise to construct, maintain, and operate a street railway in certain public streets and highways within the corporate limits of the city of Cape Girardeau, subject to certain conditions,' was passed by the city council of the city of Cape Girardeau, Mo., on the 8th day of December, 1913, and approved on the 11th day of December, 1913, which said ordinance is hereto attached and marked 'Exhibit C' and made a part of this application.

"Wherefore petitioners ask that the Public Service Commission of the state of Missouri make an order approving and authorizing the use and exercise of the franchise granted to the Street Railway Company by the city of Cape Girardeau, Mo.; and if the commission finds that under the law it has any jurisdiction or authority to make any orders touching the contract for the sale of the stock and bonds made prior to the creation of this commission, then, in that case petitioners further ask that the commission make an order authorizing the sellers, above named, to sell and transfer all of the stock and bonds of the Cape Girardeau-Jackson Interurban Railway Company, a corporation of Cape Girardeau, Mo., to the Light & Development Company, a corporation of St. Louis, Mo., and approve the contract of sale of said stocks and bonds made on the 17th day of February, 1913, and to make such other and further orders as to the commission may seem proper.

"Dated at Cape Girardeau, Mo., this 20th day of December, 1913."

Then follow the signatures of all the parties.

The Public Service Commission, after hearing said parties, gave its consent and approval to the new franchise given to the Cape Girardeau-Jackson Interurban Railway Company to construct, operate and maintain a street railway on and over the streets of the city of Cape Girardeau, but found that the contract for the sale and transfer of the stocks and bonds of the Street Railway Company to the Light & Development Company had been fully consummated and concluded, and the rights of the parties thereunder fixed, on February 17, 1913, prior to the time when the Public Service Law (Laws 1913, p. 556) went into effect.

On the 24th day of December Mr. Harrison returned from Jefferson City, and in the next few days withdrew from the Southeast Missouri Trust Company all of the stock of the Cape Girardeau-Jackson Interurban Railway Company and the "pool agreement" relating thereto, and put the same in the possession of Mr. Rodney G. Whitelaw, the secretary and treasurer of the company. Mr. Harrison did not know to whom the Light & Development Company of St. Louis desired the new stock to be issued, so he called on Mr. Kelso for that information. The latter

wrote in pencil the names and number of shares that each stockholder was to have on a slip of paper and put the same on the desk of Mr. Harrison. On this slip of paper are the following names:

"H. Wurdack, 1 share, No. 49; Horace W. Beck, 1 share, No. 50; E. M. Kurtz, 1 share, No. 51; balance to the Light & Development Company, 2,997 shares, No. 52."

In accordance with the written instructions of the president, the secretary, Mr. B. G. Whitelaw, canceled all the stock certificates standing in the name of the respondents and issued new certificates as above directed.

The "sticker" or guaranty of the Light & Development Company for the faithful payment of the \$97,000 bonds of the Street Railway Company had been prepared by attorney for defendant and printed by respondents, and made ready to "stick" or attach to the bonds upon the completion of the contract.

Mr. Harrison, as president, and Mr. Whitelaw, as secretary, for the Street Railway Company, had made all arrangements to go to St. Louis and be there on January 1, 1914, for the purpose of delivering to the appellant all of the stocks and bonds of the Street Railway Company, and to complete and fulfill the contract sued upon. But, just before their leaving for St. Louis, counsel for defendant came into the office of Mr. Harrison and informed him that he had just discovered that the Cape Girardeau-Jackson Interurban Railway Company was without power and authority to accept from the city of Cape Girardeau the franchise it had given the Railway Company, Ordinance 1046; that he had just discovered that the city of Cape Girardeau, Mo., was without power and authority to grant to the Cape Girardeau-Jackson Interurban Railway Company a "legal and valid statutory franchise covering the statutory period" as set forth in Ordinance 1046; that he had just discovered that the Cape Girardeau-Jackson Interurban Railway Company was incorporated under the statute authorizing the incorporation of commercial railroads, and not under the statute authorizing the incorporation of street railroads; "and that he could not recommend to his company the compliance with the contract until that defect had been cured."

But, at the time counsel gave the above notice to Mr. Harrison, he also stated that there might be some other statute or authority authorizing the granting and acceptance of Ordinance 1046, and that he was willing to and would make a further research of the statute. He was then asked by Mr. Harrison if he had notified Mr. Wurdack of his discovery, and he reported that he had not. A few days later Mr. Wurdack called Mr. Harrison over the telephone and wanted to know when he would be up to complete the contract; Harrison replied (relying upon

counsel's declaration above stated) that the respondents were not quite ready at that time to go up, but would be soon.

Some days afterward, counsel notified Mr. Harrison that he had been unable to find any authority authorizing the city of Cape Girardeau to grant the franchise Ordinance 1046 (the ordinance he had written) to the Cape Girardeau-Jackson Interurban Railway Company to operate a street railroad over the streets of that city, and that he could not recommend to the appellant the execution of the contract.

Soon after that plaintiffs were advised by their counsel that the city of Cape Girardeau had the power to grant the ordinance that counsel for defendant had drawn, No. 1046, and that it was a legal, valid, and statutory franchise, and that the Street Railway Company had the right to operate its cars on the streets of said city.

The appellant was then appealed to to carry out its contract, and its president expressed a willingness to do so, if it was held that the franchise granted to the Cape Girardeau-Jackson Interurban Railway Company was a legal, valid, and statutory franchise. After suit was brought, appellant set up in one paragraph of its answer a failure of respondents to deliver or tender to the appellant its stocks and bonds within the time stated in the contract.

At the close of plaintiffs' evidence, and again at the close of all of the evidence in the case, counsel for the defendant offered a demurrer thereto, each of which was by the court overruled, and the defendant duly excepted.

Chas. W. Bates and Nathan Frank, both of St. Louis, and Oscar A. Knehans and I. R. Kelso, both of Cape Girardeau, for appellant.

Jeffries & Corum, of St. Louis, and Oliver & Oliver, of Cape Girardeau, for respondents.

WOODSON, J. (after stating the facts as above). [1] I. Counsel for the defendant insist that the trial court erred in refusing the demurrer requested at the close of the plaintiffs' case, and also at the close of all of the evidence introduced. The principal reason assigned for this insistence is that the contract of sale mentioned in the evidence provided that the plaintiffs should obtain for and in the name of the Street Railway Company a legal and valid franchise from the city of Cape Girardeau authorizing it to construct, maintain, and operate a street car system upon and along the streets of that city, while the evidence affirmatively shows that they wholly failed to obtain such a franchise for the company, and therefore the contract had not been performed on the part of the plaintiffs, and consequently specific performance thereof will not lie; the specific contention being that the city of

Cape Girardeau had no power or authority to grant to the Cape Girardeau-Jackson Interurban Railway Company a standard gauge railroad company, organized under article 2 of chapter 12, R. S. 1899, a valid franchise as set forth in Ordinance No. 1046, before mentioned—that is, the ordinance applies to a street railroad company, while the evidence shows that the Cape Girardeau-Jackson Interurban Railway Company is a commercial, or standard gauge, railroad company, as before stated.

The above contention is based upon sections 9493 and 9494, R. S. 1909. The first section mentioned provides that no incorporated town or city of this state shall have power to grant to any person or corporation the right to construct and operate upon and over the streets of any such town or city any elevated, underground, or other street railway without compliance with the conditions stated in said section 9494. The latter section provides that: Before granting a franchise for the construction and operation of an elevated, underground or other street railroad in any such town or city, the authorities of such city shall, by ordinance, establish the route and define the terms and conditions of such franchise, and locate all depots, stations, turnouts, etc.; also that the party to which the franchise may be granted shall be an incorporated company under the laws of this state, to construct, maintain and operate a street railroad in the town or city by which such franchise is granted. This same section then at great length provides for the payment of compensation for the property to be taken, and the damages that will be done to property not taken by the construction and operation of the street railroad; the nature of the franchise and the road to be constructed and operated, and the court in which such proceedings must be instituted, etc.

Under the undisputed evidence in this case, the Cape Girardeau-Jackson Interurban Railway Company was a standard gauge railroad. It is contended by counsel that the city of Cape Girardeau had no power under said sections 9493 and 9494 to grant to it a franchise to construct and operate a street car system upon and over the streets of that city; they insisting that they only apply to incorporated street railroad companies, and not to standard gauge railroads, to which class the Cape Girardeau-Jackson Interurban Railway Company belongs.

It must be conceded that, if those sections of the statutes apply to cities of the third class, to which the City of Cape Girardeau belongs, then said city had no power or authority to grant to the Cape Girardeau-Jackson Interurban Railway Company a franchise to construct and operate a street railroad upon and over the streets of that city. These sections, according to their plain

letter and meaning, only apply to street railway companies, and not to standard gauge roads. In fact, we do not understand counsel for plaintiffs to dispute that proposition, if said statutes apply to cities of the third class. But their contention is that those sections have no application to cities of the third class, but, upon the contrary, that they are governed by section 107, p. 84, of Laws 1887, which is section 1576, R. S. 1889, as amended by section 105, p. 89, of Laws 1893, now section 5855, R. S. 1899, and section 9250, R. S. 1909. It will be seen by reading the last section that cities of the third class—

"have sole authority, by ordinance, to grant the right to any person or persons, or corporation, to make and construct railroads or street railroads in any street or highway of the city, and to control and regulate the use thereof."

This language of the statute is very broad, and authorizes a city of the third class by ordinance to grant to any person or corporation the right to construct and operate a railroad or street railroad in the streets of any such city, and to control and regulate the use thereof. In other words, under the broad power given to the city by said section 9250, it had the undoubted power to grant to the Cape Girardeau-Jackson Interurban Railway Company, a standard gauge railroad company, the right to construct and operate a street railroad in said city. In fact, until 1899, long after the passage of the statutes mentioned, there was no general law authorizing the incorporation of street railroad companies. Up to that year all street railroads were constructed and operated by individuals, corporations created by special acts of the Legislature, or by some business corporation organized and incorporated under article 2 of chapter 12, R. S. 1889. In 1899 the railroad statutes, if I may so denominate them, were amended by the enactment of a new section, being section 1186, which for the first time authorized the incorporation of street railroad companies, but prior to that enactment we had no general statute upon the subject.

A similar question to the one here involved was presented to this court in the case of *St. Louis & Meramec River Railroad Co. v. City of Kirkwood*, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300. The principal difference between that case and the one at bar is that in that case the plaintiff was a street railway company, incorporated to carry "passengers, and property" between and within the cities of Kirkwood and St. Louis, while in this case the Cape Girardeau-Jackson Interurban Railway Company is a standard gauge railroad company, incorporated also to carry passengers and property between and within the cities of Cape Girardeau and Jackson. In the former case the city council of the city of Kirkwood, by the franchise ordi-

nance limited the authority of the company to the carriage of passengers only within the limits of the city of Kirkwood, while in this case the city of Cape Girardeau did practically the same thing by granting to the Cape Girardeau-Jackson Interurban Railway Company the right to construct and operate a street railroad within the limits of that city. The difference is only in name; both had the power to carry passengers and freight, and in the Kirkwood Case the company was required by the franchise ordinance to surrender its corporate right to carry freight, while in the case at bar the Cape Girardeau-Jackson Company was required by the franchise ordinance to construct and operate a street car system in that city, and by necessary implication to surrender any and all corporate rights in so far as the city of Cape Girardeau was concerned, if any it had, not granted to it by said franchise ordinance. In the Kirkwood Case this court held that the city had the authority to require the company to surrender its corporate right to carry mail and express within the corporate limits of the city, and by parity of reasoning the city of Cape Girardeau had the right to require the Cape Girardeau-Jackson Interurban Railway Company to surrender all of its corporate rights, in so far as the city was concerned, not granted to it by the franchise ordinance. The former was by express limitation, and the latter by necessary implication; but the effect in both cases was the same.

But, independent of the ruling in the Kirkwood Case, and what is here said regarding it, there is nothing in the laws of this state which limits the broad authority given by section 9250, R. S. 1909, to the city of Cape Girardeau, and other cities of the third class, to grant to any corporation the right to construct and operate a street railway without its limits; this, of course, would include the Cape Girardeau-Jackson Interurban Railway Company, which the evidence shows was a corporation. Certain it is that a standard gauge railroad company, prior to the enactment of the statute in 1899 authorizing the incorporation of street railway companies, was more closely allied to a street railway company than to any other corporation then in existence, or was then authorized to be incorporated, and for that reason, if for none other, it must be presumed that the Legislature when it enacted said section 9250, authorizing cities of the third class to grant to any corporation the right to construct and operate a street railway upon and over the streets thereof, intended to include standard gauge railroads; at least, it cannot be reasonably said that such language excludes the city's authority to grant to such railway company the right to construct and operate a street railway system therein.

But in answer to this argument counsel

for the defendant suggests that there is an irreconcilable conflict between said section 9250, R. S. 1909, and sections 9493 and 9494, R. S. 1909, before mentioned, and that since the former is a special law, only applicable to cities of the third class, and the latter being a general law, applicable to all classes of cities and towns, the former must give way and yield to the latter. If this is true, then the city of Cape Girardeau had no authority to grant to the Cape Girardeau-Jackson Interurban Railway Company a franchise to construct and operate a street railway system in said city, as held in the early part of this opinion. This suggestion, however, in my opinion, is not well grounded. In considering this question, it should be remembered that all three of these sections, 9250, 9493, and 9494, were enacted during the same session of the Legislature; that is, 9493 and 9494 were approved March 26, 1887 (Laws 1887, p. 39, §§ 1, 2), and 9250 was approved March 30, 1887 (Laws 1887, p. 84, § 107), only four days afterwards. We should also bear in mind that sections 9493 and 9494 are dealing chiefly with elevated and underground street railways, which, from common observation, we know would in all probability be constructed only in the first and second class cities of the state; and from the same source we know that many cities of the third class authorize the construction and operation of ordinary surface street railways upon and over the streets thereof.

[2] With the existence of those well-known facts, we must presume that the Legislature of 1887 had knowledge of this classification of the cities of the state, as well as the different kinds of transportation required by each, and we must also presume that that classification and those requirements influenced the Legislature in its passage of the acts approved March 26 and 30, 1887. These facts throw much light upon the intention of the Legislature when it passed them. Those facts will greatly aid us in our consideration of the question as to whether or not those acts are in conflict with each other.

It must be conceded that, according to the letter of the act approved March 26, 1887, now sections 9493 and 9494, R. S. 1909, it is general in its provisions, and, if standing alone, is sufficiently broad in language to include all classes of incorporated towns and cities of the state, including cities of the third class; also that the act approved March 30, 1887, now section 9250, R. S. 1909, is special, and only applies to cities of the third class. But it by no means follows from that concession that the two acts are inconsistent and irreconcilable with each other.

In the case of *State ex inf. v. Amick*, 247 Mo. 271, 152 S. W. 591, the same contention of inconsistency was made as to sections 3896 and 5828, R. S. 1909, both enacted in

1879. The former related to any vacancy in the office of any circuit judge of the state and the mode or manner of filling the same, and the latter related to any vacancy in any state or county office, and the mode or manner of filling the vacancy; it being conceded that the office of a circuit judge is a state office. In passing upon that contention in that case, this court on page 289 of 247 Mo., on page 596 of 152 S. W., used this language:

"Sections 3896 and 5828 were both enacted in 1879, and have come down unchanged through the various revisions of the statutes. If these two statutes are consistent, and can stand together, then it is the duty of the court to harmonize rather than to hunt for conflict of statutory provisions in *pari materia*.

"In discussing this canon of statutory construction, the Supreme Court of the United States, in the case of *Frost v. Wenie*, 157 U. S. 58 [15 Sup. Ct. 532, 39 L. Ed. 614], used this language: 'It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the Legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore to displace the prior statute.'

"And in the case of *State ex rel. v. Patterson*, 207 Mo. loc. cit. 144 [105 S. W. 1048], this court used the following language: 'All consistent statutes relating to the same subject, and hence briefly called statutes in *pari materia*, are treated prospectively and construed together, as though they constituted one act. This is true where the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session or on the same day. Sutherland, *Statutory Construction*, § 283. And 'a statute must be construed with reference to the system of which it forms a part. And statutes on cognate subjects may be referred to, though not strictly in *pari materia*.' *Id.* § 284.'

"In the case of *Humphries v. Davis*, 100 Ind. loc. cit. 284 [50 Am. Rep. 788], the Supreme Court of Indiana, speaking through Elliott, J., said: 'A statute is not to be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to furnish in itself all the light needed for its construction. It is proper to look at other statutes, to the rules of the common law, to the sources from which the statute was derived, to the general principles of equity, to the object of the statute, and to the condition of affairs existing when the statute was adopted [citing authorities]. \* \* \* "Construction has ever been a potent agency in harmonizing the operation of statutes with equity and justice." Statutes are to be so construed

as to make the law one uniform system, not a collection of diverse and disjointed fragments. When this principle of construction is adopted, "an enactment of to-day has the benefit of judicial renderings extending back through centuries of past legislation." Bishop, *Written Laws*, § 242b. "A statute," says the author just referred to, "must be construed equally by itself and by the rest of the law. The mind of the interpreter, if narrow, will stumble." "The completed doctrine, resulting from a bringing together of its parts, is that all laws, written and unwritten, of whatever sorts and at whatever different dates established, are to be construed together, contracting, expanding, limiting, and extending one another into one system of jurisprudence as nearly harmonious and rounded as it can be made without violating unyielding written or unwritten terms." Bishop, *Written Laws*, §§ 118a, 86.

"If we observe and give force and effect to the foregoing rules of construction in interpreting sections 3896 and 5828, then we must read them together—that is, read the one into the other as one enactment. *State ex rel. v. Patterson*, supra [204 Mo.] loc. cit. 148 [105 S. W. 1048]. And by so doing sections 5828 and 3896 would read substantially as follows: Whenever any vacancy shall occur in any state or county office other than the office of Lieutenant-Governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the Governor; and the person so appointed shall continue in office until the first Monday in January next following the first general election: Provided, that if the office of the judge of any court of record in this state shall become vacant, such vacancy shall be filled by appointment of the Governor until the next general election held after such vacancy occurs, when the same shall be filled by election for the residue of the unexpired term.

"By so reading and construing those two sections together, we eliminate all seeming conflict that exists between them and harmonize all the laws of the state regarding vacancies in state and county offices and the mode of filling the same, and at the same time give full force and effect to the plain and clear meaning of the Legislature as expressed in the two sections, which is always the main object to be obtained in construing any statute. Laws should be so construed as to give their intent paramount effect. *City of St. Louis v. Lane*, 110 Mo. 254 [19 S. W. 533].

"There is another rule of statutory construction, which, if followed in the interpretation of these two sections of the statute, the conclusions reached would be the same as before stated. That rule is stated in the case of *Ruschenberg v. Railroad*, 161 Mo. 70 [61 S. W. 626], in substantially the following language: Where there are two acts, and the provisions of one apply specially to a particular subject, which clearly includes the matter in question, and the other general in its terms, and such that, if standing alone, it would include the same matter, and thus conflict with each other, then the former act must be taken as constituting an exception to the latter or general act, and not a repeal of the former, and especially is this true when such general and special acts are contemporaneous. To the same effect are the following cases: *State ex inf. v. Dabbs*, 182 Mo.

loc. cit. 366 [81 S. W. 1148]; *State ex rel. v. Frazier*, 98 Mo. 426 [11 S. W. 973]; *State ex rel. v. Slover*, 134 Mo. loc. cit. 19 [31 S. W. 1054, 34 S. W. 1102].

"It is perfectly clear, from reading the two sections, that the provisions of section 3896 apply specially to vacancies in the office of judge of courts of record and the manner of filling them, and that those of section 5828 are general in its provisions and are sufficiently broad, if standing alone, to embrace vacancies in the office of the judge of courts of record, and if the former is not to be construed to be an exception to the latter, then there would be a clear conflict between them; but since both sections were enacted at the same time and stand in *pari materia*, we must interpret them together, according to the rule before mentioned, and when so done the legislative intent is clear, and we must hold that section 3896 is an additional exception to those stated in section 5828."

The statutory rule of construction announced in the case of *State ex inf. v. Amick*, supra, has been expressly affirmed in the following cases: *State ex rel. v. Drainage District*, 252 Mo. 345, loc. cit. 363, 158 S. W. 633; *State ex rel. v. Gordon*, 261 Mo. 631, loc. cit. 648, 170 S. W. 892; *State ex inf. v. Duncan*, 265 Mo. 26, loc. cit. 46, 175 S. W. 940, Ann. Cas. 1916D, 1.

[3] Applying the rule just announced to the legislation under consideration, we must hold that section 9250, being special and only applicable to cities of the third class, is an exception to sections 9493 and 9494, which are general in their provisions, which, if standing alone, would include all incorporated cities and towns of all classes, and would be in conflict with each other; but by this construction all conflict is avoided, and full force and effect is given to all three of said statutes, which it is the duty of the court to do, in construing statutes, especially those standing in *pari materia*.

We are therefore of the opinion that the city of Cape Girardeau had the legal power to grant to the Cape Girardeau-Jackson Interurban Railway Company the authority to construct and operate a street car system within said city; also that said section 9250 is not in conflict with sections 9493 and 9494.

[4] II. Counsel for the defendant next insist that specific performance of the contract should be denied because the evidence fails to show that the plaintiffs delivered to the defendant all of the stock and bonds of said Cape Girardeau-Jackson Interurban Railway Company, together with the franchises required by the contract of purchase involved herein.

Ordinarily, a court of equity will not decree specific performance of a contract, without the evidence shows that the plaintiff has fully complied with his part thereof; but this is not an inflexible rule. If the evidence discloses the fact that the plaintiff has performed a part of his contract, and

that he was ready, able, and willing to perform the remainder thereof within the time specified in the contract, but was prevented from so doing by the misconduct of the defendant; or where said misconduct made it useless for the plaintiff to tender compliance within that time. *Mitchell's Heirs v. Long*, 5 Litt. (Ky.) 71; *Minneapolis & St. Louis Ry. Co. v. Cox*, 78 Iowa, 306, 41 N. W. 24, 14 Am. St. Rep. 216; *Amer. & Eng. Encyclopedia*, vol. 22, page 929 (1st Ed.).

Under such circumstances the court will decree specific performance, if it be shown that he is able and willing to perform the balance of the contract at the time of the trial. In other words, if the undertaking of the plaintiff is joint and contemporaneous with that of the defendant, the failure of the former to perform after he has been notified, by the words or conduct of the defendant, that further performance would be useless, will not prevent the court from decreeing specific performance in his favor.

[5] In applying the rule just stated to the facts of this case, it is necessary to state that the defendant under the first part of the contract sent or took over all of the physical property of Street Railway Company and has been operating the same ever since January, 1918. And, as justly stated by counsel for plaintiffs, the defendant, after the former had agreed to sell to the latter their entire holdings,

"induced the Street Railway Company to surrender its franchise to operate an electric light and power plant in the city of Cape Girardeau and to make contracts with the city of Cape Girardeau for lighting; it induced the respondent Railway Company to surrender its rights under its original franchise to operate a telephone system; it induced the stockholders of the Street Railway Company to surrender and cause to be canceled their certificates of stock in said Railway Company, and to issue new certificates thereof to the appellant and its officers; it induced the city of Cape Girardeau to grant appellant's subsidiary corporation a new franchise and contracts for operating and furnishing light and water to the city of Cape Girardeau and its inhabitants; it induced the Public Service Commission of the state of Missouri to approve that franchise and its contracts with the city of Cape Girardeau for water and light, and represented to said Public Service Commission on the same day that its contract with the respondents ought, in equity, to be regarded as having been fulfilled and performed prior to the creation of the State Board of Public Service."

No one can read this record and reach any other conclusion than that the plaintiffs, in

due time, performed their part of the contract as fully as defendant's conduct would permit, and have at all times been and still are willing, ready, and able to perform the remainder of their part of the contract, when permitted to so do by the defendant.

Under those facts, a court of equity will compel defendants to specifically carry out its obligations as stated in the contract, as damages are wholly inadequate to measure the loss or fully compensate the plaintiffs for what they have and will suffer, if the defendant is not compelled to specifically perform its contract. *Paris v. Haley*, 61 Mo. 453; *Price v. Morgan*, 10 Atl. 663; *Amer. & Eng. Encyclopedia*, vol. 22, pp. 957, 961, and 963 (1st Ed.).

Moreover, the evidence is uncontradicted that up to the very moment when defendant notified the plaintiffs that it would not complete the performance of its part of the contract, because of the controversy which arose over the charter powers of the Cape Girardeau-Jackson Interurban Railway Company, and the franchise of the Cape Girardeau Street Railway Company, the plaintiffs were ready, willing, and able to complete the performance of its part thereof, and unquestionably would have done so, had it not been for the misconduct of the defendant before mentioned. The plaintiffs have thus parted with the control of all of the physical property mentioned in the contract and surrendered all of their franchises connected therewith, and the defendant has acquired the former, and with the assistance of the plaintiffs induced the city of Cape Girardeau to grant it, in lieu thereof, new franchises similar in all respects to those surrendered, all on the faith of said contract, valued at several hundred thousands of dollars, which, by the way, can never be restored to plaintiffs, and now to deny specific performance of that contract would be unconscionable and a travesty upon equity and justice.

We are therefore of the opinion that the trial court, on the merits of the case, properly overruled both of the defendant's demurrers to the evidence, and in this connection it may not be out of place to state that a demurrer to the evidence has no standing in an equity case.

There are a score or more propositions presented and discussed by counsel for the defendant in their briefs, but, after giving them due consideration, we are of the opinion that there is no merit in any of them.

For the reasons stated, the judgment of the circuit court is affirmed. All concur.

(277 Mo. 474)

STATE ex rel. HALLER v. ARNOLD et al.  
(No. 21382.)

(Supreme Court of Missouri, in Banc. March 21, 1919.)

## 1. ELECTIONS —145—CERTIFICATE OF NOMINATION—FILING.

Where nonpartisan candidate for president of board of aldermen, filing his certificate of nomination on last day permitted by statute, failed to file with it receipt showing payment of fee required by Rev. St. 1909, § 6015, as amended by Laws 1913, p. 337, because of absence of treasurer, but tendered payment on the following day, and filed evidence thereof with election commissioners, he was entitled to have his name placed on official ballot.

## 2. ELECTIONS —145—CERTIFICATE OF NOMINATION—FILING.

To give to Rev. St. 1909, § 6015, as amended by Laws 1913, p. 337, a construction requiring absolutely as a condition precedent to placing of name of nonpartisan candidate on official ballot, that treasurer's receipt required by said section be filed contemporaneously with certificate of nomination, would unduly circumscribe the right to be a candidate contrary to Const. art. 2, § 9, that "all elections shall be free and open."

## 3. ELECTIONS —145—CERTIFICATE OF NOMINATION—FILING.

If proposed candidate is not in default, and death or absence of city treasurer prevents payment of fee required by Rev. St. 1909, § 6015, as amended by Laws 1913, p. 337, and obtention of required receipt in time to file it with certificate of nomination, all that should be required is the earliest possible payment and obtention and filing thereafter of such receipt.

Original proceedings in mandamus by the State, on the relation of Julius Haller, against Glendy B. Arnold and others, members of the Board of Election Commissioners of the City of St. Louis, and Henry C. Menne, Treasurer of the said City. Peremptory writ issued as prayed.

Taylor R. Young, of St. Louis, and T. T. Hinde, of Madison, Ill., for petitioner.

Frank W. McAllister, Atty. Gen., and S. S. Skelley, Asst. Atty. Gen., for respondents.

FARIS, J. This is an original proceeding by mandamus whereby it is sought to compel respondents Arnold, Buder, Lammert, and Dempsey, who compose the board of election commissioners of the city of St. Louis, to place and cause to be printed the name of petitioner Haller on the official ballot of an election to be held in said city of St. Louis on the 1st day of April, 1919, as a nonpartisan candidate for the office of president of the board of aldermen of said city, and to compel respondent Menne, who is the treasurer of the city of St. Louis, to receive and receipt for the deposit fee of \$60 which

is required by law to be paid by all candidates for said office.

It is stipulated by counsel for petitioner and by the Attorney General of Missouri, as counsel for all of the respondents, that the issuance of our alternative writ of mandamus shall be regarded as waived, that the petition herein shall stand as and for the alternative writ of mandamus, and that the case shall be submitted for the immediate judgment of this court upon a general demurrer to the petition, standing as and for such alternative writ. The case is therefore at issue upon a cold question of law, which question is to be resolved by the application of the ruling statutes and law to the agreed facts as the petition recites these facts.

The petition is therefore pertinent. It reads, omitting merely formal parts, as follows:

"Your petitioner, Julius Haller, states that he is, and has been for many years last past, a resident and registered voter and elector of and in the city of St. Louis, state of Missouri, a city having more than 400,000 inhabitants and having, among other offices, the elective office of president of the board of aldermen, and that, as such resident and elector, petitioner is eligible to said office of president of the board of aldermen; that said city has a board of election commissioners consisting of four members, the present members being, and were on the 17th day of March, 1919, 1, 2, 3, 4, four of the above-named respondents, having such official duties as is by law provided; that said city also has the office of said treasurer, and that the respondent 5 is now, and was on the 17th day of March, 1919, the said treasurer of said city.

"That said city has, in pursuance of law in such case made and provided, called and caused to be given notice thereof an election to be held in and for said city on the 1st day of April, 1919, at which said election there are to be elected officers to fill the several city offices, including the office of president of the board of aldermen of said city.

"That petitioner, desiring to become a candidate for said office of president of the board of aldermen of said city, and to have his name appear on the official ballot as a nonpartisan candidate therefor, prior to March 17th circulated and procured the signatures of registered electors of said city to a nomination petition or certificate of nomination, being in words and figures as follows:

"To the Honorable the Board of Election Commissioners of the City of St. Louis, Missouri:

"We, the undersigned registered electors residing within the city of St. Louis, Missouri, being bona fide supporters of, and not having aided, and who will not aid, in the nomination of any other candidate for the office hereinafter mentioned, do hereby nominate Hon. Julius Haller as nonpartisan candidate for the office of president of the board of aldermen of the city of St. Louis, Missouri, at the election to be held April 1, 1919.

Signature.	Residence.	If signer has moved since registering state where he registered from.	Ward	Prec.



"That said petition or certificate was in fact signed by 3,412 registered electors residing in said city, being a number in excess of 2 per cent. of the entire votes cast for mayor at the last preceding election of said city for that office.

"That thereafter, on the 17th day of March, 1919, petitioner, in compliance with the provisions of section 6015 of the statute as amended by Laws of 1913, p. 337, called at the office of respondent 5, city treasurer as aforesaid, for the purpose of paying in the sum of \$60 and taking his receipt therefor, to be thereafter filed with said election commissioners, but was then unable to find said treasurer at his office or elsewhere; said sum of \$60 being equal to 2 per cent. of the salary for one year of said office of president of the board of aldermen of said city, for which petitioner is the candidate.

"That thereafter, on the 17th day of March, 1919, being the last day for filing certificates of nomination, petitioner presented to and filed with said board of election commissioners his said certificate of nomination, signed as aforesaid, which was, and is now, retained by said board, but by its voting action said board has officially ruled and declared that said filing is not in compliance with the law and for the sole reason that the receipt of said treasurer for a deposit with him of said filing fee was not filed with said board together with said certificate of nomination filed as aforesaid, and for that reason said board informed petitioner that his name would not appear on the official ballot to be voted at said election.

"That thereafter, on the 18th day of March, 1919, petitioner found said treasurer and tendered to him said filing fee in the sum of \$60, and demanded that said treasurer receive and receipt for the same, that petitioner might be thus enabled to file said receipt with said board of election commissioners, but this the said treasurer declined and refused to do, then stating to petitioner he was advised by the city counselor of said city not to accept or receipt for said fee, but said treasurer did on that date give petitioner a written statement over his signature showing that petitioner had made the tender and demanded a receipt therefor as above stated.

"That thereafter, on the 18th day of March, 1919, petitioner filed said written statement of said treasurer with said board of election commissioners and again requested and demanded that his name be by said board ordered printed and printed on the official ballot, to be voted at said election as a nonpartisan candidate for the office of president of the board of aldermen of said city, but this the said board again refused, and yet refuses, to do, and will not do unless so ordered by the court.

"Petitioner further avers that by a proper construction of the language of the provisions of the laws of the state of Missouri governing such nominations it was not made obligatory upon him to pay said filing fee and file said treasurer's receipt therefor with said board of election commissioners thereafter and at the time of filing his said certificate of nomination as aforesaid; that the filing of such receipt at the time of filing his certificate of nomination is not by law made a prerequisite to entitle petitioner to have his name printed on the of-

ficial ballot; that, if by a proper construction of the language of the statute it can be said the receipt is required to be filed with the certificate of nomination, such provision must be held to be only directory, and not mandatory.

"Petitioner further avers that if, as claimed and contended for by respondents, section 6015 of the statute, as amended by Laws of 1913, p. 335, requires petitioner to pay said filing fee before filing his certificate of nomination, then said section is unconstitutional and void as being in conflict with section 9, art. 2, of the state Constitution, providing that 'all elections shall be free and open'; and petitioner hereby expressly raises this constitutional question, and asks the court to pass on the same in considering this petition.

"Petitioner further avers that respondents, and each of them, have refused, and yet refuse, to perform their respective official duties in the premises, as hereinabove alleged; that the matter herein involved is not only of personal interest to petitioner, but is also of vital public interest to the citizens of the city and state at large; that because of this, and the exigencies of the matter, this court ought to entertain and determine this cause speedily, and to that end should suspend its rule No. 33 as to the five-day notice therein provided.

"Wherefore your petitioner, being wholly without other adequate remedy, prays the issuance by this court of a writ of mandamus directing said board of election commissioners, and each member thereof, to place the name of petitioner on the official ballot to be voted at said election as a nonpartisan candidate for said office of president of the board of aldermen of said city; that, if by the court deemed necessary to the rights of petitioner in the premises, the respondent Henry C. Menne, as treasurer aforesaid, be directed to accept and receipt for said \$60 filing fee, which petitioner stands willing and ready to pay under the direction of the court; and petitioner prays for such other and further relief to which by reason of the premises he may be entitled."

[1] Upon the above facts how stands the law? It is obvious that the sole point presented involves the single question of the meaning, when applied to the agreed facts, of section 6015 of the act of February 24, 1913 (Laws 1913, pp. 337, 338), repealing an act which amended article 11 of chapter 43, Revised Statutes of 1909, and enacted divers new sections in lieu thereof. This section reads thus:

"Any person or persons filing certificates signed by electors for 'nonpartisan candidates' as provided in section 6034a of this act shall pay the same sum of money required by this act to be paid by any candidate of a political party for the office for which he proposes to the city treasurer, take a receipt therefor and file said receipt with his certificate of nomination; said sum of money so paid shall go into the general revenue fund of the city." Section 6015, Laws 1913, pp. 337, 338.

The sole question at issue may be stated in yet a narrower compass. That question is: Does section 6015 of the act supra, above quoted, absolutely require, as a condition

precedent to the placing by the board of election commissioners of the name of a proposed nonpartisan candidate on the official ballot, that the receipt of the city treasurer for the deposit of the sum of \$80 shall be filed along with and contemporaneously with the certificate of nomination of such proposed candidate?

[2] We have concluded that it does not. The affirmative of the question stated and presented by the facts here at issue would in our opinion and in the light of the language of the above section be too narrow a view to take of the meaning of that section. Such a view would inevitably restrict and circumscribe the right of a citizen to be a candidate for office within such limits and hedge the privilege about with such conditions as materially to impinge upon the guarantee of the Constitution that "all elections shall be free and open." Section 9, art. 2, Constitution 1875. It will be noted that the statute uses the word "with" only, without qualifying this word by the word "contemporaneously" or other similar word connoting or importing simultaneity of filing of both the receipt for the deposit and the certificate of nomination. Clearly the language used imports and requires the filing of this receipt at the same place and with the same officer with whom such certificate of nomination is filed. We may go further and concede that it requires, no compelling reason or valid excuse to the contrary existing, the filing of the receipt contemporaneously with the filing of the certificate of nomination; but, as forecast, the application of such latter iron-bound rule in all cases would so far work a hardship and a denial of free and open elections as to impinge upon constitutional rights. A brief reference to the agreed facts illustrates this: Here petitioner endeavored to pay the required deposit fee of \$80 to the proper officer, that is to say, to respondent Menne, as treasurer of the city of St. Louis, on the last day allowed to him by the letter of the law within which to make such payment, and likewise endeavored to obtain from such treasurer the required receipt therefor. But petitioner was unable to make such payment on that specific day, solely because he was unable to find either in his office or elsewhere about the city the only officer to whom by law such payment could be made. It will be observed that this payment can be made, perforce the statute under discussion, only to the treasurer of the city of St. Louis in person, and that the receipt of this officer is made the sole evidence of the payment of such deposit. Pursuing the facts further, it will be observed that on the day following the last day on which the letter of the applicatory statute permitted the filing of certificates of nomination the

petitioner made a tender of the required deposit fee to the respondent Menne, as city treasurer, and requested from the latter the proper receipt therefor, which request was refused solely because such tender was by respondent Menne deemed to be out of time.

It is manifest that any eligible candidate for office is entitled to the whole of the last day allowed by law within which to submit himself to the electors for their suffrages. In a case like this, where the proposed candidate is in no wise at fault (the argument that he should have made up his mind earlier obviously having no weight, by reason of the truth of the premise last above), ought he to be deprived of the privilege of running for a public office by the mere adventitious fact of the absence from his office, or from the city, or from the state, of the only officer from whom the required official receipt can under the letter of the law be obtained? The treasurer might be ill, or a case can be imagined where the death of the treasurer might occur on the last day for filing prescribed by the letter of the statute, and wherein it would be impossible to appoint his successor in time to have such successor accept the required deposit and issue the required receipt therefor.

[3] In such case the untrammelled constitutional privilege of all eligible persons to become candidates for office requires us, if we are to escape holding this statute invalid for that it contravenes the spirit and the letter of the Constitution in denying this privilege, to say that, if the proposed candidate be in no wise in default, and the death of the treasurer, or the latter's illness, or his absence from his office, from the city, or from the state, shall prevent the making of the required deposit and the obtention of the required receipt on the day prescribed by the letter of the statute, all that should be required is the earliest possible payment and obtention and filing thereafter of such receipt, provided such filing of the receipt shall be in time to allow of the performance by the board of election commissioners of the very first of the ensuing duties incumbent upon them by law. The fair, just, and equitable construction by this court of the election laws and machinery of this state in the analogous cases of *Nance v. Kearby*, 251 Mo. 374, 158 S. W. 629, and *State ex rel. v. Seibel*, 262 Mo. 220, 171 S. W. 69, ruled by this court in opinions by Lamm, C. J., requires such a construction of this statute at our hands. The demurrer should be overruled.

It follows that the contention of petitioner should be sustained, and our peremptory writ of mandamus should issue as prayed. Let this be done.

BOND, C. J., and WALKER, BLAIR, and WOODSON, JJ., concur.

**GARBER v. MISSOURI PAC. RY. CO.**  
(No. 18674.)

(Supreme Court of Missouri, Division No. 1  
March 1, 1919. Rehearing Denied  
March 28, 1919.)

**1. PLEADING**  $\S$  365(2) — **MOTION TO STRIKE COUNT—NATURE.**

Motion to strike out count of petition is not in the nature of a demurrer to the petition.

**2. APPEAL AND ERROR**  $\S$  518(6)—**RECORD—MOTION TO STRIKE OUT COUNT.**

Court's action in overruling motion to strike out count from petition must be preserved in the bill of exceptions, such motion not being in the nature of a demurrer.

**3. APPEAL AND ERROR**  $\S$  518(3)—**RECORD—DEMURRER.**

A ruling on a motion which in substance amounts to a demurrer is a part of the record proper and requires no preservation in the bill of exceptions.

**4. APPEAL AND ERROR**  $\S$  518(1)—**BILL OF EXCEPTIONS—MOTIONS.**

Court's ruling on motion which in substance does not amount to a demurrer must be preserved in the bill of exceptions.

**5. APPEAL AND ERROR**  $\S$  549(1)—**RECORD—EXCEPTIONS.**

Exceptions have no place in the record proper.

**6. APPEAL AND ERROR**  $\S$  900—**REVIEW—PRESUMPTIONS.**

There is a presumption of right action on the part of the trial court, which must prevail on appeal in absence of a showing to the contrary.

**7. APPEAL AND ERROR**  $\S$  919—**REVIEW—PRESUMPTIONS—MOTION TO STRIKE OUT COUNT OF PETITION.**

Court's action in sustaining motion to strike out third amended count of petition, on the ground that it set up a totally different cause of action from counts pleaded in original petition, will not be reviewed on appeal, where counts of original petition were not pleaded by third amended petition and are not shown by record on appeal; it being presumed, there being no showing to the contrary, that court's action was right.

**8. PLEADING**  $\S$  365(3)—**MOTION TO STRIKE OUT COUNT—ORDER—CAPTION OF PETITION.**

In action for death of railroad employe while engaged in interstate commerce, where count of amended petition basing action upon federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) was stricken because it set up a different action from original petition in which plaintiff brought action under state statute as surviving widow and in which there was no averment of interstate commerce, it was proper to strike from the caption of the petition the words designating plaintiff as administratrix of employe's estate; the action being by plaintiff individually and not in her representative capacity as administratrix.

**9. APPEAL AND ERROR**  $\S$  549(5)—**RECORD—BILL OF EXCEPTIONS.**

Court's ruling on motion to strike out certain words from the caption of the petition will not be reviewed on appeal, where an exception thereto was not preserved in the bill of exceptions.

**10. COMMERCE**  $\S$  27(6)—**"INTERSTATE COMMERCE"—RAILROAD EMPLOYE.**

Locomotive fireman on train of interstate commerce, who was injured after the train had completed its journey and after locomotive had been uncoupled from train and was being placed on a storage track, was injured while engaged in interstate commerce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

**11. COMMERCE**  $\S$  8(6)—**INTERSTATE COMMERCE—DEATH OF RAILROAD EMPLOYE—RIGHT OF ACTION.**

Widow of a railroad employe killed while engaged in interstate commerce cannot recover for his death as his surviving widow under the state statutes, the only right of action therefor being in employe's administrator under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665).

Appeal from Circuit Court, Benton County; C. A. Calvird, Judge.

Action by Josephine Garber, as widow and as administratrix of the estate of H. S. Garber, deceased, against the Missouri Pacific Railway Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

W. S. Jackson, of Warsaw, and C. W. Prince, E. A. Harris, J. E. Westfall, and J. N. Beery, all of Kansas City, for appellant.

Thomas T. Ralley and Jeffries & Corum, all of St. Louis, for respondent.

**GRAVES, J.** Action for negligence. Case was tried upon a third amended petition. The only thing in the record as to previous petitions is the following:

"The petition was filed on the 11th day of May, 1912, plaintiff therein being Josephine Garber, the widow of H. S. Garber, deceased. Thereafter, and on the 15th day of December, 1914, the plaintiff filed her second amended petition against the defendant, wherein Josephine Garber, as widow, and Josephine Garber, administratrix of the estate of H. S. Garber, deceased, were plaintiffs."

The accident occurred November 13, 1911. Under the federal act, an action thereon was barred in two years, or on November 13, 1913.

The third amended petition is thus entitled:

"Josephine Garber and Josephine Garber, Administratrix of the Estate of H. S. Garber, Deceased, Plaintiff, v. Missouri Pacific Railway Company, a Corporation, Defendant."

This petition is in three counts. The first two is under the state statutes as to deaths occurring by negligence. The third is under the federal Employers' Liability Act (April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]). The death of plaintiff's decedent (her husband) is alleged to have been on the 13th of November, 1911. The third amended petition was filed December 14, 1915. What became of the first and second amended petitions does not appear. We take it that they were abandoned. The abstract of record before us shows no petition but the third amended petition. The defendant filed motion to strike out the third count of the third amended petition, in form as follows:

"Now comes defendant and moves the court to strike the third count of plaintiff's third amended petition from the files of this court, and as grounds for said motion defendant assigns the following reasons:

"First. Because the proof required under the original petition would be insufficient under the third count of the third amended petition.

"Second. Because the evidence required to support the original petition would not warrant a recovery under said third count.

"Third. Because the original petition is founded on the laws of the state, and the third count of the third amended petition is founded on an act of Congress of the United States, known as the federal Employers' Liability Act.

"Fourth. Because to allow the plaintiff to proceed to trial on said third count would constitute a departure from law to law.

"Fifth. Because the same measure of damages is not applicable to the original petition and to the damages claimed in said third count of the third amended petition.

"Sixth. Because in the said third count of said third amended petition plaintiff has departed from the cause of action set forth in her original petition.

"Seventh. Because to permit plaintiff to proceed to trial on said third count would be to permit her to introduce a new and distinct cause of action, which was barred at the time the said third amended petition was filed, and at the time the prior amended petitions herein were filed, by section 6 of the act of Congress, known as the federal Employers' Liability Act, approved April 22, 1908 [U. S. Comp. St. § 8662].

"Eighth. Because an additional party is made plaintiff by the third amended petition, and the evidence required thereunder is of a different character than that required on the original petition, and the damages are measured by a different standard.

"Wherefore, defendant prays that said third count of said third amended petition be stricken from the files."

On the same day defendant filed its motion to strike out a part of the caption of plaintiff's petition, which motion is as follows:

"Now comes the defendant and moves the court to strike from the caption of plaintiff's third amended petition the following words, 'and Josephine Garber, Administratrix of the Estate of H. S. Garber, Deceased,' and for the grounds of said motion assigns the following reasons:

"First. Because the plaintiff has no right under the laws of this state, upon which the first and second counts of plaintiff's third amended petition are based, to sue for the death of her husband in her alleged capacity as administratrix of his estate.

"Second. Because plaintiff, in her representative capacity, is not a necessary party to a complete determination of the matters set forth in the said first and second counts of her third amended petition.

"Third. Because plaintiff cannot, under the laws of this state, sue for the death of her husband in her representative capacity as administratrix of his estate.

"Wherefore, defendant prays that this motion be sustained."

Both of these motions were sustained by the trial court. The bill of exceptions shows no exceptions saved to the action of the court in so sustaining these motions. It is true that in the abstract of record proper it is stated that exceptions were saved to this action of the court, but nothing of the kind is found in the abstract of the bill of exceptions.

The trial court then heard the evidence for plaintiff. The defendant then offered a written stipulation as to facts, and plaintiff followed with rebuttal testimony. At the close of this evidence, the following occurred:

"By Mr. Prince: Plaintiff asks leave to amend first and second counts of their petition, by alleging the fact that Mrs. Josephine Garber has been appointed administratrix of the estate of H. S. Garber, and is now the legally authorized and acting administratrix of the estate of said H. S. Garber.

"By Mr. Corum: Defendant objects for the reason that would constitute a departure from the cause of action alleged in the original petition, and would be the same case which the court has already ruled on, and ruled out on at least two occasions.

"By the Court: Objection sustained. Leave to amend refused.

"To which action of the court the plaintiff then and there excepted and now excepts.

"Plaintiff closes.

"Defendant closes."

The court thereupon gave a peremptory instruction to find for defendant, whereupon the plaintiff took an involuntary nonsuit, and thereafter duly moved to set the same aside, which was by the trial court refused. Plaintiff appealed, and the matters are here. This outlines the case. Other matters of consequence can best be stated in the course of the opinion.

[1-5] I. The status of the record in this case should be first determined. Appellant urges error upon the part of the trial court in sustaining the two motions, set out in the statement, supra. Of these in order: The motion to strike out the third count is not in the nature of a demurrer to the petition. Its overruling, therefore, became a matter of exception, which must be preserved in the bill of exceptions. A demurrer, or even a

motion, which in substance amounts to a demurrer, is a part of the record proper and requires no preservation in the bill of exceptions; but this is not true of other motions. This motion and the exception to its overruling is not preserved in the bill of exceptions. Exceptions have no place in the record proper. It therefore follows that this alleged error has been rendered lifeless by the failure to make and properly preserve the exception. The propriety of the third count in the petition is not really before us for review. The right of review here was lost in the failure aforesaid. Our rulings have been so consistent and of such long standing upon this point that citation of cases may well be omitted.

[6, 7] II. Even if the exception had been well preserved, the action nisi would have to be sustained here, upon the record before us. Nowhere in this record appears either the original petition or any of the amended petitions, prior to the third amended petition. What kind of an action was stated in those petitions (especially in the original one) is totally in the dark, so far as this court is concerned. We are in no position to pass upon the motion without having more before us. There is a presumption of right action upon the part of the trial court, and this presumption must prevail, unless a showing is made which overthrows the presumption. There is no showing in this record. As said, the original petition is not presented to us. We cannot say whether the trial court was right or wrong in holding that the third count of the petition set up a totally different cause of action. The condition of the record precludes this kind of a review.

[8, 9] III. Coming now to the motion to strike out certain words from the caption of the petition: The motion in full is in the statement, *supra*. When the motion to strike out the third count of the petition had been sustained, it was perfectly proper to sustain this motion. There was then pending only an action under the state law. In the action left, "Josephine Garber, Administratrix of the Estate of H. S. Garber, Deceased," had no place. The date of the death must not be overlooked, in the consideration of the several questions involved in this record; also, that no averment of interstate commerce is found in either count 1 or 2 of the petition. But aside from this, it should be said that this motion is not in the nature of a demurrer to the petition, and that no exception to its overruling was preserved in the bill of exceptions. It is purely a motion "to strike out," and as such an exception to the action of the trial court in overruling the motion should have been preserved in the bill of exceptions. The bill of exceptions does not so show.

IV. With the questions raised by the two motions aforesaid out of the way, there is

left the merits of the case as an action under the statutes of this state. My views on the character of the two actions, i. e., the action under the state law, and the action under the federal law, are fully expressed in my concurring opinion in *Sells v. Railroad*, 266 Mo. loc. cit. 188, 181 S. W. 106. From those views I have never intentionally departed. I concurred in *Pipes v. Railroad*, 267 Mo. 385, 184 S. W. 79. This was an action by the injured party himself. It was a common-law action (*Pipes v. Railroad*, 267 Mo. loc. cit. 392, 184 S. W. 79), and the question of a personal right of action, or a representative's right of action, was not in that case. What was said of the *Moliter Case*, 180 Mo. App. 84, 168 S. W. 250, in the *Pipes Case*, escaped my attention. I had in mind the great fact that the plaintiff was the injured party and was suing for himself, and was not the dependent of a deceased person, or the representative of the estate of a deceased person. This, in my judgment, took it out from the line of thought I had in the *Sells Case*, *supra*. So much by way of clearing up matters.

In the instant case, the following stipulation was read into the record:

#### "Stipulation.

"It is hereby stipulated between attorney for plaintiff and attorney for defendant that it shall be admitted at the trial of this case that the deceased husband of plaintiff immediately prior to his death had been engaged as fireman on one of defendant's locomotives pulling a train of interstate commerce to Kansas City, Missouri, and that at the time plaintiff's husband met his death, said train had completed its journey to Kansas City and said engine had been uncoupled from said train containing interstate commerce, and was being placed, by the engineer in charge of said engine and by plaintiff's husband, on a storage track, belonging to and used by the defendant, in connection with its business as a common carrier, where said engine was to remain until required for further use by defendant the succeeding day.

"[Signed] George F. Longan.

"C. W. Prince,

"Attorney for Plaintiff.

"C. D. Oorum,

"Attorney for Defendant."

[10, 11] This stipulation was the only thing introduced by defendant. By virtue of it, there was an admission by plaintiff to the effect that deceased was engaged in interstate commerce at the time of his accident and death. Under this admission, the plaintiff could not recover under the state law. Vide concurring opinion in *Sells v. Railroad*, *supra*. I can add nothing to the views there expressed.

These views make proper the action of the court in refusing the amendment tendered upon the close of the whole case.

The judgment nisi was proper, and is therefore affirmed.

BLAIR, P. J., concurs in separate opinion.  
WOODSON, J., concurs.

BOND, J., concurs in paragraph 2 and in result.

BLAIR, P. J. (concurring). The principles announced and cases cited in *Railway v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983; *Seaboard Air Line v. Renn*, 241 U. S. loc. cit. 294, 38 Sup. Ct. 567, 60 L. Ed. 1006; *Seaboard Air Line v. Koennecke*, 239 U. S. loc. cit. 354, 38 Sup. Ct. 126, 60 L. Ed. 324; *M., K. & T. Ry. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; *Salzer v. Coal Co.*, 246 Fed. 794, 159 C. C. A. 96; and *Walker v. Iowa Central Ry.* (D. C.) 241 Fed. 395—are applicable in this case (*Central Vermont Ry. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252) and require an affirmance of the judgment.

#### DE MAYO v. KANSAS CITY. (No. 11812.)

(Supreme Court of Missouri, Division No. 1.  
March 1, 1919. Rehearing Denied  
March 28, 1919.)

#### MUNICIPAL CORPORATIONS §733(4)—DEFECTIVE HYDRANTS—FLOODING BUILDING.

A city, having installed a defective or leaky hydrant in front of plaintiff's premises, is liable for damages from water escaping therefrom and seeping into the building.

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Action by Frank De Mayo against Kansas City. Judgment for plaintiff was affirmed by the Court of Appeals, and the case is certified to the Supreme Court. Affirmed.

A. F. Evans and A. F. Smith, both of Kansas City, for appellant.

Joseph F. Aylward and Calvin & Rea, all of Kansas City, for respondent.

WOODSON, J. This suit was instituted in the circuit court of Jackson county by the plaintiff to recover of the defendant the sum of \$299.50 damages done to his premises and furniture, through the alleged negligence of the latter in flooding the same with water.

The plaintiff had judgment for \$289.50, and the defendant duly appealed the cause to the Kansas City Court of Appeals. The latter court affirmed the judgment, one of the judges dissenting, because in his opinion the judgment was in conflict with the law as announced by this court in the case of *Cassidy v. St. Joseph*, 247 Mo. 197, 152 S. W. 306, and on

that account the cause was certified to this court. The cause has been submittted to this court upon the same briefs and arguments that were used in the Court of Appeals.

After a careful consideration of the cause, in our opinion the majority opinion of the Court of Appeals correctly declared the law of the case, and we adopt it as the opinion of this court. Formal parts omitted, it reads as follows:

"Plaintiff's action is for damages. He recovered judgment in the trial court. The facts are that he owned a pool hall situated in the basement of a building at Eighth and Walnut streets, in Kansas City. He had occupied the premises about seven months, when the hydrant or fire plug at the curb in front of his place was turned on for the purpose of flushing the streets, and water escaped from the bottom of it and ran or seeped through the area wall into plaintiff's room, flooding the floor from two to six inches in depth. It was the first and only trouble he had since his occupation, though he had heard that a prior tenant had a similar complaint on one occasion.

"The water escaped through the drain at the bottom of the hydrant or plug. The cause of the escape was failure of the city employes to properly and securely turn off the water when they ceased to use it, there being a hole at the bottom of every hydrant or fire plug, so that when it is closed properly the small quantity of water left standing in the hydrant will drain out. But, if not properly shut off, more or less water would continue to flow and find its way through the drain into the ground. In the present instance, the water seeping into plaintiff's premises was stopped by completely turning off the hydrant.

"An interesting case recently decided by the Supreme Court (*Stifel v. St. Louis*, 181 S. W. 577) involved a consideration of the city's liability for a defective hydrant from which water escaped to the foundation of an adjoining building. A hydrant, or fire plug, at the corner of two streets, was located in the sidewalk space. The plaintiff owned a building on the abutting lot, and water leaking from the hydrant seeped along the foundation of the building, causing it to settle and the walls to crack. The water escaped from the 'nozzle of the plug three-quarters of an inch in diameter, although it did not appear upon the surface of the ground or plug.' The city owned the waterworks with which the streets were sprinkled and flushed, and located and supervised the hydrants. The cause of the leak was a gravel in the rubber valve about the size of a man's thumb. In that case Commissioner Railey said that 'while some of the earlier cases in this state are not in harmony with the later authorities in some respects, yet they all agree that where defendant has assumed control and supervision of the whole street in front of the building of an adjacent property owner, as in the case at bar, it is bound to exercise reasonable care in the installation and maintenance of water plugs on said street, and to see that they are kept in reasonably safe repair after being so installed. \* \* \* Hence the defense that defendant was

acting in a governmental capacity in respect to the fire plug in front of plaintiff's building is without merit and cannot be sustained upon the record before us.

"A city, after opening a street and inviting the public to use it, cannot, with impunity, violate its duty to keep it free from dangerous obstruction under the guise of the exercise of governmental functions. *Stifel v. St. Louis*, supra; *Sprague v. St. Louis*, 251 Mo. 624, 629, 158 S. W. 16. So if, in flooding the streets, the city employees had washed a hole therein, or otherwise rendered it not reasonably safe for travel by the public, it undoubtedly would have been liable under the cases just cited. So we are of the opinion that, the city having installed a defective or leaky hydrant in front of plaintiff's property, from which the water flowed into plaintiff's pool hall and injured his property, defendant is liable under the reasoning of *Commissioner Rayley* in the *Stifel* Case.

"The judgment should therefore be affirmed."

For the reasons stated by the Court of Appeals, the judgment of the circuit court is affirmed.

All concur.

(276 Mo. 539)

**KANSAS CITY v. PUBLIC SERVICE COMMISSION OF MISSOURI et al.** (two cases). (Nos. 21073, 21075.)

(Supreme Court of Missouri, in Banc. Dec. 31, 1918. Rehearing Denied Jan. 14, 1919.)

**1. CARRIERS §12(1)—REGULATION OF RATES—CONSTITUTIONALITY—POLICE POWER.**

Const. art. 12, § 20, prohibiting grant of right to construct street railway without consent of local authorities and that franchise granted shall not be transferred without similar assent, does not divest Legislature of authority, under the police power, to change rates of street railway.

**2. CONSTITUTIONAL LAW §135 — CONTRACT OBLIGATION—RATES FIXED BY FRANCHISE.**

Street railway rates fixed by franchise and contract are revisable by state agencies in exercise of the police power to regulate rates.

**3. STATUTES §181(2) — CONSTRUCTION — REASONABLENESS.**

In choosing between two meanings of not entirely unambiguous language, that construction will be given statute which will not render it absurd and unenforceable in practice.

**4. CARRIERS §12(1)—REGULATION OF RATES—POWER OF PUBLIC SERVICE COMMISSION.**

Laws 1913, p. 583, § 47, as to authority of Public Service Commission, held to empower commission to raise rates fixed by franchise agreement.

**5. STREET RAILROADS §107(3) — CONSTRUCTION OF FRANCHISE—PAYMENT OF INTEREST ON MORTGAGE INDEBTEDNESS.**

Where street railway franchise provided for a 6 per cent. return to company upon an agreed valuation, to be cumulative upon failure to obtain semiannual return, the fact that franchise

covenants run with company's property, and that mortgage on property is subject to franchise, does not sustain contention of city that the company could, under section of franchise providing for cumulation of its returns, defer payment of interest on mortgage indebtedness, payable out of its return, upon failure to obtain return, where interest is not expressly made cumulative.

**6. CONTRACTS §152—CONSTRUCTION—MEANING OF LANGUAGE.**

Words must be construed according to their plain and ordinary meaning.

**7. COURTS §89—SUPREME COURT—DUTY.**

Supreme Court will not concern itself with question of what the law ought to be, its sole function being to declare what the applicable law is.

Appeal from Circuit Court, Cole County; J. G. Slate, Judge.

Petition by the Kansas City Railways Company to Public Service Commission of Missouri. Order of commission reversed on writ of error to circuit court, and the Kansas City Railways Company and the Public Service Commission of Missouri and others appeal. Reversed and remanded, with directions.

A. Z. Patterson and J. D. Lindsay, both of Jefferson City, for appellant Public Service Commission.

Clyde Taylor, of Kansas City, Mo. (Frank Hagerman, of Kansas City, Mo., and R. J. Higgins, of Kansas City, Kan., of counsel), for appellant Kansas City Rys. Co.

E. M. Harber, City Counselor, and M. A. Fyke and E. F. Halstead, Asst. City Counselors, all of Kansas City, Mo., for respondent.

**BLAIR, J.** This case involves the validity of the order of the Public Service Commission increasing street car fare in Kansas City to six cents. The order was made June 22, 1918, was reversed by the circuit court of Cole county September 7, 1918, and a special order granting an appeal to this court was made by the Chief Justice on the same day. The cause on appeal was argued and submitted November 11, 1918.

The Kansas City Railways Company operates the street car system in the two Kansas Cities, Mo. and Kan. Its petition to the Public Service Commission sets up that the company's franchise requires (1) public service and (2) a 6 per cent. return upon an agreed valuation; that it was "prepared with care upon correct tables of the average reasonable expense and revenue on the basis of a five-cent fare"; that from such revenue under normal conditions the property is reasonably certain to pay all necessary expenses, give all needful service, pay the 6 per cent. return out of which bonded interest would be met, and yield a surplus; that op-

eration under the franchise for three years from July, 1914, paid expenses and interest and yielded a surplus of \$400,000 per annum which inured to the city's benefit; that the result of the nation's entry into the war changed conditions radically and largely increased expenses to such an extent as to endanger the property and the rights of the public under the franchise. Details of increases are set forth. Increases in cost of labor, oil, coal, and interest and taxes are specified. It is alleged other increases will result and that none of these could have been in contemplation when the franchise was drawn, ratified, and accepted; that a five-cent fare, while these abnormal conditions exist, will not yield revenue adequate to give—

"the city and those interested the full advantages of the franchise provisions of an up-to-date street railway system in a rapidly and constantly growing community, make additions and improvements called for, allow the company to earn, at the legal rate, interest upon the money invested, and meet the general demands, not of a franchise nature, for contributions for or towards public improvements and undertakings.

"After return to anything like prewar normal conditions it again will be possible to carry out the entire spirit of the franchise with the passenger revenue based upon that fare. The relief now sought is therefore temporary in nature, to continue so long as the commission shall determine to be necessary to meet the abnormal situation."

The prayer is for such increase of fare as may be fair and just in view of the changed conditions. This succinctly epitomizes the petition.

The answer of the city need not be set out. It sufficed to raise all questions now presented, and particular averments will be referred to as occasion demands in the course of the opinion.

Considerable evidence was offered. The whole financial history of the company since the adoption of the franchise in 1914 was laid before the commission. Estimates of operating expenses for the last nine months of 1918 were made. Some differences as to amounts expended and as to receipts and probable receipts appear. After an examination of the record and briefs and the opinion of the Public Service Commission, we are of the opinion the commission's findings on these questions are correct. Those findings sufficiently appear in the opinion which follows.

After finding the facts, the Public Service Commission, speaking generally, held: (1) It had power to raise street car fare in Kansas City, despite the franchise provisions and certain constitutional provisions relied upon by the city; and (2) that the facts made a case which called for the exercise of that power.

The commission ordered: (1) That the plea

to the jurisdiction be overruled; (2) that the company might charge a six-cent fare from July 15, 1918, to July 15, 1919, and then should restore the five-cent rate, subject to the commission's power to terminate or extend this order; (3) that certain books of fares be placed on sale; and (4) that monthly reports of income and expenditures should be made to the commission. The commission retained full jurisdiction of the whole matter for the purposes of supervision and modification of its order as justice might require. This sufficiently states the order for present purposes.

On writ of review to the circuit court the order was reversed. On the granting of the appeal here, conditions imposed required the segregation and repayment of the increase in the fare in case of affirmance and payment to the company in case the judgment was reversed and the order of the commission allowed to stand.

[1] I. The city's first contention is that section 20, art. 12, of the state Constitution, vests full power in the city to regulate street car rates within its limits and divests the Legislature and its agencies of all right to interfere. That question was presented in the case of *City of St. Louis v. Public Service Commission*, 207 S. W. 799, argued here on the same day this case was argued. After full consideration of the briefs and arguments of counsel in both these cases, this court in that case held section 20 had no such meaning as contended for by the cities and constituted no obstacle to the exercise of authority under the police power to change rates in a case in which the facts were such as to call for the exertion of such power. To that conclusion we adhere.

II. There is no question of confiscation in this case. Whether such question could be raised under a franchise like that before us is therefore not an issue. The company expressly states it asks no increase for, the purpose of paying anything except operating expenses and fixed charges.

[2] III. The question whether rates fixed by franchise and contract are revisable by state agencies in the exercise of the police power to regulate rates has been settled by recent decisions of this court (*State v. Public Service Commission*, 204 S. W. 497; *City of Fulton v. Public Service Commission*, 204 S. W. 386; *Kansas City Nut & Bolt Co. v. Kansas City Light, Heat & Power Co.*, 204 S. W. 1074; *City of St. Louis v. Public Service Commission*, et al., 207 S. W. 799, not yet officially reported), and we are satisfied with the principles therein announced. Those principles answer the contention that a franchise or contract rate is, by the fact of being such a rate, put beyond the reach of the exercise of the constitutional power vested in the Legislature and its agencies to regulate rates. That portion of the argument devoted to



these questions need not be further considered.

[3, 4] IV. It is urged that the statute (section 47, p. 583, Laws 1913) does not empower the Public Service Commission to raise rates fixed by franchise agreement. This contention rests solely upon the statute. Whether the commission could raise such rates for the mere purpose of securing to the utility a difference between what it received under the franchise rate and a reasonable return upon its investment is not involved in this case. Under this statute we have held that the commission may permit a carrier to charge a rate higher than that fixed by statute. *State ex rel. v. Public Service Commission*, 259 Mo. 704, 168 S. W. 1156; *State ex rel. v. Public Service Commission*, 270 Mo. loc. cit. 562, 194 S. W. 287. The principal ground upon which this ruling was put was that any other construction would render the act "shocking in its inequities and unfairness"; that to empower the commission to control expenditures necessarily precluded the theory that it "was denied control of the income." At most, in choosing between two meanings of not entirely unambiguous language, reason requires that to be chosen which will not render the act absurd and unenforceable in practice. That principle requires the same conclusion in this case as was reached in the cases cited. Those cases have been re-examined in the light of the briefs and arguments now before us, and we find nothing which justifies a view that they are incorrect in their construction of the law.

The commission is authorized to enforce orders for operation of the system in such manner as to render adequate service. That this cannot be done without income sufficient to pay operating expenses and fixed charges is apparent, without reference to the manner in which the inadequate rate is fixed.

It was a matter of common knowledge that franchise street car rates existed pretty generally. The Legislature passed the act in view of this situation. The construction urged by the city would render the act somewhat absurd and partially unenforceable. The more reasonable and natural construction is that given by the commission and by this court in analogous cases. It is settled law that in such circumstances that meaning must be adopted which will not attribute absurdity to the Legislature and which will give the act its natural force.

V. The city insists that the facts do not, in view of the peculiar franchise provisions, present a case for the exercise of the power to raise rates, even though it be conceded such power resides in the Public Service Commission.

This makes it necessary to set out the facts developed in so far as they are relevant to the question the city raises. The contention is that the revenue produced by the five-cent

fare is shown to be sufficient to pay all expenses and charges unconditionally payable under the franchise and will leave a balance of several hundred thousand dollars available to meet the expenditures asserted by the company and found by the commission to be necessary to preserve the property and render adequate service. If the city is right in this contention, the order, in the state of this record, is wrong without regard to any question of the reasonableness of the return, if any, the company would receive out of the revenue for the period covered by the order. We say this because the company expressly disclaims that it asks or wishes any increase in rates for the purpose of payment to it of any sum in excess of an amount equal to the sums it is required to pay and must pay out under the terms of the franchise and the mortgages securing the authorized and existing bonded indebtedness and those necessary to preserve the property and render adequate service. The real question presented by the city's contention is whether interest on the mortgage indebtedness of the company is, when the franchise fare does not yield revenue sufficient to meet it, deferred under what the parties term the "cumulative" section of the franchise. The commission's findings are very nearly in accord with the city's contention in respect of the particular facts relevant to the question raised.

Treating interest on mortgages as a fixed charge, the company estimates the total deficit for the calendar year of 1918 at \$1,034,499.37. The city offered an estimate of \$992,254, and made an estimate in its brief of \$853,787.17, and another of \$820,295.81. The commission's estimate is \$860,564.99. The commission finds that \$739,000 of this is assignable to Missouri business and \$648,546 to Missouri intrastate business. The commission proceeds, with a wealth of detail, to discuss the whole of the evidence on the question. It tabulates the whole income and all expenditures since the adoption of the franchise, and discusses at length the contention of the parties with respect to the various items. We think it unnecessary to set out the whole of this, since the same legal result will flow from the adoption of any one of the estimates, as will presently appear. We are satisfied with the accuracy of the commission's estimate. We do not understand that its correctness in any important particular is seriously assailed as being unsupported by the preponderance of the evidence. In considering this deficit it is necessary to keep in mind that it takes no account of increased wages or of contingencies.

The commission found that the "bond interest" for the calendar year of 1918 would amount to \$1,731,920. The city contends the payment of this interest is deferred by the "cumulative" section until such time as the revenue from the five-cent fare becomes again sufficient to pay it after paying other

charges which cannot be deferred. If this contention is correct, and the deficit, including such interest, is only \$860,564.99, then, the interest payments being deferred, the company would have in hand about the difference between the total interest and the total estimated deficit as estimated on the basis stated, or approximately \$900,000, with which to meet wage increases, contingencies, etc. The commission finds this sum to be \$901,053.84. The city estimates it at \$907,831.65. Of its estimate the commission finds \$680,057.77 to be assignable to Missouri intrastate business.

The franchise was submitted to and adopted by the people of Kansas City and formally accepted by the company. It constituted a settlement of controversies which had long existed. It fixed the total value at something over \$35,000,000 for the whole property in both Kansas and Missouri. The mortgage indebtedness was over \$28,000,000, and the balance (about \$6,148,000) represented what are called "intangibles." It provided for a five-cent fare. Section 27 provides for payment, in order, of

"(1) All expenses of management and operation, including all expenditures needful and necessary, to put, keep and maintain the property, and every part thereof, in first-class condition, and provide for the public first-class modern street car service.

"All taxes, license fees, or public charges and special assessments of every kind and character, including all public charges or for earnings, or incomes.

"(2) \* \* \* To the company, an amount equal to 6 per cent. per annum, cumulative, payable semiannually, upon the amount of the capital value from time to time determined and certified as herein provided. By the word 'cumulative' is meant that if the earnings for any six months are not sufficient to pay at such rate of six per cent., then such deficiency with interest thereon at the rate of six per cent. shall be paid from future earnings, if any, when made.

"(3) All liabilities for personal damages and injuries," etc.

Section 27 further provides for the amortization of the \$6,148,000 intangible value out of surplus and for the division, after amortization is complete, of the surplus between the city and company. Methods by which the city might acquire the property were provided.

The question now raised by the city is based upon these and the following franchise provisions:

"Section 1. The obligation of the company to the city created by this ordinance shall be the first and paramount obligation of the company prior and superior to any other obligation, lien or right upon or against any of its property or the earnings thereof."

(Here appears section 27, quoted above.)

Section 30, p. 35. "Any and every mortgage shall conform and be subject to the provisions of this ordinance."

Same section, p. 36. "Every mortgage execut-

ed by the company must be expressly made subject to the terms and provisions of this ordinance, and must, before the same shall be valid, be approved by the city counselor in writing endorsed thereon."

Same section, same page. "If such mortgage conforms, and is expressly made subject, to the terms of this ordinance, it shall be mandatory upon the city counselor to approve the same."

Section 27, p. 33. "All the terms, conditions and covenants in this contract contained, shall be construed as covenants running with the property in whatsoever manner the same may be mortgaged, sold, transferred or conveyed."

In this connection the additional abstract states that, at the time the property was taken out of the court of bankruptcy, Judge Hook promulgated an order or plan of reorganization by the express terms of which "the present outstanding bonds and mortgages above referred to are expressly made subject to the terms, conditions and covenants contained in the franchise."

The franchise conditions and covenants run with the property. Every mortgage is expressly required to be made, and is made subject to them. Such mortgages were in contemplation as a part of the reorganization and franchise scheme. The city contends that by reason of these facts the "cumulative" provision in the franchise (section 27) thereby becomes one of the conditions and provisions of the mortgages and has the same effect upon the interest payments under the mortgages that it has upon the payment of the 6 per cent. upon the total capital valuation as specifically provided in the "cumulative" section, i. e., that such interest payments (the contention is) are not enforceable, but are deferred in case the net income payable to the company under the 6 per cent. franchise "cumulative" section is insufficient to enable the company to meet such interest payments as they fall due. Such we understand the position of the city to be.

It is not contended there is any clause in either the franchise or mortgages which expressly provides for deferring mortgage interest payments in any case. The argument is, in effect, that the quoted franchise provisions justify and require the conclusion that counsel draw that the "cumulative" section, which expressly refers only to the company's 6 per cent. return, applies to, and in like circumstances defers, mortgage interest payments.

[5, 6] This position we do not think tenable. The franchise sets out in great detail the rights and interests of the city and the company. The city is given the right to purchase the property and the right to a substantial participation in the income above operating expenses, fixed charges, and the return allowed the company. The city thus acquired a valuable interest. The franchise was drawn with a view to the protection of the rights of all concerned. The "cumula-

tive" section makes no specific reference to anything save the 6 per cent. income payable to the company on the agreed capital value. Its terms do not include anything else. It does not either expressly or by necessary implication, refer to mortgage interest. The mortgages, it is not disputed, expressly provide for the payment of interest at a stated per cent. on fixed dates. The general rule is that words must be construed according to their plain and ordinary meaning. Such a construction in this instance defeats the city's contention. Is there reason to think the case requires, in order to reach the real meaning of the parties, some other construction of the clauses in question? To give the mortgage interest provisions their plain and natural meaning in no wise affects the company's or the city's rights under the "cumulative" section referred to or under any part of the franchise. It may be that, if these interest payments fall due and are not met, foreclosure proceedings will result; but such foreclosure cannot affect the city's rights, since the purchaser could acquire nothing save the company's interest. The franchise and the mortgages provide that the city's rights under the franchise cannot be affected by foreclosure and that the purchaser must take subject to all of them.

The protection of the city's interest under the franchise was doubtless the object of making the mortgages subject to the franchise. It is the company's interest only which is covered by the mortgage. It thus appears there was ample reason for making the mortgages subject to the franchise without our construing the cumulative section as urged by the city. In other words, there is no need of our giving the words of the franchise an unusual meaning in order to find some reason for requiring the mortgages to be made subject to the franchise provisions. The franchise discloses ample reason for the incorporation of that requirement independently of the cumulative section. Therefore any argument that mortgage interest payments must be held to be deferrable under the cumulative section, or that the provision making the mortgages subject to the franchise has nothing upon which it can operate, is unsound.

Again, it is not contended the language of either the "cumulative" section or of the mortgages is ambiguous. On the contrary, it is plain and unequivocal. Very clearly the mortgages are made subject to the franchise. Just as clearly they provide for the payment of interest at fixed times. The cumulative section plainly provides for deferring, in given circumstances, the 6 per cent. payments on capital value to the company. Just as plainly it entirely omits to make any such provision respecting mortgage interest payments. This franchise was the result of long

and careful deliberation on the part of all concerned. Mortgages were in contemplation of all. There is nothing mysterious or complicated in the term mortgage. All parties must have known that, when such an instrument provided in terms for interest payments on given dates, those payments would become due regardless of the ability of the mortgagor to meet them—unless provision to the contrary was made. Is it conceivable that the framers of the franchise, had their intent been as the city contends, would have left such a vital matter to inference and argument from franchise provisions making no direct reference thereto but, in fact, in their ordinary meaning excluding such an idea? An affirmative answer would tend to impeach the soundness of judgment of all concerned.

Further, it is to be remembered the parties were engaged in launching a great public utility into new franchise waters. All were aware that one important feature was that a great deal of money be secured by mortgages on the company's interest in the property. It was the concern of both city and company to secure a low interest rate. The construction now given the "cumulative" section by the city would necessarily imply that the framers of the franchise intended that the security offered mortgagees should be one so hedged about that, under conceivable conditions, interest might not be paid for years and, possibly, not at all.

Another consideration is this: In case conditions arose, as they very conceivably might, such that the five-cent rate during the life of the franchise would not, according to the franchise provisions, be sufficient to raise sufficient revenue to pay the company the whole of the 6 per cent. per annum upon agreed capital value, could the company enforce its claims for such deficit? Against what interest would it enforce it? And if this is a condition of the company's right to income, does it, under the city's argument, become a condition of the right of the mortgagees to interest and even to their principal? The city's argument is that all the conditions of the "cumulative" section are conditions of the mortgages. It seems to us the argument proves too much and therefore proves nothing.

We are driven to the conclusion that the mortgage interest payments become due and payable according to their plain language and are unaffected by the "cumulative" section.

It results that on the undisputed facts the case made before the commission showed that, after paying operating expenses and fixed charges falling due during the year, the company would face a total deficit of approximately \$850,000 and a deficit of \$648,546 on Missouri intrastate business.

Regardless, therefore, of the question of

wage increase and contingencies and of any net return to the company on its interest, the system faced foreclosure and bankruptcy.

VI. It was shown that a wage increase was necessary to a continuance of proper operation of the system. It appeared without dispute that common labor in the community was paid a much higher wage than the company's motormen and conductors; that some had left and others were about to leave the service of the company on account of the insufficiency of their pay to meet living conditions; that they were going to other employment where larger wages were paid; and that this was resulting more and more in affecting the service injuriously. It was shown that an increase of one cent an hour for each employé who received less than \$1,800 per annum would add \$105,000 to the year's wage expense. It also appeared that the average wage previously paid (1917) motormen and conductors was about 30½ cents per hour, and that common labor was being paid, by some large employers, at the rate of 40 cents an hour. We do not find that the city contends a wage raise is unnecessary, not essential to the proper manning of the cars for adequate service. That contention of the company and finding of the commission do not seem to be questioned. On this record we conclude the finding was correct.

The insistence of the city that the deferring of interest payments would leave large funds in the company's hands was doubtless deemed by the city sufficient on this point. With that position we have already dealt.

VII. The suggestion that the interstate commerce clause of the federal Constitution invalidates the order of the commission is sufficiently met by *Simpson v. Shepard* (the Minnesota rate cases) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. In that case the right of the state to regulate intrastate rates, provided no direct burden was laid upon interstate commerce, was given full recognition. The Public Service Commission followed the rule in that case with respect to separate value of the intrastate property and income.

[7] VIII. A portion of the brief is devoted to what we take to be an argument as to the policy of the law. With the question what the law ought to be we have no power or right to speak in this case. Our sole function is to declare what the applicable law is. We must take the law as it is and the facts as they are and apply the one to the other and announce our conclusion. This is our sole function under the Constitution. It is the only commission given us. Whether we differ from or agree with the policy of a constitutional provision of our law is of no moment in the performance of judicial duty.

The conclusions reached require a reversal of the judgment of the circuit court of Cole county and a remandment of the cause to that court, with directions to set aside its judgment in this case and affirm the order of the Public Service Commission. It is so ordered.

All concur.

(377 Mo. 175)

STATE ex rel. MISSOURI, K. & T. RY. CO.  
et al. v. PUBLIC SERVICE COMMISSION  
OF MISSOURI et al. (No. 20961.)

(Supreme Court of Missouri, Division No. 2.  
March 4, 1919.)

1. PUBLIC SERVICE COMMISSIONS — AUTHORITY IN GENERAL.

The Public Service Commission derives whatever authority it possesses from the law of its creation.

2. COMMERCE — STOPPING OF INTERSTATE TRAINS—POWER OF STATE COMMISSION.

The Public Service Commission is vested with plenary power under Public Service Commission Act, § 51, to compel a railway company to stop an interstate passenger train at a point on its line, if such point is not otherwise furnished reasonable, proper, and adequate service.

3. RAILROADS — ORDER REQUIRING PASSENGER TRAINS TO STOP ON FLAG—REASONABLENESS.

Evidence held insufficient to show that a compliance with order of the Public Service Commission requiring defendant railroad, to stop interstate passenger trains on flag at a certain station will result in financial loss in the operation of such trains.

4. CONSTITUTIONAL LAW — DUE PROCESS—PROCEEDINGS BEFORE PUBLIC SERVICE COMMISSION.

Proceeding before Public Service Commission to require defendant railroad to stop certain interstate passenger trains on flag at a certain station does not, where conducted in accordance with Public Service Commission Act, §§ 107, 111-113, deprive defendant of its property without due process of law.

5. CONSTITUTIONAL LAW — RIGHT TO REMEDY — PROCEEDINGS BEFORE PUBLIC SERVICE COMMISSION.

Public Service Commission Act, §§ 106, 110, are so related that they must be considered in pari materia, and when so construed are not subject to objection that the latter, by authorizing Public Service Commission to hold a motion for rehearing under advisement for an indefinite time, renders it possible for property of defendant railroad to be damaged without a remedy.

6. RAILROADS — ORDER REQUIRING TRAIN TO STOP ON FLAG—REASONABLENESS.

Testimony of defendant railroad held insufficient to show such material injury from com-

pliance with order of Public Service Commission requiring the stopping of two interstate passenger trains on flag at a certain station as to render the order void.

**7. PUBLIC SERVICE COMMISSIONS §1, 14—PLEADING—SUFFICIENCY IN GENERAL.**

The Public Service Commission is not a court, but a committee created by the Legislature, and the technical rules of pleading need not be observed in proceedings before commission, in view of Public Service Commission Act, § 127, as to substantial compliance with act being sufficient, and as to liberal construction of provisions of act.

**8. PUBLIC SERVICE COMMISSION §32—ORDERS—REVIEW.**

Where a case reaches the Supreme Court from a circuit court affirming an order of the Public Service Commission, it must be construed as a suit in equity, and the Supreme Court may make its own findings of fact.

**9. RAILROADS §9(1)—PROCEEDINGS BEFORE PUBLIC SERVICE COMMISSION—PLEADING.**

In proceeding before the Public Service Commission to require defendant railroad to stop certain interstate passenger trains on flag at a certain station, complaint *held* sufficient to invoke remedial power of commission.

**10. RAILROADS §227—STOPPING TRAINS ON FLAG—PUBLIC NECESSITY—EVIDENCE.**

On review of order of the Public Service Commission requiring defendant railroad to stop two interstate passenger trains on flag at a certain station, *held*, under the evidence, that there was a public necessity for stopping the trains in question.

Williams, J., dissenting in part.

Appeal from Circuit Court, Cole County; J. G. Slate, Judge.

On complaint by the city of Pilot Grove, in Cooper county, Mo., the Public Service Commission granted an order requiring the Missouri, Kansas & Texas Railway Company and Charles E. Schaff, its receiver, to stop certain trains at said city, and to renew said order the state, on the relation of the railway company and its receiver, brought certiorari against the commission. From judgment confirming the order, the railway company and its receiver appeal. Affirmed.

J. W. Jamison, of St. Louis, for appellants. Alex. Z. Patterson, Gen. Counsel, and Jas. D. Lindsay, Asst. Gen. Counsel, both of Jefferson City, for respondent Public Service Commission.

**WALKER, P. J.** This appeal seeks the review of a judgment of the circuit court of Cole County affirming an order of the Public Service Commission.

The complaint filed with the commission, upon which its order was based, is as follows:

"The complaint of W. A. Scott, mayor of Pilot Grove, Cooper county, Missouri, respectfully shows that the Missouri, Kansas & Texas Railroad Company has and does refuse to stop trains Nos. 9 and 10 at this, Pilot Grove, station for any point on their system other than St. Louis on the east, and Parsons, Kansas, on the south; that this city has enjoyed this train service continually, and that now service to Sedalia, Boonville, New Franklin, Fayette, Higbee, Moberly, and all points north, as well as McBaine, Columbia, Jefferson City, and all points on the east excepting St. Louis, may only be had on very early trains in the morning or late at night; that we now have no midday train service, much to our discomfort.

"We were granted service on trains Nos. 9 and 10 even while we had former train No. 1, and the removal of trains Nos. 9 and 10 or service from those trains is also working a hardship on Sedalia and Boonville and on the traveling public at large, and we respectfully ask that the service of trains Nos. 9 and 10 be restored to us."

A hearing upon this complaint was held before a member of the commission at Pilot Grove. The evidence showed that the appellant railroad company had, for a considerable length of time, regularly stopped trains Nos. 9 and 10 at Pilot Grove for the reception and discharge of passengers to and from all points. This practice was continued until August, 1917, when appellant put into effect a rule providing that train No. 9 should stop at Pilot Grove only for the discharge of passengers from St. Louis and the reception of passengers for Sedalia and beyond, and that train No. 10 should stop only for the discharge of passengers from Parsons, Kan., and the reception of passengers for Columbia and beyond. In pursuance of this course, these trains were compelled to make frequent stops at Pilot Grove; yet the appellant refused to carry passengers between Boonville and Pilot Grove on those trains, although stops were regularly made at Boonville and frequently at Pilot Grove. The principal passenger business at Pilot Grove was to Boonville and Sedalia; that during the months of August and September immediately preceding the hearing on the complaint train No. 9 in thirteen days stopped nine times at Pilot Grove, and train No. 10 in sixteen days stopped there eleven times; that at the time of this hearing appellant operated three trains daily between St. Louis, Mo., and Sedalia, Mo., with final destination beyond the state. The time schedules of a number of appellant's other trains were shown to demonstrate the fact that the amount of time they consumed in running from Sedalia to Pilot Grove and from the latter place to St. Louis was not appreciably different from that consumed by the two trains sought to be affected by the complaint in running between the same points. The testimony of a number of witnesses was in-

roduced to show the inconvenience to the public at Pilot Grove on account of the manner in which the appellant ran the two trains in question.

The finding of the commission based on this testimony was that the principal passenger business at the station of Pilot Grove was to Boonville and Sedalia; that trains No. 9 and No. 10 stopped at Pilot Grove for passengers from and to St. Louis and beyond, and from and to Parsons, Kan., and beyond, and that said trains seldom passed Pilot Grove without stopping; and that the stops for the discharge and reception of Boonville and Sedalia passengers at Pilot Grove could be made without material delay or expense to the appellant.

The commission thus defines its reasons for the ruling in this regard:

"(1) That the appellant, after it had voluntarily stopped trains Nos. 9 and 10 at Pilot Grove for a long period of years, ceased making the stops solely for the purpose of answering the contention of complainant that, inasmuch as the trains stopped nearly all the time at Pilot Grove, it was possible, without detriment to the service, or additional delay, to permit the carriage of Boonville and Sedalia passengers thereon.

"(2) That the railroad company for a long period of time, in fact nearly ever since the inauguration of passenger train service over its line, has rendered flag-stop service for Pilot Grove on certain of its fast trains. This fact in itself is strongly indicative of the necessity for these stops.

"(3) Without the flag stops of trains Nos. 9 and 10 at Pilot Grove, the city of Pilot Grove and a populous community around it has service only on two trains each way each day—trains Nos. 3 and 7 west bound, and trains Nos. 4 and 8 east bound; train No. 7 west bound originates at McBaine, and the destination of train No. 8 east bound is McBaine.

"These facts make the conditions and circumstances affecting the service complained of in this case entirely different from the conditions and circumstances in the California Case (State ex rel. Missouri Pacific v. Public Service Commission [273 Mo. 632], 201 S. W. 1143). In that case, California, having only about 400 more inhabitants than Pilot Grove, had six trains each way each day. Every passenger train operated by the Missouri Pacific through California, including its fastest through trains, stopped regularly or on flag, except one early morning train, west bound. At Pilot Grove, under the service inaugurated by the appellant November 25th, two of the fast M., K. & T. trains passed through each way daily without stopping."

An order was thereupon entered by the commission requiring the appellant to regularly stop trains No. 9 and No. 10 at Pilot Grove thereafter.

A rehearing of the case was granted by the commission, and additional testimony was offered by appellant, in which it was disclosed that appellant had prepared and put in operation a new schedule, prohibiting

trains Nos. 9 and 10 to stop at Pilot Grove for passengers from or to any point. A cancellation, therefore, of the commission's order was sought by the appellant on the ground that the new schedule remedied the inadequate local service theretofore existing between Pilot Grove and Boonville, since daylight service was furnished such points on trains other than Nos. 9 and 10. The commission found, however, from the evidence adduced, that the failure to stop trains Nos. 9 and 10 at Pilot Grove rendered the service less adequate to and from St. Louis and from points south of Parsons, Kan. Whereupon the order theretofore made by the commission in regard to said trains was affirmed, and a supplemental order entered as follows:

"The commission having heretofore, on the 10th day of October, 1917, issued an order in the above-entitled proceeding, and on the 22d day of October, 1917, issued its first supplemental order in the above proceeding, and the case now being before the commission for rehearing and upon motion to set aside and dismiss, and the commission being fully advised in the premises, it is—

"Ordered, 1. That section 1 of the order entered herein on October 10, 1917, be, and the same is hereby, amended, so as to read as follows:

"Ordered, 1. That the defendant, the Missouri, Kansas & Texas Railway Company, and Charles E. Schaff, receiver thereof, be and it is hereby required, from and after the effective date of this order, to stop west-bound passenger train No. 9 at Pilot Grove, Missouri, on flag, when it has passengers from St. Louis or Boonville, Missouri, destined Pilot Grove, Missouri, or when passengers at Pilot Grove, Missouri, desire to board said train for Sedalia, Missouri.

"And that it be required to stop east-bound passenger train No. 10 at the station of Pilot Grove Missouri, on flag, when it has passengers from Sedalia who desire to stop at Pilot Grove, Missouri, or when passengers at Pilot Grove, Missouri, desire to board said train for Boonville or St. Louis, Missouri.

"Ordered, 2. That defendants' motion for rehearing filed herein on November 9, 1917, be, and the same is hereby, overruled.

"Ordered, 3. That defendants' motion filed herein on December 17, 1917, asking that order entered herein on October 10, 1917, be set aside and held for naught, be, and the same is hereby, overruled.

"Ordered, 4. That this order shall be in full force and effect from and after the first day of January, 1918, and that the secretary of the commission forthwith serve upon defendants a certified copy of this order.

"Ordered, 5. That the defendants shall, on or before the effective date of this order, notify the commission, in the manner required by section 25 of the Public Service Commission Law, whether the terms of this order will be accepted and complied with."

It is with the foregoing order that we are concerned in determining the propriety of the commission's action.

[1] I. That the Public Service Commission

derives whatever authority it possesses from the law of its creation there can be no question. *State v. Public Service Commission*, 272 Mo. 645, 199 S. W. loc. cit. 1001; *State ex rel. United Ry. Co. v. Public Service Commission*, 270 Mo. 429, 192 S. W. 958, 198 S. W. 872.

This act so far as applicable to the matter at issue, provides:

"If, in the judgment of the commission, any railroad corporation or street railroad corporation does not run trains enough or cars enough or possess or operate motive power enough, reasonably to accommodate the traffic, passenger and freight, transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at reasonable or proper time having regard to safety, or does not run any train or trains, car or cars, upon a reasonable time schedule for the run, the commission shall, after a hearing, either on its own motion or after complaint, have power to make an order directing any such railroad corporation or street railroad corporation to increase the number of its trains or of its cars or its motive power or to change the time for starting its trains or cars or to change the time scheduled for the run of any train or car or make any other suitable order that the commission may determine reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation." Section 51, p. 590, Laws 1913.

[2] It is contended by appellant that this statute has no application to the case at bar, on the ground that the facts show that appellant was furnishing Pilot Grove and vicinity adequate service by other trains than those in controversy, and the latter, being interstate trains, should not have been subjected to the commission's order, and hence the latter was improper and unauthorized.

A review of the testimony is confirmatory of the soundness of the reasons of the commission, above set forth, for entering the order herein. Our recent ruling, therefore, in *State ex rel. R. R. v. Pub. Serv. Com.*, 273 Mo. 682, 201 S. W. 1148, is apposite and controlling, that the commission is vested with plenary power under the statute to compel a railroad company to stop an interstate train at a point on its line, if it is not otherwise furnishing reasonable, proper, and adequate interstate service to that point and locality.

This conclusion finds support in *C. & Q. R. R. v. Railroad Commission of Wisconsin*, 237 U. S. 220, 35 Sup. Ct. 560, 59 L. Ed. 926, in which that court, in ruling upon a like question to that here at issue, held:

"In reviewing the decision we may start with certain principles as established: (1) It is competent for a state to require adequate local facilities, even to the stoppage of interstate trains or the rearrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal

interference with interstate commerce. (3) And this, whether the interference be directly by the Legislature or by its command through the orders of an administrative body. (4) The fact of local facilities this court may determine, such fact being necessarily involved in the determination of the federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce by imposing an arbitrary requirement."

Numerous other cases, decisive of the commission's power in this regard, are cited in respondent's brief, and therefore need not be set out here. We overrule this contention.

[3, 4] II. It is contended that the commission's order compels the appellant to operate the trains in question at a loss, and hence deprives the appellant of its property without due process of law.

That the application of the doctrine here invoked is not confined to law and chancery actions has been definitely determined by the Supreme Court of the United States in *Portland R., etc., Co. v. R. R. Com. of Oregon*, 229 U. S. 397, 33 Sup. Ct. 820, 57 L. Ed. 1248, in which it was held, in effect, that special proceedings applicable to a specified subject-matter and conformable to the rules requiring notice and the acquisition of jurisdiction, which affect all persons alike whose property or rights come within the lawful scope of the proceedings, are prosecuted with "due process of law," and therefore, where the proceedings before a commission contemplate notice to the railroad companies, giving them an opportunity to be heard, and provide for a judicial review by the courts of the orders of the commission, the railroads cannot complain. See, also, *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 812, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. Rep. 477; 4 R. C. L. 624.

The Public Service Act provides ample procedure to enable the commission to proceed with due process of law in a case of this character in conformity with the rulings of the United States Supreme Court.

To illustrate: Section 107 of the Public Service Act requires adequate notice of complaint and of prospective hearings to corporations or persons against whom complaints have been lodged. Sections 110, 111, 112, and 113 of said act provide for a full and complete judicial review of the commission's orders.

[5] There is no complaint that the proceedings at bar were not conducted in accordance with the formal requirements of these statutes; but it is especially urged by appellant that certain provisions of section 110 authorize the commission to hold a motion for rehearing under advisement for an indefinite length of time, thus rendering it possible for appellant's business and property to be damaged without remedy in violation of its constitutional rights. The par-

ticular portion of section 110 to which this objection is urged is as follows:

"An application for such a rehearing shall not excuse any corporation or person or public utility from complying with or obeying any order or decision, or any requirement of an order or decision, of the commission, or operate in any manner to stay or postpone the enforcement thereof, except as the commission may by order direct."

The burden of appellant's complaint in this behalf is that, if indefinite delay occurs in the disposition of a motion for a rehearing appellant must nevertheless obey the orders of the commission or suffer the severe penalties provided by section 130 of the act for its failure so to do. The explicit terms of section 106 of the act show clearly that appellant's contention in this regard is not tenable. The pertinent portion of said section is as follows:

"An action to recover a penalty or forfeiture \* \* \* may be brought. \* \* \* In any such action \* \* \* if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for the violation of an order or decision of the commission, the defendant was actually and in good faith prosecuting a suit to review such order or decision in the manner as provided in this act, the court shall remit the penalties or forfeitures incurred during the pendency of such proceeding."

The filing of a motion for rehearing in a case of this character sustains a like relation to that of a motion for a new trial in an ordinary action in the circuit court. During the pendency of the motion for a rehearing, the applicant is not subject to penalties and forfeitures for failure to obey an order of the commission, provided the proceeding for a review of its action is prosecuted in good faith. That the filing of a motion for a rehearing before the commission is an essential part of a proceeding for review is demonstrated by the following provisions of section 110 of the act:

(a) That no review proceeding shall accrue in any court unless the aggrieved party shall have filed, before the effective date of the order of the commission complained of, an application to the commission for a rehearing; and—

(b) Such application must provide specifically the ground or grounds on which the applicant considers the order of the commission unlawful, unjust, or unreasonable; and, further,

(c) No corporation, person or public utility is permitted to urge in any court any ground not set forth in said application.

Judicial approval of these provisions has been given in *State ex rel. R. R. v. Commission*, 269 Mo. 634, 192 S. W. 86, L. R. A. 1918A, 46, Ann. Cas. 1917E, 987. Thus it will be seen that ample opportunity is given the applicant for a review of the commission's order, which is stayed and suspended until determined, for no penalty or forfeiture may be collected for a noncom-

pliance with same. If the section complained of (110) stood alone, some ground for the contention would exist; but, construed in connection with section 106, it is not subject to the criticism leveled against it, under the general rule that the two sections are so related that they must be read together and considered in *pari materia*. While the way is therefore open for a review by the circuit court of the commission's proceedings, like opportunity is offered for the securing of a suspending order, as in any other case, provided the circuit court finds the application in that behalf meritorious. Aside, however, from this technical contention, as to a lack of due process of law, under the terms of the act, do the facts offer any support of this contention? The only material testimony offered in this regard was that of the appellant's assistant passenger agent, who testified that certain trains, some four or five in number, but not the particular trains in controversy, were earning at various periods amounts per train mile of 40 to 73 cents; that these earnings were not sufficient to cover the transportation costs of these trains, and that the information he possessed and was testifying to was obtained from the appellant's accounting department. He did not testify, however, in what manner, or to what extent, the stopping of trains Nos. 9 and 10 on flag, as required by the commission's order, would add to the loss claimed to have been incurred in the running of the other trains. There is therefore, in our opinion no sufficient testimony to show that a compliance with the order of the commission will result in financial loss in the operation of trains Nos. 9 and 10. The lack of merit of the appellant's contention, and that it has in no wise been subjected to liabilities, penalties, or forfeitures, as it contends, is further shown by the record of the proceedings in this case; supplemental order No. 2, upon which the appellant's contention must be based (section 110, Pub. Serv. Act; *State ex rel. Railroad v. Pub. Serv. Com.*, 269 Mo. 634, 192 S. W. 86, L. R. A. 1918A, 46, Ann. Cas. 1917E, 987), was entered on December 18, 1917, to become operative January 1, 1918. On December 31, 1917, appellant filed its motion for rehearing. It was overruled by the commission on January 26, 1918. It is stated by respondent and not questioned by the appellant, that the latter did not comply with the order of the commission during the pendency of said motion, and as a matter of fact had not done so at the time this appeal was perfected and the case submitted for our consideration.

We have reviewed the cases cited by the appellant in support of this contention, and find that the opinions therein were rendered in construing statutes unlike the Missouri Public Service Act, and were applied to facts, in many instances not parallel with those at bar. Hence the conclusion deduced by ap-



pellant from these rulings is inapplicable in the determination of the matter here at issue.

III. That the order such as has been made herein, may, under the facts, be sustained, although it may entail some pecuniary loss, has been more than once determined by the Supreme Court of the United States in cases sufficiently similar in subject-matter to that at bar to justify their citation as authorities here. To illustrate: In *Miss. R. Com. v. M. & O. R. R. Co.*, 244 U. S. loc. cit. 390, 37 Sup. Ct. 602, 61 L. Ed. 1216, it was held that—

"The principles of law applicable to the decision of such a case as this record presents are few, and they have become so settled and so familiar by repeated decisions of this court that extended discussion of them would be superfluous. They are these:

"A state may regulate the conduct of railways within its borders, either directly or through a body charged with the duty, and invested with powers requisite to accomplish such regulation. \* \* \*

"Under this power of regulation a state may require carriers to provide reasonable and adequate facilities to serve, not only the local necessities, but the local convenience of the communities to which they are directly tributary. \* \* \* And such regulation may extend, in a proper case, to requiring the running of trains in addition to those provided by the carrier, even where this may involve some pecuniary loss."

In an earlier case of *Mo. P. Ry. Co. v. Kansas City*, 216 U. S. loc. cit. 278, 30 Sup. Ct. 335, 54 L. Ed. 472, the federal Supreme Court, in discussing this question, said:

"The difference between the exertion of the legislative power to establish rates in such a manner as to confiscate the property of the corporation by fixing them below a proper remunerative standard, and an order compelling a corporation to render a service which it was essentially its duty to perform, was pointed out in *Atlantic Coast Line v. N. Car. Corp. Com'n*, 206 U. S. 1 [27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398]. In that case the order to operate a train for the purpose of making a local connection necessary for the public convenience was upheld, despite the fact that it was conceded that the return from the operation of such train would not be remunerative. Speaking of the distinction between the two, it was said: \* \* \*

"This is so (the distinction) because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable under the doctrine of *Smyth v. Ames* [169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819]. \* \* \*

"Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the rea-

sonableness of the order; but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance."

[6] The doctrine thus announced is applicable here because, if the testimony of appellant as to loss of earnings be given the full probative force to which its relevant portions are entitled, it is not sufficient to show such material injury to appellant, arising from a compliance with the order, as to render same invalid. As we have held, however, except upon a strained construction, this evidence has very little probative force.

[7] IV. The technical exactness of court pleadings is not required in complaints filed before the commission; it is not a court, but as we said in *Atch., etc., Ry. Co. v. Pub. Serv. Com.*, 192 S. W. 460, "a committee created by the Legislature to make findings of fact and orders based" thereon, "which, if reasonable, \* \* \* may be enforced by the \* \* \* courts." In addition, in *State ex rel. Sedalla v. Pub. Serv. Com.*, 204 S. W. 497, we held that the nature and purpose of the act authorized us to "view it in a kindly spirit by giving it a liberal construction." This view comprehends the procedural as well as the administrative provisions of the act. Express legislative approval of this manner of construing the act is evident from section 127 of same, which provides that—

"A substantial compliance with the requirements of this act shall be sufficient to give effect to all the rules, orders, acts and regulations of the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto. The provisions of this act shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities." Laws 1913, p. 648.

Our rulings in this regard are, therefore, as they should be, but an express affirmation of the legislative construction of the act embodied in this section.

The technical rules of pleading, therefore, need not be observed in proceedings before the commission, a substantial compliance with the requirements of the act being sufficient. A rule in harmony with this conclusion has been promulgated by the Supreme Court of the U. S. in *Cin., etc., Ry. Co. v. Interstate Com. Com.*, 206 U. S. loc. cit. 150, 27 Sup. Ct. 648, 51 L. Ed. 995, although that body possesses more of the characteristics of a judicial nature than the Public Service Commission. There is therefore no merit in this contention.

[8] V. There is no gainsaying the question that when a case reaches this court from a circuit court, affirming an order of the Public

Service Commission, it must be construed as a suit in equity, and we may make our own findings of fact. This course we have approved in *State ex rel. Wab. Ry. v. Pub. Serv. Com.*, 271 Mo. 155, 196 S. W. 369, and by this rule we have been guided in the review of this case.

[9, 10] Summarizing our findings based upon this review in the light of the law applicable thereto, we hold that the complaint is sufficient to authorize the invoking of the remedial powers of the commission; that the latter is authorized to consider a case involving the running of interstate trains; that under the preponderance of the evidence there is a public necessity for the stopping of the trains in question at Pilot Grove, as prayed; that this finding does not result in such a loss of the earnings, or other inconvenience or detriment to the appellant, as to constitute a violation of any substantial right, whether invoked under the due process or interstate commerce clauses of the Constitution.

In consequence of all of which the judgment of the circuit court should be affirmed, and it is so ordered.

FARIS, J., concurs. WILLIAMS, J., concurs in the result and in all except paragraph 5.

(277 Mo. 303)

STATE ex rel. KANSAS CITY v. OREAR,  
City Comptroller. (No. 21322.)

(Supreme Court of Missouri, in Banc. March 15, 1919.)

1. MUNICIPAL CORPORATIONS ⇨918(1) — ISSUANCE OF BONDS—TWO-THIRDS AFFIRMATIVE VOTE—CONSTITUTION—"VOTING."

Affirmative vote of two-third of electors voting on proposition of city's issuance of bonds was a sufficient authorization, under Const. art. 10, § 12, requiring assent of two-thirds of voters voting at an election to be held for that purpose, "voting" meaning expressing the will, mind, or preference; casting or giving a vote.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Voting.]

2. CONSTITUTIONAL LAW ⇨14—CONSTRUCTION OF CONSTITUTION.

Under Rev. St. 1909, § 8057, as to construction of statutes, Supreme Court must construe the language of the Constitution in its plain, ordinary, and usual sense.

3. MUNICIPAL CORPORATIONS ⇨918(3) — BOND ELECTION—PUBLISHED NOTICE—STATUTE.

Election on proposition of city's issuance of bonds for a municipal ice plant and for fire protection was not void because there was no daily German language newspaper printed in the city to render possible publication of notice of election in it as required by Laws 1913, p.

534, notice having been published in weekly German language newspaper.

4. MUNICIPAL CORPORATIONS ⇨267 — ENGAGEMENT IN MANUFACTURE AND SALE — CHARTER AUTHORITY.

Before a city can legally engage in making and selling ice, it must have charter authority, either express or clearly implied.

5. MUNICIPAL CORPORATIONS ⇨861—TAXATION FOR PRIVATE PURPOSES—COMMON LAW.

The common law, even without the aid of any constitutional inhibition, forbids the levying and collecting of taxes by a city for any private purpose or business.

6. MUNICIPAL CORPORATIONS ⇨910—ISSUANCE OF BONDS—ENGAGEMENT IN ICE BUSINESS—"PUBLIC PURPOSE."

A city, despite charter permission, may not lawfully issue bonds, which must be paid from taxes, to engage in the business of making and selling ice to its inhabitants, the purpose not being "public," to warrant the expenditure of public moneys.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Purpose.]

Woodson, J., dissenting.

Mandamus by the state of Missouri, at the relation of Kansas City, Mo., against Ed. T. Orear, city comptroller of Kansas City. Alternative writ as to the first count of the petition quashed; as to the second count made peremptory.

This is an original proceeding by mandamus in two counts, whereby it is sought to compel respondent, as city comptroller of Kansas City, to prepare, sign, and arrange for the sale of two certain issues of municipal bonds heretofore authorized, as it is alleged, by elections held for those purposes.

The petition filed herelp sets forth, as stated above, two separate causes of action in two separate counts. By the first count of the petition it is sought to compel respondent to perform his official duties above named with reference to a certain proposed issue of \$400,000 par value of municipal ice-plant bonds (so-called to distinguish them and for brevity), which bonds it is alleged were duly authorized, by an election, to be issued and sold, and the proceeds thereof used "for the manufacture and distribution of ice to the different municipal departments of the city, and for the manufacture, sale, and distribution of ice to the inhabitants of the city."

By the second count of the petition herein it is sought to compel respondent to perform his official duties in the preparation, signing, and sale, of an issue of \$200,000 par value of fire-protection bonds, which likewise were, it is alleged, duly authorized to be issued by an election, and which are to be used in the "purchase and construction of im-

provements and betterments for the city's system of detecting, preventing, and extinguishing fires."

Upon the making here by relator of the application for the issuance of our writ of mandamus, the respondent entered his appearance, waived the issuance of our alternative writ, and agreed that the petition filed herein should stand for and be treated in all respects as the alternative writ of mandamus, and that the respondent should plead thereto as if to such alternative writ.

Thereupon the respondent, for his return to both the first and second counts of the petition herein, demurred generally thereto, for that said counts, and each of them, failed to state facts sufficient to entitle the relator to the relief prayed for. After demurring generally, respondent further alleged by way of answer, and for his further excuse in law for failing to perform his official duty as aforesaid, that the elections held to authorize the issuance of the bonds were invalid, for that (a) two-thirds of the voters voting at the elections therefor did not vote in favor of the issuance thereof, and (b) that the notice of the elections was not published, as the statute requires, for at least three weeks in a daily newspaper published in the city of Kansas City and printed in the German language, and having a bona fide circulation in Kansas City of at least 2,000 copies of each issue, and which had been continuously published in said city for at least 52 weeks next before such elections.

Upon the first point, the conceded facts show that the elections upon both of the proposals to issue bonds were held at the same time and place as the general election for federal, state, and county officers was held, to wit, on the 5th day of November, 1918, and at the regular polling places; that the total number of votes cast at this election for such federal, state, and county officers was 43,405, but that there were cast on the proposals to issue the bonds in question only 34,902 votes, of which number 26,988 voted in favor of issuing said bonds, and 7,914 against the issuance thereof.

Upon the second point of contention the facts show that the notice of said elections, while not published in a daily newspaper printed in the German language, because none such existed there, was yet published in a weekly newspaper printed in the German language, and likewise published in all of the English daily newspapers which were published in the city of Kansas City.

Both of the above contentions which affect the alleged invalidity of the elections apply, of course, to both issues of bonds here in controversy. Another contention, however, is made in the return touching the proposed issue of bonds to acquire and operate an ice-plant, which is that the business of manufacturing, selling, and distributing ice

is not a public purpose, and for that reason the ordinance which provides for the issuance of bonds whereof the proceeds are to be used for that purpose is void.

Upon the filing here of the return of respondent, consisting, as stated, of a general demurrer and of the special answer above substantially set out, the relator filed in this court a motion for judgment on the pleadings.

Therefore the case stands here with all of the facts which are well pleaded in the petition confessed by respondent, and with all of the facts set out in the special answer of respondent confessed by relator. The case is here, therefore and up for decision upon the above facts, and such others as we shall have occasion to set out in our opinion.

E. M. Harber, M. A. Fyke, and A. F. Smith, all of Kansas City, for relator.

Charles M. Howell and Lathrop, Morrow, Fox & Moore, all of Kansas City, for respondent.

FARIS, J. (after stating the facts as above). Two contentions affecting the validity of the elections at which the issuance of the bonds was attempted to be authorized are made by respondent as excusing in law his refusal to act in the premises. These two contentions as stated affect the fire-protection bond issue as well as the ice-plant bond issue. The third contention made by respondent affects the validity of the ice-plant bonds only, and is, to wit, that the purpose for which the proceeds of the ice-plant bonds are to be used is not a public purpose, and therefore there is lacking both legislative and constitutional authority to use therefor public moneys raised by public taxation.

[1, 2] I. The first point urged is that two-thirds of all voters of Kansas City "voting at an election to be held for that purpose" (Const. 1875, § 12, art. 10) failed and neglected to vote in favor of the issuance of the bonds. As forecast in our recital of the facts, this contention is bottomed upon the conceded fact that, while 43,405 votes were cast at the general election held in Kansas City at the same time and places, only 34,902 of these were voted at all upon the question of the bond issues. (The number of those voting upon the two proposed issues of bonds differs slightly, but the result and the principle are identical in both, and so we consider them together.) Of these 34,902, so registering their will positively, 26,988 voted in favor of issuing the bonds, and 7,914 voted against such issuance. Therefore, while far more than two-thirds of those voting at all on the proposition to issue the bonds voted in favor thereof, yet two-thirds of all persons who voted at the general election, held at the same time and places, did not vote to issue the bonds. Was such a vote a sufficient authorization under the provisions

of section 12 of article 10 of the Constitution? We are of the opinion that it was.

So much of said section 12 of the Constitution as affects and rules the point presented for consideration reads thus:

"No county, city, town, township, school district or other political corporation or subdivision of the state, shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof *voting at an election to be held for that purpose.*" (Italics ours.)

Obviously the decision of the question presented involves only a construction of the above-quoted language of the Constitution. This language we are required to construe in its plain, ordinary, and usual sense. Section 8057, R. S. 1909. Such plain, ordinary, and usual sense is that meaning which is given to words and language by the recognized and standard dictionaries of the English language. From these we find that the word "voting" (the same being the present participle of the intransitive verb "to vote") means "expressing the will, mind, or preference; casting or giving a vote" (Webster's Dictionary); "casting a vote, as a formal or an authoritative expression of opinion; exercising the right of suffrage" (Standard Dict; Century Dict.) Turning, as the point does, solely upon the meaning of the words employed in our Constitution, it is manifest that the cases ruled in other jurisdictions are of negligible value, because of the fact that it is almost, if not quite, impossible to find words used in the organic laws of other states which are even substantially like the language of our own Constitution. Upon situations which are analogous even, there is much contrariety of opinion in the cases from other jurisdictions. There are apparently conflicts in our own decisions. These conflicts Kennish, J., in the case of *State ex inf. v. Kansas City*, 233 Mo. 162, 134 S. W. 1007, undertook to reconcile by logical classification. Whether he successfully did so or not is, however, beside the question; for Division 2 of this court, construing this identical language in a case precisely upon all fours with this held that the words, "two-thirds of the voters thereof, voting at an election to be held for that purpose," mean two-thirds of those who actually vote for or against the given proposition, whether such two-thirds be two-thirds or not of all the voters taking part in the election otherwise, and voting upon other propositions, matters, and things presented thereat and up for decision by vote. *Franklin v. School District*, 271 Mo. loc. cit. 593, 197 S. W. 348. In the latter case, at the page cited, Roy, C., said:

"It is claimed that 186 votes for the proposition is not two-thirds of the total of 214 voting at such election. It is exactly two-thirds of

those voting on that proposition, and we think is sufficient to authorize the issuing of the bonds. Section 12 of article 10 of our state Constitution requires 'the assent of two-thirds of the voters thereof voting at an election to be held for that purpose.' That section, in the respect now under discussion, has never been construed. Similar provisions in the states of Kentucky and Washington have been construed by the courts of those states as meaning that the result is to be determined by the number of votes cast on the particular proposition.

"In *Montgomery County Fiscal Court v. Trimble*, 104 Ky. 629 [47 S. W. 773, 42 L. R. A. 738], a similar provision of the Constitution of that state was held to require only two-thirds of the votes of those voting on the proposition. That case overruled three prior cases, and has been followed in frequent cases since. *Board of Education v. City of Winchester*, 120 Ky. 591 [87 S. W. 768]; *City of Marion v. Haynes* [157 Ky. 687], 164 S. W. 79; *Fowler v. City of Oakdale* [158 Ky. 603], 166 S. W. 195.

"In *Fox v. City of Seattle* [43 Wash. 74] 86 Pac. 379 [117 Am. St. Rep. 1087], it was said:

"The Constitution, it will be noted, does not provide for either general or special elections so termed, but provides only for an election to be held for that purpose. \* \* \* The provision in the charter that such proposition shall have then received the assent of three-fifths of the voters voting at such election, construed with reference to the constitutional provision, evidently means three-fifths of the voters who are expressing an opinion on the question discussed in the ordinance, and the question discussed in the ordinance was the question of the loan and the issuance of the bonds."

"The Constitution must be so construed as to give effect to all its terms. If it be construed to mean two-thirds of all votes cast at an election where other matters are voted upon, then the words 'for that purpose' are, in effect, stricken out of the Constitution."

[3] II. But it is contended that the notice of the election held to authorize the issuance of the bonds in question was insufficient, in that such notice was not published for at least three weeks in "a daily newspaper printed in the German language." Laws 1913, p. 534. It appears from the conceded facts that there is no daily newspaper printed in the German language and published in Kansas City. There is a weekly paper printed in that language and published in said city, in which latter paper the notice of the election in question was duly published. In other words, the conditions existing utterly precluded compliance with the strict letter of the act of 1913. The officers of the city, therefore, complied with the statute mentioned by approximation, i. e., as nearly as it was humanly possible to comply under the circumstances existing, by causing publication to be made weekly in a weekly newspaper printed in the German language and published in Kansas City. In passing, it may be noted that the statute or act referred to and here invoked requires that the

daily newspaper printed in the German language in which any such notice is required to be given must have been in existence for at least one whole year next before the publication of such notice therein; but that *weekly, and not daily, insertions of the notice only are required.* It will be seen, therefore, that precisely the same notice was given in the German language as is required by statute to be given; that is to say, as many insertions or different publications of the notice were made by printing the notice in the weekly German newspaper as the statute required to be made in a daily German newspaper. And while the act supra requires publication to be made in only two daily newspapers, one of which, as stated, to be printed in the German language, the notice of the election here was published in four English daily newspapers and in one German weekly newspaper. There is therefore no question that as a matter of fact ample notice was given. Does the mere fact of technical noncompliance with the act's provisions, when strict compliance therewith became impossible, render the election void? We do not think so. We are of opinion that the act in question must be held to require publication of the notice in a German daily newspaper only in case there be in fact such a newspaper published in Kansas City at the time notice of such an election is required to be published. Any other view is unthinkable. For the effect of a contrary view would be to wholly preclude the issuance of municipal bonds by that city for any purpose, till the statute be changed by the Legislature, or until a German daily newspaper shall have been established, issued, and published in that city for a whole year. We may well assume that if there be in Kansas City a sufficient number of voters who can read German, but not English, as to make necessary the giving of notice to them in the German language, then there would be published therein a daily German language newspaper to cater to such voters' literary needs. In a case differing somewhat as to the facts, but analogous in the principle announced, and therefore persuasive, it was said:

"One of the sections of the charter act governing cities of the metropolitan class (section 85, c. 12a, Compiled Statutes 1893) provides that the notice of the sitting of the board of equalization shall be given by publication in three daily papers of the city. The record discloses that there are but two daily papers published which are printed in the English language and one in the German language. The notice in the case at bar, it appears, was published in all three of the papers mentioned, being printed in the German language in the German paper. It is quite true that ordinarily a publication of a legal notice in a foreign language, when not expressly authorized by statute, would not be a valid notice. In the instant case, however, we think an exception arises. The requirement of the rule as to publication of notice in the Eng-

lish language is met by the publication in both dailies printed in that language, they being all the daily publications in the city printed in English. The Legislature hardly contemplated an impossibility, nor that a publication of the notice in English in a German daily paper should be had in order to comply with the statutory requirement. We are not disposed to adopt such a construction. The object of the notice by publication is to give the greatest possible publicity. \* \* \* The objection is not regarded as tenable." *John v. Connell*, 71 Neb. loc. cit. 16, 98 N. W. 457, 459.

It is urged by relator that if the act of 1913, supra, be given the construction contended for by respondent, it would of necessity be unconstitutional, for that it is class legislation. Since we find ourselves constrained to disallow respondent's contention, and to place upon the act a construction which obviates the doing of an impossibility, we need not now or here pass upon the question whether the act is invalid constitutionally as class legislation.

III. Which brings us to a consideration of the question whether a municipal corporation can lawfully issue bonds for the purpose of erecting and operating a factory or plant for the manufacture and sale of artificial ice. Specifically (and in order that the exact question may be squarely presented we quote), the stated object of the issuance of what we have herein called the "ice-plant bonds" was, to set out the ordinance, this:

"For the acquisition, by purchase or otherwise, of a site or sites, within or outside of the corporate limits of the city, and for the purchase, construction, equipment, extension, and enlargement of a plant or plants thereon, for the manufacture and distribution of ice to the different municipal departments of the city, and for the *manufacture, sale, and distribution of ice to the inhabitants of the city*, at such times and under such conditions as may be expedient or necessary in maintaining the peace, order, good government, health, and welfare of the city and the inhabitants thereof." (Italics ours.)

Two contentions are urged by respondent as excusing his refusal to act. These are (a) that there is no authority contained in the charter of Kansas City to authorize that city to engage in the business of manufacturing and selling ice, and (b) that the engaging in the making and selling of ice is a private, and not a public, business, and therefore a business wherein the money of the public raised by public taxation cannot be used. *State ex rel. v. St. Louis*, 216 Mo. loc. cit. 90, 115 S. W. 534.

[4] That there must be authority in the charter of Kansas City, either express or clearly implied, permitting that municipality to engage in making and selling ice, before it can legally do so is settled by the repeated adjudications in this state. *State ex rel. v. Kansas City Terminal Railway Co.*, 260 Mo. loc. cit. 495, 168 S. W. 1144; *St. Louis v. Dreisoerner*, 243 Mo. 217, 147 S. W. 908, 41

L. R. A. (N. S.) 177; *St. Louis v. Telephone Co.*, 96 Mo. loc. cit. 628, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370. Quoting Judge Dillon's most excellent work on Municipal Corporations (1 Dillon Mun. Corp. [3d Ed.] § 89), it was said in the very early case of *St. Louis v. Telephone Co.*, supra, at page 628 of 96 Mo., at page 198 of 10 S. W. (2 L. R. A. 278, 9 Am. St. Rep. 370), that—

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: (1) Those granted in express words; (2) those necessarily or fairly implied, in, or incident to, the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

[5, 6] While, by reason of the novelty and far reaching importance of the question presented, we have mentioned as requisite an apt and sufficient charter provision, nevertheless, in the view we are constrained to take of this case, it makes no difference whether the issuance of the bonds in question is warranted by a specific provision of the general welfare clause of the Kansas City charter or not. The question before us cuts deeper than that. If such bonds cannot be issued lawfully the charter permitting, we must needs refuse to compel respondent to issue, sign, and sell the same; for, even if such issuance is warranted by either an express or implied provision of the charter, the further question arises whether such a charter provision, when thus construed, is not itself bad, for that it contravenes the constitutional and statutory requirement that the charter of Kansas City shall be in harmony with, and subject to, the Constitution and laws of the state. Section 16, art. 9, Const. Since the last question, if found against the contentions of the relator, is decisive of the point whether the ice factory bonds are valid, we need not trouble ourselves or take up time in further discussing the other one.

*May a town or city in this state, its charter permitting, lawfully engage in the business of making and selling ice to the inhabitants of such city?* In approaching a discussion and a solution of the question we must, of necessity, take that phase of the case made which is strongest against the exercise of the right contended for. So we eliminate the mere matter of the city's right to make ice for its own departments, offices, and hospitals, as likewise the matter of a sale to the inhabitants of the city of merely surplus ice left after the city's departments, offices, and hospitals are supplied by a city ice factory, and thus we come to state baldly, as above, the proposition presented.

The state of the conceded facts regarded, there is here no compelling necessity for the

relator's engaging in the business of ice making and vending; for the respondent in his return, while confessing that, owing to the exigencies of the war, there was a shortage of ice in Kansas City during the summer of 1918, yet avers that this shortage was due to causes not now existing, and that steps are being taken to increase the output, thus obviating any recurrence of the shortage conditions from which the city suffered in 1918. The motion for judgment on the pleadings admits the truth of all this. So, the case is shorn of the element of compelling or absolute necessity, even if such element would, under our Constitution, affect the situation in a way favorable to relator's contentions, touching which, however, we need not and do not rule. But in passing, even granting for argument's sake the right of the city, under the general welfare clause of its charter, to engage in the selling to its inhabitants of any necessity of life during a period of compelling emergency, it would yet seem plain that no such business could be continued with the money of the public after the emergency had passed. Should a vast and valuable plant be built, could it be run with public money after the absolute necessity had passed away?

Our Constitution explicitly says, "Taxes may be levied and collected for public purposes only." Section 8, art. 10, Const. We have held that this was the law before the provision was ever put into the Constitution. *State ex rel. v. St. Louis*, 216 Mo. 47, 115 S. W. 534. It is obvious therefore that in the final analysis the question becomes, Is the making and sale of ice to all inhabitants of a city who desire to buy a public or a private business? It is public, of course, in the sense that the police power of the city extends to regulating the cleanliness and sanitary methods of making, handling, and vending ice. It is not public in the sense that it is such a utility as comes under the supervision of the Public Service Commission. That it is not the latter is persuasive, but, we concede, not conclusive, in the view against its public nature.

When a purpose is public and when it is not is within the purview of law, and our own constitutional provision a close and difficult question. Bread, clothing, shoes, water, light, fuel, ice, drugs, and medicines and transportation may be enumerated as some of the things now deemed to be absolute necessities for the human race in the latitude of this state. Some of these, e. g. light and water, are regarded as falling within the category of things which the well-settled rule permits the municipality on its business side to furnish and engage in the business of furnishing. Other of the things enumerated, though equally necessary to the health, comfort, life, and well-being of the populace, are, by common consent, regarded as wholly without the powers of the municipality to furnish or deal in. The rule to be invoked in determining

whether the business in question—when it is proposed by the municipality to engage in the sale of the enumerated necessities of life—is public or private, is whether such business is sanctioned by time and the acquiescence of the people as being public or private. The twilight zone is apparent and to an extent perplexing. Discussing this question, Mr. Justice Miller in the case of *Citizens' Saving & Loan Assoc. v. Topeka*, 20 Wall. 664, (23 L. Ed. 455), said:

"It is undoubtedly the duty of the Legislature, which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

Judge Cooley, speaking for the Supreme Court of Michigan, in the case of *People ex rel. v. Salem*, 20 Mich. 452, 4 Am. Rep. 400, said:

"But when we examine the power of taxation with a view to ascertain the purposes for which burdens may be imposed upon the public, we perceive at once that necessity is not the governing consideration, and that in many cases it has little or nothing to do with the question presented. Certain objects must of necessity be provided for under this power, but in regard to innumerable other objects for which the state imposes taxes upon its citizens the question is always one of mere policy, and, if the taxes are imposed, it is not because it is absolutely necessary that those objects should be accomplished, but because on the whole it is deemed best by the public authorities that they should be. On the other hand, certain things of absolute necessity to civilized society the state is precluded, either by express constitutional provision or by necessary implication, from providing for at all, and they are left wholly to the fostering care of private enterprise and private liberality. We concede, for instance, that religion is essential, and that without it we should degenerate to barbarism and brutality; yet we prohibit the state from burdening the citizen with its support, and we content ourselves with recognizing and protecting its observance on secular grounds. Certain professions and occupations in life are also essential, but we have no authority to employ the public moneys to induce persons to enter them. The necessity may be pressing, and to supply it may be, in a certain sense, to accomplish a 'public purpose'; but it is not a purpose

for which the power of taxation may be employed. The public necessity for an educated and skillful physician in some particular locality may be great and pressing, yet if the people should be taxed to hire one to locate there the common voice would exclaim that the public moneys were being devoted to a private purpose. The opening of a new street in a city or village may be of trifling public importance as compared with the location within it of some new business or manufacture; but while the right to pay out the public funds for the one would be unquestionable, the other by common consent is classified as a private interest, which the public can aid as individuals if they see fit, while they are not permitted to employ the machinery of the government to that end. Indeed, the opening of a new street in the outskirts of a city is generally very much more a matter of private interest than of public concern, so much so that the owner of the land voluntarily throws it open to the public without compensation; yet, even in a case where the public authorities did not regard the street of sufficient importance to induce their taking the necessary action to secure it, it would not be doubted that the moment they should consent to accept it as a gift the street would at once become a public object and purpose, upon which the public funds might be expended with no more restraints upon the action of the authorities in that particular than if it were the most prominent and essential thoroughfare of the city.

"By common consent also a large portion of the most urgent needs of society are relegated exclusively to the law of demand and supply. It is this in its natural operation, and without the interference of the government, that gives us the proper proportion of tillers of the soil, artisans, manufacturers, merchants, and professional men, and that determines when and where they shall give to society the benefit of their particular services. However great the need in the direction of any particular calling, the interference of the government is not tolerated, because, though it might be supplying a public want, it is considered as invading the domain that belongs exclusively to private inclination and enterprise. We perceive, therefore, that the term 'public purposes,' as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification, to distinguish the object for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest, or liberality."

Ice has but recently been elevated—granting for argument's sake the promotion—to a place among the necessities of life. Time was but recently when it was considered as a luxury only. But be this as may, it is yet certainly no greater a necessity to the human race than are food and clothing. If a city should undertake, absent compelling necessity at least, to establish and operate grocery stores and clothing "emporiums," no one would hesitate to say that no power exists in the municipality to use public money, or the

proceeds of public taxation, for such purposes. Such things may be given away by the city to paupers and to the temporarily unfortunate, but the city cannot enter into the business of selling such articles to all inhabitants of such city who may desire to buy. If the cities, towns, and villages of this state deem that their entry into private business in competition with individuals now engaged in such business is a matter of public expediency, then the initial effort to this end must be an amendment to the Constitution; and following such an amendment the passage of an act changing the common law, which, even without the aid of the constitutional inhibition, forbids the levying and collecting of taxes for any private purpose or business. *State ex rel. v. St. Louis*, 216 Mo. 47, 115 S. W. 534. If the situation were one of continuing, or perennial, necessity, a city might well have the power under the general welfare clause of its charter to take such steps as would be requisite to supply the compelling need for any such necessity of life so long as such condition existed. But this, as stated above, is not the question before us.

While a reference to the holdings in other jurisdictions, which we analyze and discuss below, discloses some contrariety of opinion, we are constrained to rule that our own Constitution and our own trend of judicial opinion, touching what is a public purpose for which public money may be used, place us among the great majority of jurisdictions holding, in similar or analogous cases, that the proposed purpose is not a public purpose. *State ex rel. v. Public Service Com.*, 205 S. W. 36; *State ex rel. v. Associated Press*, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368; *State ex rel. v. Ashbrook*, 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, 77 Am. St. Rep. 765; *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; section 3, art. 10, Const. of Mo.; *State ex rel. v. St. Louis*, 216 Mo. 47, 115 S. W. 534.

The question whether a city or town can engage in the making and selling of ice as a business has, as forecast, never before been up for decision in the courts of this state. It was before the Supreme Court of Georgia in the case of *Holton v. City of Camilla*, 134 Ga. 560, 68 S. E. 472, 31 L. R. A. (N. S.) 116, 20 Ann. Cas. 199, wherein it was ruled that, under an express statute conferring upon the city of Camilla the power to erect and operate an ice factory, such city could exercise this power as an incident to the operation of a lighting plant already existing, without contravening the constitutional provisions of that state making "protection to person and property \* \* \* the paramount duty of government" (paragraph 2, § 1, art. 1, Const. of Ga. 1877), or that which forbids that any "person shall be deprived of life, liberty, or property, except by due process of law" (paragraph 3, § 1, art. 1, Const. Ga. 1877). No mention is

made in the above case by the Georgia Supreme Court of a constitutional provision such as we have in Missouri, which provides that "taxes may be levied and collected for public purposes only" (Const. of Mo., § 3, art. 10), nor even of any rule of law to the above effect, such as we have, even absent our constitutional provision last above quoted. *State ex rel. v. St. Louis*, 216 Mo. 47, 115 S. W. 534.

In the case of *Saunders v. Mayor of Arlington*, 147 Ga. 581, 94 S. E. 1022, Ann. Cas. 1918D, 907, also decided by the Supreme Court of Georgia, the power of the town of Arlington to erect and operate an ice factory was (as appears from the limited concurrences of the judges) grudgingly and doubtfully bottomed on what may be broadly called the "general welfare clause," or, to be more accurate and exact, upon a provision in the charter of the town of Arlington which permitted that town to issue bonds for the purpose of sewers, schools, electric light and water systems, "and for making any other public improvements."

Likewise, the Supreme Judicial Court of Maine in the case of *Laughlin v. City of Portland*, 111 Me. 486, 90 Atl. 318, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916C, 734, held that, pursuant to an act of the Maine Legislature expressly authorizing cities to establish fuel yards for the sale of fuel at cost to the inhabitants of such city, the city of Portland could establish such a fuel yard, and that, present the exigency of necessity, such use of the money is a public use.

But in the case of *Union Ice Co. v. Ruston*, 135 La. 898, 66 South. 262, L. R. A. 1915B, 859, Ann. Cas. 1916C, 1274, it was held that even an express provision in the charter of a town permitting such town to engage in the business of making and selling ice to the inhabitants thereof did not and could not save such business from being ultra vires, because violative of the Constitution of Louisiana, which provides, substantially as does our own, that the taxing power may be exercised by municipal corporations for purposes strictly public in their nature.

In the case of *Rippe v. Becker*, 56 Minn. 100, 57 N. W. 331, 22 L. R. A. 857, the Supreme Court of Minnesota held that the Legislature had no power to authorize even the state itself to maintain an elevator or warehouse for the public storage of grain.

In the case of *Keen v. Mayor of Waycross*, 101 Ga. 588, 29 S. E. 42, it was held that a city or town cannot engage in the plumbing business, or in the business of selling plumbers' supplies to its citizens, even though such business be ancillary to, and deemed necessary for, the successful operation of the municipal waterworks system. While the above case rode off on the point that express legislative authority to engage in the business mentioned was lacking, it is yet, in view



of the subsequent holding in the case of *Holton v. Camilla*, supra, interesting to note that the Supreme Court of Georgia took occasion to say in the *Keen* case this:

"But the position of the city that, to bring about this result [that is, to render the city waterworks system efficient], it was necessary to engage in the plumbing business, is utterly untenable, because obviously not well founded in fact. It might as reasonably be urged that, in order to satisfy its patrons, it was necessary for the city to embark in the ice business, as an incident to its right to supply good drinking water to its citizens." *Keen v. Waycross*, 101 Ga. loc. cit. 591, 29 S. E. 43.

The Legislature of the state of Maine, apparently having under consideration the passage of a law to permit cities to "establish manufactories entirely on their own account and run them by the ordinary town officers," called on the judges of the Supreme Judicial Court of Maine for their opinion touching the legality of the proposed act. The court held that such a statute would be ultra vires and therefore invalid. Opinion of the Judges, 58 Me. 590.

In the case of *State ex rel. v. Lynch*, 88 Ohio St. 71, 102 N. E. 970, 49 L. R. A. (N. S.) 720, Ann. Cas. 1914D, 949, it was held by the Supreme Court of Ohio that an ordinance passed by the city of Toledo appropriating public money for the establishment and operation of a moving picture show was invalid, because it was an unauthorized use of public money.

In the case of *Radford v. Clark*, 113 Va. 199, 78 S. E. 571, 38 L. R. A. (N. S.) 281, it was held by the Supreme Court of Appeals of Virginia that in the absence of statutory authority a municipal corporation of that state had no power to operate a stone quarry, and that such a power did not inherently flow as a necessary concomitant to the city's duty to keep its streets in repair.

The Supreme Court of Kansas, in the case of *State v. Kelly*, 71 Kan. 811, 81 Pac. 450, 70 L. R. A. 450, 6 Ann. Cas. 298, held that an act permitting the state to establish and operate an oil refinery was not upon the facts of the case an incident to providing labor for convicts in the penitentiary, as it ostensibly purported to be, and that the establishment and operation of such a plant would therefore constitute an unauthorized invasion by the state into private business, and would therefore be void. Touching upon the broad policy of the federal government and of the state of Kansas in the behalf under consideration, the Supreme Court of Kansas said:

"It has been the policy of our government to exalt the individual rather than the state, and this has contributed more largely to our rapid development than any other single cause. Our Constitution was framed, and our laws enacted, with the idea of protecting, encouraging, and developing individual enterprise, and if we now

intend to reverse this policy, and to enter the state as a competitor against the individual in all lines of trade and commerce, we must amend our Constitution and adopt an entirely different system of government." *State v. Kelly*, 71 Kan. loc. cit. 836, 81 Pac. 459 (70 L. R. A. 450, 6 Ann. Cas. 298).

In an opinion furnished to a branch of the Massachusetts Legislature by the Supreme Judicial Court of Massachusetts upon the query whether a proposed act, whereby it was sought to authorize cities and towns to buy and sell fuel, was valid, it was said:

"Cities and towns now have ample power to provide in any reasonable way for paupers, whether it be by furnishing out of door relief, or by support in almshouses, and whether their need of relief is permanent or caused by a temporary condition. It is equally true that the second of these consequences does not justify taxation of those who do not have occasion to buy coal for the benefit of those who do. The use of the money of taxpayers for such a purpose would not be a public use, but a use for the special pecuniary benefit of those who happen to be affected by the state of the coal market." *Re Municipal Plants*, 182 Mass. 609, 66 N. E. 26, 60 L. R. A. loc. cit. 594.

Without lengthening our views by the analysis of, and citations from, other cases in point or apposite, we take leave to append hereto some of these other cases, which are either directly in point, or which throw light upon the discussion from the point of view that municipal corporations may not engage in private business, or use public money in business ventures heretofore deemed to be private. *Re Municipal Fuel Plants*, 155 Mass. 601, 30 N. E. 1142, 15 L. R. A. 809; *Leesburg v. Putnam*, 103 Ga. 110, 29 S. E. 602; *Attorney General v. Leicester*, 74 J. T. 304; *Baker v. Grand Rapids*, 142 Mich. 687, 106 N. W. 208 (another fuel case); *Hayward v. Red Cliff*, 20 Colo. 33, 36 Pac. 796; *Bloomsburg Co. v. Bloomsburg*, 215 Pa. 452, 64 Atl. 602; *Citizens' Saving, etc., Co. v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *State ex rel. v. Thompson*, 149 Wis. 488, 137 N. W. 20, 43 L. R. A. (N. S.) 339, Ann. Cas. 1913C, 774; *People ex rel. v. Salem*, 20 Mich. 452, 4 Am. Rep. 400.

Recurring again to the view taken in *Saunders v. Arlington*, supra, that a city may engage in the making and sale of ice pursuant to the power conferred by a clause in its charter authorizing such city to make any other public improvements, and to that taken in *Holton v. Camilla*, supra, that the power to engage in such business is referable to the police power, it is enough to say that both of these cases leave out of careful consideration the question of whether such exercise of the powers invoked violates the constitutional and common-law rule which prohibits the use of public money for other than public purposes. Many things are within the purview of the police power

of a municipality which are yet not so coupled with a public interest as that the expenditure of public money therefor or therein would be justified. The fact that a municipality possesses inherently or by statute police powers does not mean that it may engage in all those avocations or businesses wherein it has such power; it merely means that it has power to regulate the business of others. Following closely in its definition what was said by Gantt, J., in *State ex rel. v. St. Louis*, 216 Mo. loc. cit. 90, 115 S. W. 534, the Supreme Court of Minnesota in the case of *Rippe v. Becker*, 56 Minn. 100, 57 N. W. 331, 22 L. R. A. 857, said this:

"As understood in American constitutional law, the term [police power] means simply the power of the state to impose those restraints upon private rights which are necessary for the general welfare of all, and is but the power to enforce the maxim, 'Sic utere tuo ut alienum non laedas.'"

Without further, we are of the opinion that the business of making and selling ice by Kansas City to the inhabitants of that city is not, under the situation shown by the conceded facts, so far a public purpose as to warrant the expenditure therein of public money obtained as the proceeds of municipal bonds, the payment of which, with the interest thereon, must be met by the levy and collection of public taxes.

It follows that our alternative writ was, as to the first count of the petition improvidently issued, and should be quashed; but that the failure and refusal of respondent to perform his official duties touching the bonds for fire protection, as set forth in the second count of the petition, are without legal warrant or excuse. As to said second count of the petition of relator, therefore, our alternative writ should be made peremptory. Let it be so ordered.

All concur, except WOODSON, J., who dissents in separate opinion.

WOODSON, J. (dissenting). I dissent from the majority opinion in so far as it holds that Kansas City has no power or authority, under the Constitution, to construct and operate an ice plant, and sell ice therefrom to the citizens of the city, and that it has no power to issue bonds of the city for the purpose of sale, and with the proceeds thereof to construct and operate such a plant for said purpose.

In dissenting I approach the legal propositions underlying the questions presented for determination from a totally different angle from that which my learned Brother views the case, and that is this:

When we pause for a moment and contemplate what a great city is, its tremendous requirements, and the incalculable beneficence ice constantly brings to its teeming masses of humanity, we are enabled at a glance to

see and understand the great and far-reaching effects the questions under consideration bear upon the well-being and public health of a great municipality.

Such cities are spread over many thousands of acres of land, laid out in lots and blocks, streets and alleys, avenues, parks, and public places. In the densely populated portions the streets, avenues, etc., are improved—paved with brick, stone, asphalt, or other materials, which are great conductors and retainers of heat, and upon these lots and blocks thousands and tens of thousands of buildings are constructed, from one to many stories in height, composed of wood, stone, brick, iron and steel, all of which are also good conductors and retainers of heat. Most of the buildings contain stoves, thousands have heating plants, and thousands of others have furnances, steam, or electrical plants, all of which generate large volumes of heat, and all of these buildings are occupied as homes, shops, factories, stores, banks, counting houses, etc. During the hot summer months, while the interior of these structures are heated up to the various degrees for the purposes for which they are used, and the hot, scorching sun is pouring forth its burning rays upon their exterior, roofs and walls, augmented with the stifling heat, dust, and vapors arising from the busy bustling streets and alleys, one can fully appreciate the terrible heat, and the great suffering of man and beast that is necessarily incident thereto, under the most favorable circumstances, and if, in addition, the teeming masses of men, women, and children who reside therein should be deprived of ice, cold drinks, and refrigeration, famine, pestilence, and death would follow in its wake. Ice cools the brow of the feverish and quenches the thirst of the sick and dying; it preserves sweet and fresh the milk for the babies, their staff of life, as well as the milk, butter, meat, poultry, eggs, and vegetables of all kinds. Without ice, milk would sour, butter become rancid, meat and poultry tainted and spoiled, eggs strong, and all kinds of vegetables would become stale, insipid, and unpalatable, if not decayed, all breeding microbes, bacteria, disease, and death. This may not be true in the same degree in the rural district and smaller towns and cities, where the air is pure and circulates unobstructed, and shade is in abundance, the heat not nearly so great or intense, and where all provisions may be had at home, or from near by, fresh and pure; but not so with great cities abounding with hundreds of thousands, yea, millions, of people who subsist from day to day upon the transportation of every morsel of food eaten and every glass of milk drunk. Yea, more than that, most of the things mentioned must be transported so far, hundreds of miles, yea, many of them thousands of miles, that transportation must be had in the refrigerating cars, and given the right of way on the wings

of lightning expresses, otherwise they would spoil before reaching their destination; and after reaching their destination, whether in the hands of the wholesaler, retailer, or consumer, they must again be placed in refrigeration, else they become unwholesome, spoiled, and dangerous to the public and private health of the city. Moreover, it is common knowledge that in large cities even a scarcity of ice causes babies to die like flies, to say nothing of hundreds of others who are old, sick, and infirm, who must live upon milk, butter, eggs, and other perishable provisions.

These things are so well known to every man and woman who live in large cities it would seem a useless waste of time to press the matter further upon the attention of the court.

I know of no greater calamity that could befall the large cities of this state and country than to deprive them of ice; in one week, I dare say, food stuffs would double and treble, and sickness, disease, and death would multiply with leaps and bounds. To all such cities ice has become a prime necessity, the equal to any of them and superior to most; for without it some of the others cannot be had, and many of them only in an unhealthy and deplorable condition.

It is no longer a debatable question that ice is strongly conducive to the public health and well-being of our large cities, and to hold that the Constitution prohibits them from preserving the public health and well-being is to face about and deny that which we have been writing upon that subject in this state for almost a century, and flies into the very teeth of section 2 of article 2 of the Bill of Rights, which provides that "the people of this state have the inherent, sole and exclusive right to regulate the internal government and police thereof. \* \* \*". The word "police," as used in this provision of the Constitution, means, as defined by Mr. Webster:

"The internal organization or regulation of a state, the control and regulation of a community or state through the exercise of the constitutional power of government; especially such control and regulation with respect to matters affecting the general comfort, health, morals, safety, or prosperity of the public."

The constitutional provisions cited and relied upon by my learned Associate in support of the position taken by him in the majority opinion have, in my opinion, no application whatever to the facts of this case. I say this for the reason that if I am correct in the views expressed regarding the important factor ice contributes to the well-being and general health of our large cities, then its production, sale, and distribution to their citizens would not be a private enterprise, but public in the highest degree and sense of that term, and therefore the expenditure of

the revenues of the city for those purposes would likewise be for public purposes and not for private use or gain.

Moreover, I have always understood, and in my opinion it is no longer a debatable question in this state and country, that all laws enacted for the preservation of the public health and well-being of a city or state are derived from the police power of the state, and that it is an inherent attribute of sovereignty, and is unabridged by any constitutional provision that can be found in the state or federal Constitution. This is the express provision of section 2 of article 2 of the Bill of Rights, before quoted, and the unqualified ruling announced by this court in banc in the case of *City of St. Louis v. Public Service Commission*, 207 S. W. 799 (not yet officially reported).

In the light of these constitutional provisions, it cannot be said that the Legislature is prohibited, or in any degree trammelled, in its sovereign power to enact such laws for the promotion of the public good and health of our cities and state as it may deem best; and if ice and refrigeration are conducive to those ends—which in my opinion they are—then, as a matter of course, the laws authorizing Kansas City to issue and sell the bonds in question for the purposes mentioned are constitutional and valid, and the respondent should be ordered to issue the same, and, in my opinion, a mandatory writ of mandamus should be issued as prayed.

For these reasons I dissent from the majority opinion.

(277 Mo. 294)

STATE ex rel. BUCKNER, Judge, v. ELLISON et al., Judges. (No. 20981.)

(Supreme Court of Missouri, in Banc. Feb. 15, 1919. Motion for Rehearing Denied March 15, 1919.)

1. PROHIBITION  $\S$  28—QUESTION PRESENTED—SUFFICIENCY OF EVIDENCE.

On proceeding by writ of prohibition, Court of Appeals was concerned merely with question whether circuit court had jurisdiction to hear and determine, in first instance, matter then pending before it, and question of sufficiency of evidence presented on hearing before circuit court was not properly before Court of Appeals.

2. PROHIBITION  $\S$  10(2) — JURISDICTIONAL QUESTION—EVIDENCE TO SUPPORT NUNC PRO TUNC ORDER.

Question of sufficiency of written minute evidence on judge's docket to support requested order correcting judgment nunc pro tunc of circuit court was not jurisdictional question, in proper sense, inquirable into by Court of Appeals on proceeding by writ of prohibition, but was question involving merely interpretation and application of strict rule of evidence applicable to hearings on motions for orders nunc pro tunc.

**3. APPEAL AND ERROR —440—COURTS —114—CONTROL OF RECORDS—JURISDICTION AFTER TERM AND APPEAL.**

A court at any subsequent term, or even after an appeal taken, has jurisdiction of its own records, and consequently to entertain motion for correction of its judgments nunc pro tunc.

**4. PROHIBITION —11—CORRECTION OF ERRORS.**

Purpose of writ of prohibition is not to correct errors, but to prevent a usurpation of jurisdiction.

**5. APPEAL AND ERROR —440—TRANSFER OF CAUSE—CORRECTION OF RECORD—JURISDICTION OF LOWER COURT.**

Circuit court, on motion to correct its judgment nunc pro tunc after appeal, in the first instance, at least, had jurisdiction to pass on sufficiency of record evidence offered in support of motion, as well as jurisdiction over record sought to be corrected, and jurisdiction to entertain motion.

Certiorari by the State, on the relation of Thomas B. Buckner, Judge of Division 1 of the Circuit Court of Jackson County, Missouri, against James Ellison and others, Judges of the Kansas City Court of Appeals. Record and judgment of the Court of Appeals quashed.

This is an original proceeding by certiorari, which seeks to quash, on the ground that it conflicts with controlling previous decisions of this court, an opinion of the Kansas City Court of Appeals in the case of State ex rel. Aikin, Relator, v. Buckner, Respondent. The opinion in the above case is published in 203 S. W. at page 242. Hon. Thomas B. Buckner, the relator in the case at bar, was respondent in that case, and is the judge of division 1 of the circuit court of Jackson county, Mo.

The case in which the Kansas City Court of Appeals delivered the alleged conflicting opinion was an original proceeding in prohibition, which sought to prohibit Judge Buckner from taking further judicial action upon a motion then pending before him which prayed the correction of a judgment of said circuit court by order nunc pro tunc.

The Court of Appeals held that Judge Buckner was without jurisdiction to proceed in the matter then pending before him, and ordered that the preliminary rule in prohibition be made absolute.

Thereafter Judge Buckner, as relator, instituted the certiorari proceeding here.

The facts stated in the opinion of the Court of Appeals which throw light upon the proceeding then pending in the circuit court may be summarized as follows:

One William H. Aikin, as plaintiff, instituted in said circuit court an action for damages against the Sidney Steel Scraper Company and Samuel B. Strother, administrator

of the estate of one Tomlinson, deceased, as defendants.

The action for damages proceeded to final judgment.

The memoranda entered upon the judge's docket, in the handwriting of Judge Buckner, who tried the case, was as follows:

"William H. Aikin v. Tomlinson and Sidney Steel Scraper Company. Walsh & L. Conrad, S. & W. December 5, 1916. At close of case court directs a verdict for defendant Sidney Steel Scraper Company. Plaintiff dismisses as to S. B. Strother, Adm'r."

The minutes kept by the clerk of the circuit court were as follows:

"76663—Aikin v. Sidney Steel Scraper Company et al. By leave of court plaintiff amends petition by reducing the amount sued for to \$7,500.00. Defendant Sidney Steel Scraper Company excepts.

"Plaintiff dismisses as to Samuel B. Strother, administrator of estate of J. C. Tomlinson, deceased.

"At close of plaintiff's evidence, under instructions given by the court, the jury returned the following verdict, to wit:

"We, the jury, find the issues for the defendant Sidney Steel Scraper Company.

"H. A. Kelly, Foreman."

"Judgment accordingly."

The judgment entered by the clerk was as follows:

"Now, on this day again come the parties in this cause, and also comes the jury herein, and now plaintiff, by leave of court, amends his petition by reducing the amount sued for to seventy-five hundred dollars; to which action in permitting said defendant Sidney Steel Scraper Company excepts.

"And now plaintiff dismisses this cause as to defendant Samuel B. Strother, administrator of the estate of J. C. Tomlinson, deceased.

"Wherefore it is ordered and adjudged by the court that this cause be, and the same is hereby, dismissed as to defendant Samuel B. Strother, administrator of the estate of J. C. Tomlinson, deceased, and that the said defendant have and recover of and from plaintiff his costs herein, and have execution therefor; and at the close of plaintiff's evidence, under the instruction given by the court, the said jury returned the following verdict, to wit:

"We, the jury, find the issues for the defendant Sidney Steel Scraper Company.

"H. A. Kelly, Foreman."

"Wherefore it is ordered and adjudged by the court that plaintiff take nothing by this suit, and that defendant Sidney Steel Scraper Company, have and recover of and from plaintiff its costs herein, and have execution therefor."

Aikin, the plaintiff therein, appealed from said judgment, and the appellate court, holding that the circuit court had erred in giving the peremptory instruction, reversed the judgment, and remanded the cause for trial.

After the mandate of the appellate court

had reached the circuit court, said Sidney Steel Scraper Company, the then sole remaining defendant in said cause, filed a motion in said circuit court, asking for an order nunc pro tunc changing or transposing the record judgment so that the portion showing a dismissal as to Strother, Adm'r, would appear after that portion which showed a directed verdict for the defendant Sidney Steel Scraper Company, so that (as contended by the movant) it might speak the truth, and be in conformity with the memoranda upon the judge's docket.

In substance the Court of Appeals held:

(1) That the judgment entered upon the record by the clerk of a court of record is presumed to be the judgment rendered by the court, and such presumption cannot be qualified by the recollection of the judge or witnesses.

(2) That there is nothing in the judge's docket to overcome the above presumption.

(3) That respondent (Judge Buckner, the relator here), under the facts shown, was without jurisdiction to determine the matter, and should be prohibited from taking further action therein.

John D. Wendorff, of Kansas City, for relator.

Walsh & Aylward, of Kansas City, for respondents.

WILLIAMS, J. (after stating the facts as above). I. Upon a careful review of the matter it would appear that the learned judges of the Court of Appeals may have fallen into the error of treating the case as though a review of the proceeding before the circuit court were before them upon appeal.

[1, 2] The question of the sufficiency of the evidence presented upon the hearing, before the circuit court was, however, not properly before the appellate court for discussion. Upon its proceeding by writ of prohibition it was concerned merely with the question of whether or not the circuit court had jurisdiction to hear and determine, in the first instance, the matter then pending before it. The question of the sufficiency of the written evidence to support the requested order nunc pro tunc was not a jurisdictional question in the proper sense, but a question which would involve nothing more than the interpretation and application of a strict rule of evidence applicable to hearings upon motions for orders nunc pro tunc.

That the sufficiency or insufficiency of the minutes in a judge's docket to justify the court in correcting its record by an order nunc pro tunc is a question of evidence rather than one of jurisdiction is, we think, clearly apparent from the language employed in previous rulings of this court.

In the early case of Jones v. Insurance Co., 55 Mo. 342, loc. cit. 344, it was said:

"Since this case came here by an appeal, an amendment nunc pro tunc of the judgment originally entered was made in the circuit court, correcting errors in the original entry made by the clerk. This was done on motion after due notice to the opposite party; and, the correction having been \* \* \* made, we will presume (no showing having been made in the appellate court) that the court had *sufficient evidence in its records* to authorize the change in the entry." (Parentheses and italics ours.)

To the same effect are Bank v. Allen, 68 Mo. 474, loc. cit. 476; Belkin v. Rhodes, 76 Mo. 643, loc. cit. 652.

In the case of Board of Ministerial Relief, etc., v. Drummond, 167 Mo. 54, loc. cit. 60, 61, 66 S. W. 930, 931, we find the following language:

"The decree of a court of general jurisdiction duly entered of record imports verity, and cannot be changed or altered on the ground of clerical mistake, except by *evidence* contained in some written record, minute entry, memorandum, or paper in the case. \* \* \* The facts alleged in the petition (here the correction was sought by a bill in equity) are only those upon which might have been predicated on application by motion and notice for the same relief, by an order \* \* \* nunc pro tunc, and the *rules of evidence* in such case cannot be changed by filing a petition and calling it a bill in equity." (Parentheses and italics ours.)

To the same effect are the following cases: Railroad v. Holschlag, 144 Mo. 253, loc. cit. 256, 45 S. W. 1101, 66 Am. St. Rep. 417; Young v. Young, 165 Mo. 624, loc. cit. 630, 65 S. W. 1016, 88 Am. St. Rep. 440; Becher v. Deusser, 169 Mo. 159, loc. cit. 165, 69 S. W. 363; Burnside v. Wand, 170 Mo. 531, loc. cit. 542, 71 S. W. 337, 62 L. R. A. 427.

In the case of Collier v. Lead Co., 208 Mo. 246, loc. cit. 273, 106 S. W. 971, 979, Graves J., speaking for Division 1, said:

"If it appears that the court has jurisdiction of the subject-matter and of the parties, as shown in this case, a nunc pro tunc judgment *cannot be attacked in a collateral proceeding on the ground that there was no evidence to support it.*"

The following propositions have also become well settled by previous rulings of this court, to wit:

[3] A court may by an appeal lose jurisdiction of a cause, but it does not thereby lose jurisdiction over its own records. At any subsequent term, and even after an appeal has been taken, the court which has jurisdiction of the record has jurisdiction to entertain a motion for correction of its judgments by nunc pro tunc. Johnston v. Ragan, 265 Mo. 420, loc. cit. 441, 178 S. W. 159, and cases therein cited; Exchange National Bank v. Allen, 68 Mo. 474, loc. cit. 486; De Kalb County v. Hixon et al., 44 Mo. 841.

[4] The purpose of the use of the writ of prohibition is "not to correct errors, but to

prevent a usurpation of jurisdiction." State ex rel. Graham v. Seehorn, 246 Mo. 541, loc. cit. 559, 151 S. W. 716, 721; State ex rel. v. Stoble, 194 Mo. 14, loc. cit. 45 and 52, 92 S. W. 191, and cases therein cited.

"It is this very right to hear, determine, and decide, whether rightfully or wrongfully, that we denominate jurisdiction." State ex rel. Johnson et al. v. Withrow, 108 Mo. 1, 18 S. W. 41.

[5] From the authorities above quoted it will appear that division 1 of the circuit court of Jackson county had jurisdiction over the record sought to be corrected, and also had jurisdiction to entertain the motion for an order nunc pro tunc, and, in the first instance at least, had the jurisdiction to pass upon the sufficiency of the record evidence offered in support of said motion.

The opinion of the Court of Appeals in holding that the writ of prohibition was available under the facts shown clearly conflicts with the principles of law stated in the authorities cited above, and for that reason should be quashed.

In the recent case of State ex rel. Lusk et al. v. Ellison et al., 271 Mo. 463, loc. cit. 474, 196 S. W. 1088, 1091, Graves, C. J., speaking for the court en banc on the question of conflict of opinion under review by certiorari, said:

"'Grey mule' cases as to facts are not required. It is sufficient that on a given state of facts the holding of the appellate court contravenes well-established rulings in law or equity as made by this court."

II. We have refrained from expressing any view as to the sufficiency or insufficiency of the evidence to support an order nunc pro tunc correcting the judgment in the circuit court. That privilege must first be accorded the learned circuit court. Up to date that court has never had the opportunity of judicially determining the matter. After the matter has been determined by that court it would then be proper for an appellate court, before whom the matter was properly brought for review, to render a decision thereon. Any discussion of the matter now would rise to no higher standard than mere dictum.

From the foregoing discussion in paragraph 1 above it follows that the record and judgment of the Court of Appeals should be quashed. It is so ordered.

BOND, C. J. (concurring). This is an application by certiorari to quash the record and judgment of the Kansas City Court of Appeals. Under the rule of law established by my Brethren, against my dissent, this court has power, under the Constitution, to quash judgments of the Courts of Appeals whenever such judgment conflicts with the last previous ruling of this court. In the present case

the Kansas City Court of Appeals held, in effect, that a circuit judge had no power, upon the record data before him, contained in the minutes made on his docket and the clerk's minutes and entry of judgment, to entertain an application for a nunc pro tunc entry to make the judgment and orders conform to those which were actually made and given at the time. Of course that was error on the part of the Kansas City Court of Appeals, for the power to hear and determine such motions is inherent in the circuit court. This is what I understand the opinion of my learned Brother WILLIAMS holds.

Because of the conflict thus pointed out by him, and because, while the present scope of review by certiorari subsists, it is the duty of all the members of this court to enforce it (State ex rel. v. Robertson, 264 Mo. loc. cit. 670, 175 S. W. 610), I concur in the quashing of the judgment in conformity to the Constitution as expounded by my Brethren, although I do not personally think their construction of the Constitution is correct. I therefore concur for conformity only.

#### JAMISON v. VAN AUKEN. (No. 19584.)

(Supreme Court of Missouri, Division No. 1.  
March 1, 1919. Rehearing Denied  
March 28, 1919.)

#### 1. REFORMATION OF INSTRUMENTS §17(1)—INADVERTENT OMISSION—SALE OF LAND.

Where an agreement whereby defendant was to pay for land to be occupied by ditches was made, but was inadvertently omitted from the written contract of sale, the contract should be reformed.

#### 2. VENDOR AND PURCHASER §130(7)—"GOOD MERCHANTABLE TITLE"—ADVERSE POSSESSION.

Plaintiff vendor, by showing a perfect record title to 1,050 acres covered by contract of sale, and a fee-simple title to the remaining 220 acres by adverse possession, under the 10, 24, and 30 years statute, would show a "good merchantable title," within contract requiring him to furnish an abstract showing such title. (Per Woodson and Graves, JJ.)

#### 3. VENDOR AND PURCHASER §130(7)—TITLE BY ADVERSE POSSESSION.

Specific performance of contract of sale of 1,270 acres of land, plaintiff vendor to furnish an "abstract showing good merchantable title," will not be denied though the abstract furnished does not technically show a record title in plaintiff to 220 acres, where the uncontradicted evidence shows that plaintiff had acquired fee-simple title to 220 acres by adverse possession under 10, 24, and 30 years statutes. (Per Woodson and Graves, JJ.)

#### 4. VENDOR AND PURCHASER ⇨140—PURPOSE OF ABSTRACT OF TITLE.

The purpose of an abstract of record of the title is not simply to show that the paper title is perfect as it appears of record, but that vendor has actual title. (Per Woodson and Graves, JJ.)

#### 5. VENDOR AND PURCHASER ⇨130(2)—GOOD MERCHANTABLE TITLE—WHAT CONSTITUTES.

Contract requiring vendor to furnish an "abstract showing good merchantable title" does not condemn a title for lack of record evidence, or require a party to accept a title if it is clouded by another title, lien, or incumbrance outside of the record title. (Per Woodson and Graves, JJ.)

#### 6. VENDOR AND PURCHASER ⇨130(7)—TITLE—ADVERSE POSSESSION.

While, under contract requiring vendor to furnish an "abstract showing good merchantable title," the purchaser will not be compelled to accept a title when there is any reasonable doubt as to the title acquired by adverse possession, the vendor is not required to show such a title beyond a reasonable doubt. (Per Woodson and Graves, JJ.)

#### 7. SPECIFIC PERFORMANCE ⇨12—DEFENSE—DEFECTIVE TITLE — RETAINING POSSESSION OF LAND.

Specific performance of contract for sale of 1,270 acres of land will not be denied plaintiff vendor as against defense that his title to 220 acres thereof is defective, where defendant purchaser retains possession of the entire tract, and refuses to pay the balance of the purchase money.

#### 8. SUBROGATION ⇨18—PAYMENT BY VENDOR.

Where purchaser, who as part of purchase price assumed and agreed to pay debts of vendor secured by trust deeds on part of the land conveyed to two banks, refused to pay debts when due after demand, vendor who made payment is entitled to be subrogated to the rights of the banks.

Appeal from Circuit Court, Lincoln County; Edgar B. Woolfolk, Judge.

Bill by William D. Jamison against Frank Van Auker. Decree for defendant, and plaintiff appeals. Reversed and remanded, with directions.

This is a bill in equity, consisting of two counts, the first asking for a reformation of a written contract by which the plaintiff agreed to sell to the defendant 1,270 acres of land situate in the county of Lincoln and state of Missouri, and the second prays for the specific performance of the contract as reformed; it also asks that the plaintiff be subrogated to the rights of the Elsberry Banking Company and the People's Bank of Troy, Mo., to have certain deeds of trust conveying certain portions of said land to secure \$7,227, which the defendant assumed to pay by the terms of said contract, as part of the contract price, which he failed

to do when due, by reason of which the plaintiff was compelled to pay in order to protect said lands from sale under said deeds of trust.

The trial resulted in a decree for the defendant, and the plaintiff duly appealed the cause to this court.

Because of the unusual issues presented in this case by the pleading and evidence, it is thought best to state the substance of petition and answer and the finding and judgment of the court.

The petition, in substance, stated:

"That the plaintiff, on and prior to June 4, 1913, was the owner of, and had a good and merchantable title and in possession of, the following described real estate, situate in Lincoln county, Mo., to wit: All of fractional section 2, township 51, range 2 east, except 81 acres in the northeast corner thereof; all of section 11, township 51, range 2 east; and all of the east half of section 14, township 51, range 2 east.

That on said 4th day of June the plaintiff agreed to sell to the defendant, and the latter agreed to purchase, all of said lands at the following prices: For all of said lands in said section 2 at the price and sum of \$45 per acre, and for all of said lands in said section 14 at the price and sum of \$50 per acre.

Plaintiff further states that the lands above described are situated within the boundaries of the Elsberry drainage district, and that at the time of making said agreement the said Elsberry drainage district had surveyed and located over and in said lands certain ditches, drains, and waterways, and that the location, extent, and area of such ditches, drains, and waterways were well known and understood by said defendant, and that the plaintiff and the defendant, in agreeing upon and estimating the value and price to be paid for said land, took into consideration the location, extent, and area of said ditches, drains, and waterways, and the damages to be assessed and paid by said Elsberry drainage district therefor, and agreed that said defendant should pay for all of the lands above described, including the area covered by such ditches, drains and waterways at the prices per acre as above stated, and take such lands subject to such right as the said Elsberry drainage district had or might thereafter acquire in the lands covered by said ditches, drains, and waterways as surveyed and located, and that in lieu and place of the lands so covered by said ditches, drains, and waterways the defendant should receive from said Elsberry drainage district all damages assessed and paid therefor, and the plaintiff says that said defendant has received and accepted the damages so allowed and paid by said Elsberry Drainage District on account of said ditches and drains and waterways.

Plaintiff says that the contract as written and signed by plaintiff and defendant (a copy of which is attached hereto), the original not being in the possession or control of the plaintiff, does not express the whole agreement made by the plaintiff and defendant, in that it fails and omits to recite and set out the agreement so made between the plaintiff and the defendant as above stated; that is, that defendant was to pay plaintiff for all of said lands, including the quan-

tity covered by said ditches, drains, and waterways, at the prices per acre as above stated, and take the same subject to whatever right the said Elsberry drainage district had or might thereafter acquire therein, and that the failure and omission to incorporate and insert the same in said written contract was occasioned by the mutual mistake and oversight of the parties and of the scrivener in the preparation and writing of said contract.

Wherefore plaintiff prays that said contract so written and signed as aforesaid be reformed so as to conform to and express the true intention and agreement of the parties as above stated, and for such other relief as to be consistent with the facts.

Plaintiff, for the second count and cause of action herein, states that the contract so signed by plaintiff and defendant, referred to in the first count of this petition, provides that the lands described in the first count of the petition, and so contracted to be sold by plaintiff to defendant, should be surveyed by the surveyor of Lincoln county, Mo., and the quantity in each of the tracts as found by such survey to be the basis by which to ascertain and determine the aggregate amount of the purchase price of said lands, and that in pursuance to said provision the plaintiff did on the — day of —, 1913, cause said lands to be surveyed by the county surveyor of Lincoln county, Mo., and the quantity thereof found as follows: All of fractional section 2, township 51, range 2 east, except 81 acres in the northeast corner thereof, containing 304.42 acres; all of section 11, township 51, range 2 east, containing 635.91 acres; and all of the east half of section 14, township 51, range 2 east, containing 329.04 acres.

That the total or aggregate value of said lands at the prices per acre in accordance with said survey was the sum of \$57,223.10.

Plaintiff says it is further provided in said contract that plaintiff should make a general warranty deed to said land, and deliver the same to John M. Gibson & Son, to be held in escrow, subject to the completion of said contract, and to furnish defendant with an abstract showing a good merchantable title to said land on or before September 1, 1913, at which time, upon the receipt of said abstract, it was stipulated and agreed that said defendant would make a further cash payment to the plaintiff on the purchase price of said lands of the sum of \$5,000, and would assume as part of the purchase price of said lands whatever indebtedness there was on said lands, and would make to plaintiff a promissory note due five years after June 4, 1913, with 6 per cent. compound interest thereon, secured by deed of trust on said land for the remainder of the purchase price of said land, after deducting the cash payments and the assumed indebtedness against said lands.

Plaintiff says that at the time of making said contract there were debts against said land secured by deeds of trust, and which the defendant under said agreement assumed the payment of as a part of the purchase price of said land, as follows: To the Northwestern Mutual Life Insurance Company the sum of \$10,000, secured by deed of trust on the following parts of said land, viz., the west fractional half of section 11, township 51, range 2 east, and the southeast fractional quarter of section 14, township 51, range 2 east; to Mollie B. Anderson and Lou

Boone the sum of \$3,000, secured by deed of trust on the following parts of said land, viz., the northeast quarter of section 14, township 51, range 2 east; to the People's Bank of Troy and the Elsberry Banking Company of Elsberry, Mo., each the sum of \$3,566.50, or \$7,133 to both, secured by the deed of trust on the following parts of said land, viz., all of fractional section 2, township 51, range 2 east, except 30 acres in the northeast corner thereof; and to R. L. Goode the sum of \$7,000, secured by deed of trust on the following parts of said land, viz., the east fractional half of section 11, township 51, range 2 east; and it is further agreed in said contract that defendant shall pay all taxes or assessments, state and county, levee or drainage district taxes levied against said lands during the year 1913 and all subsequent years.

Plaintiff says that he made and executed a general warranty deed to said lands to the defendant, and delivered the same to John M. Gibson & Son, to be held in escrow until the completion of said contract, and that said deed still remains in the hands and control of said John M. Gibson & Son in escrow; but plaintiff says he is not advised, and does not now know, whether the deed so made by him and held by said John M. Gibson & Son contains all the assumptions, exceptions, reservations, and conditions as agreed to between the plaintiff and defendant or not; and if said deed does not contain such assumptions, exceptions, reservations, and conditions, as agreed to by plaintiff and defendant, he offers and tenders and prays to be permitted now to make such deed as will conform to the true intention and agreement between the plaintiff and defendant.

Plaintiff further states that, in pursuance to the requirement of said contract, he furnished said defendant with an abstract of title to all of said lands, and that the title thereof, as shown by said abstract and the proofs submitted therewith and as a fact, is a good merchantable title.

The plaintiff further states that the defendant entered into the possession of all of said lands under said agreement about June 4, 1913, and has ever since remained in the absolute control and possession thereof, receiving all the rents and profits thereof.

Plaintiff further says that the defendant on September 2, 1913, paid to plaintiff the further cash sum of \$7,200 on the purchase price of said lands, and on June 2, 1914, paid the plaintiff the further sum of \$1,650.86 to be applied to the interest due plaintiff, to June 4, 1914, but in all other respects the defendant has neglected, failed, and refused to comply with said agreement.

The plaintiff states that the debts of said People's Bank and the Elsberry Banking Company, secured by deed of trust as aforesaid, which the defendant by said agreement assumed the payment of, became due and payable subsequent to the time of making said agreement, and that said defendant neglected, failed, and refused to pay, discharge, or otherwise take care of said debts and relieve the plaintiff from liability thereon, and that by reason of defendant's failure so to do the plaintiff was compelled to pay, and did on or about the 18th day of June, 1913, pay, the sum of \$1,000 on said debts, and thereafter, about September 3, 1913, pay the remainder due thereon, to wit, the sum of \$6,227, mak-



ing the total sum so paid by plaintiff on said debts so assumed by defendant the sum of \$7,227; and the plaintiff says that by reason of paying said debts so assumed by the defendant he became subrogated to all the rights of said People's Bank and said Elsberry Banking Company in the lien and security under said deed of trust made to secure said debts as aforesaid, with the right and power to have the same enforced against the lands in said deed of trust described; and the plaintiff says that defendant, though often requested so to do, has failed, neglected, and refused to repay and return to him the amount so paid on said debts.

Plaintiff further states that since the making of the agreement aforesaid the debts due said Northwestern Mutual Life Insurance Company of \$10,000, which the defendant assumed the payment of, have become due and payable; and that said defendant, in violation of the purpose, intent, and meaning of said agreement, has failed, neglected, and refused to pay off and discharge said debts or otherwise take care of the same, and relieve the plaintiff from personal liability thereon, as he was bound to do under said agreement.

Plaintiff further states that the defendant is indebted to him on the purchase price of said land, over and above the \$7,227 paid by plaintiff on said debts of the People's Bank and the Elsberry Banking Company, and in addition to debts assumed by defendant and not yet paid, the sum of \$17,823.15, for which, under said agreement, the defendant was to make, execute, and deliver to the plaintiff his promissory note, due five years after date, with interest thereon at the rate of six per cent. per annum, payable annually, and secured by deed of trust on said lands; and plaintiff says that defendant has failed, neglected, and refused to comply with the requirements of said agreement with respect thereto, and has failed, neglected, and refused to make, execute, and deliver to the plaintiffs his promissory note due five years after date with 6 per cent. interest, payable annually, secured by deed of trust on said land for the balance due plaintiff on the purchase price of said land.

Wherefore the plaintiff prays:

First. That the court will adjudge and decree that the plaintiff, by reason of having paid the debts of the People's Bank and the Elsberry Banking Company, be subrogated to all the rights, liens, and securities of said People's Bank and the Elsberry Banking Company, under their said deed of trust, for the amount as paid by the plaintiff, with interest from date of such payment, and that the plaintiff have judgment therefor, and that such judgment be declared a lien upon the lands described in the deed of trust securing said debts, to wit, the fractional section 2, township 51, range 2 east, except 30 acres in the northeast corner thereof, and that the court will order and adjudge said lands be sold for the payment of said judgment, with the further order that any surplus remaining from the sale of said lands shall be applied towards the payment of the balance due the plaintiff on the purchase price of all of said lands.

Second. That the court will make such order and judgment respecting the debt due the Northwestern Mutual Life Insurance Company and the debt of R. L. Goode for the payment thereof, or will require defendant to do such things

respecting said debts as will fully protect the plaintiff and relieve him from personal liability thereon.

Third. That the court will ascertain and determine the amount of money still due the plaintiff on the purchase price of said land, and will order and adjudge that defendant make, execute, and deliver to plaintiff his promissory note therefor, due five years from June 4, 1913, with 6 per cent. interest, payable annually, and secured by deed of trust on said lands, duly and properly executed, and that upon a failure so to do the court decree and adjudge the amount thereof a lien upon defendant's interest therein, and order and adjudge the sale thereof.

Fourth. That the court will make such other orders and judgments in the premises and give plaintiff such other relief as will be just and proper.

The contract of sale attached to the petition was as follows:

"This agreement, made and entered into this fourth day of June, A. D. 1913, by and between William D. Jamison and Cynthia A., his wife, of the county of Lincoln and state of Missouri, parties of the first part, and Frank Van Auker, of the town of Calve, Henry county, Illinois, party of the second part:

"Witnesseth, that parties of the first part for and in consideration of the sum of five thousand (\$5,000.00) dollars in hand paid by the party of the second part as first payment hereunder, receipt of which is hereby acknowledged, agree to sell to party of the second part the following described tracts or parcels of land as follows: 321 acres, more or less, being all the west fractional half of the east fractional half of section 2, Twp. 51, range 2 east, of Lincoln county, Mo., at the sum of forty (\$40.00) dollars per acre; also all of fractional section eleven, Twp. 51, R. 2 E., containing 623 acres, more or less, at the sum of forty-five (\$45.00) dollars per acre; also the east half of section 14, containing 326 acres, more or less, at the sum of fifty (\$50.00) dollars per acre; the said above tracts being all in Twp. 51, R. 2 east, in Lincoln county, Missouri, and in the possession of the said first parties.

"The above-described lands to be surveyed by the county surveyor, and said lands to be paid for at the above rates specified per acre, in accordance with the plats and surveys made by him. The cost of said survey and abstract to be borne by said first parties hereto.

"It is mutually agreed that should the land outside of the river levee right of way exceed ten acres, that parties of the first part agree to accept the sum of twenty dollars per acre for all land in excess of ten acres outside of said levee right of way.

"Parties of the first part agree to deed by general warranty deed and will furnish an abstract showing good merchantable title. The said abstract and warranty deed to be furnished on or before September 1, 1913, at which time, and upon the receipt of such abstract by the second party, the party of the second part agrees to pay the sum of five thousand dollars cash as further payment hereon, and agrees to assume whatever indebtedness there is on said land, and the balance due on the purchase price above the payments made and amounts assumed by

second party is to be paid in the shape of a promissory note due five years after date, with interest from date (June 4, 1913) at the rate of 6 per cent. per annum, the same to be paid annually; the first annual installment of interest to be due and payable June 4, 1914, and annually thereafter.

"Should the interest be not paid when due, then after first parties have given second parties thirty days' written notice of such default, then the whole amount of principal and interest shall become due and payable. The maker of this note to have the privilege of paying the sum of one hundred dollars or any amount in excess thereof on the principal of said note at any interest paying period. Any unpaid installment of interest to bear interest until paid at the rate of six per cent. per annum. The said note to be secured by a deed of trust on the above-described land.

"It is understood and agreed that the said second party hereto shall pay all taxes or assessments, state and county, levee or drainage districts taxes, levied against said land during the year 1913, and all subsequent years. All damage and drainage awards shall be paid to the second party as his own.

"It is further agreed that party of the first part will make a general warranty deed to above-described lands unto the said party of the second part, the said deed to be held in escrow and delivered to second party by John M. Gibson subject to the completion of this contract.

"It is understood and agreed that said second party shall have full possession of all lands covered in this contract, subject, however, to the leases now on said land, none of which extend beyond March 1, 1914; and shall receive all rents that may or will be due said first parties, the said possession to commence from date of this contract.

"In testimony whereof the said parties to these presents have hereunto and also to a duplicate copy hereof set their respective hands at Elsberry, Mo., on the date first above written."

Then follows the signatures of the parties.

Said contract was duly acknowledged on the 4th day of June, 1913, and was filed for record in the office of the recorder of Lincoln county on the 6th day of October, 1913.

The answer of the defendant to the first count of the petition consists, first, of a denial that the plaintiff was on June 4, 1913, the owner of the lands described in the petition, and that the plaintiff had a good and merchantable title to the same, and that the plaintiff was at that time in the possession of said lands.

Second, a denial that the defendant agreed to sell said lands at the price set out in the petition, and admits that said lands are situate within the boundaries of Elsberry drainage district; that at the time of the execution of said contract said district drains and waterways had been surveyed and located over said lands, but denies that said ditches and waterways were known to defendant when said contract was executed.

Third, a denial that defendant, in agreeing upon price to be paid for said land, took into

consideration the location, extent, or area of said ditches, drains, or waterways, or the damages to be assessed or paid by said drainage district therefor; denies that defendant agreed to pay for all of said lands (including the area covered by such ditches, drains, and waterways) at the price per acre as above stated; and denies that defendant agreed to take such lands subject to such rights as the Elsberry drainage district had or might thereafter acquire in the lands covered by said ditches, drains, and waterways as surveyed and located.

Fourth, an admission that defendant, under the contract of purchase and sale, should have received from said Elsberry drainage district all damages assessed and paid therefor, and admits that defendant had received such damage as was awarded by said Elsberry drainage district on account of said ditches, same in lieu or in place of the land covered by ditches, drains and waterways, but only by virtue and in accordance with the said contract of sale.

Fifth, a denial that defendant was to pay plaintiff for all of said lands, including the quantity covered by said drains, ditches, and waterways, and denies that defendant was to pay plaintiff any amount more than the actual area to which plaintiff had and could exhibit a merchantable title; and defendant denies that any such provision was omitted by any mutual mistake or oversight of the parties to the said contract or otherwise.

Sixth, a denial that plaintiff is entitled to have the said written contract reformed in any particular.

Seventh, an admission that the said contract provided for the survey of said lands, and admits that plaintiff did cause said lands to be surveyed; but whether the area, as set out in said petition, is the correct area of said lands, or the correct area as determined by said survey, defendant has no knowledge or information thereof sufficient to form a belief, and thereof requires proof.

Eighth, a denial that the aggregate value of said lands (at the price per acre in accordance with said survey) was or is the sum of \$57,223.15.

Ninth, an admission that said contract provided that plaintiff should make a general warranty deed to said lands, and deliver the same to John M. Gibson & Son to be held in escrow, subject to the completion of said contract, and admits that under said contract said plaintiff was to furnish defendant with an abstract showing good merchantable title to said lands on or before September, 1913; but defendant denies that plaintiff had at the time of the execution of said contract, or has had at any time since then, a good, merchantable title to said lands, or has at any time presented to this defendant, or to any one for him, an abstract of title showing such good, merchantable title in said plaintiff.

Tenth, a denial that defendant was to make any further payment to plaintiff until plaintiff shall have delivered such an abstract showing a good, merchantable title in plaintiff.

Eleventh, a denial that at the time of the execution of said contract there were debts against said lands secured by deeds of trust, and that this defendant did assume such debts as were secured by deeds of trust, and admits that defendant agree in said contract to pay the taxes and drainage assessments against said lands levied during the year 1913, but defendant avers that said agreements were part of the general contract of sale, and that plaintiff has so far failed and omitted to comply with the terms thereof on his (plaintiff's) part, by reason whereof plaintiff is not legally or equitably entitled to require further performance on the part of defendant until plaintiff has complied with the terms of said contract of sale to be performed on the part of plaintiff.

Twelfth, an averment that plaintiff, as an inducement to defendant to enter into said contract stated, represented and guaranteed to defendant that the total drainage assessments (as levied and to be levied on said lands) in completing said drainage district would not exceed \$23 per acre, while the facts are (as subsequently disclosed to defendant) that the drainage assessments as levied during the year 1913 against said lands amounted to approximately \$50 per acre, for which difference defendant prays credit on final accounting with plaintiff for the purchase price under said contract of sale.

Thirteenth, an admission that the plaintiff executed a general warranty deed to this defendant, and delivered the same to John M. Gibson & Sons, and as far as this defendant is informed and believes said deed is and should be in their possession, subject to the terms of said contract of sale.

Fourteenth, an admission that plaintiff did finally submit to this defendant an alleged or pretended abstract of title to said lands, but defendant denies that said abstract shows a good or merchantable title in plaintiff, and defendant denies that the plaintiff actually has or had such good or merchantable title to such lands as contracted for, and denies that said alleged abstract is correct or complete; and defendant denies that same contains all drainage proceedings which are a lien on said lands, and avers the same is otherwise imperfect and incomplete, and not in accord with said contract of sale.

Fifteenth, an admission that he entered into possession of said lands under said agreement about June 13, 1913, and has remained in such possession and control to this day, and is willing and ready to carry out the contract of sale on defendant's part upon performance by plaintiff, and due accounting

by plaintiff to defendant for the omissions and deficiencies of performance on plaintiff's part.

Sixteenth, an admission that on, to wit, September, 1, 1913, he paid to plaintiff the sum of \$7,200 on the purchase price of said lands, and on June 2, 1914, the further sum of \$1,650.86, as interest on deferred payments; but defendant denies that defendant has neglected, failed, or refused to comply with any part or with any of the terms of said agreement.

Seventeenth, a denial that he ever failed or refused to pay, discharge, or otherwise take care of the certain indebtedness to the said People's Bank and to the said Elsberry Banking Company; and,

Eighteenth, an averment that the written contract of sale of said lands between plaintiff and defendant contains the whole agreement of parties in the particulars specified by plaintiff, and that same should not be reformed or changed in any of such particulars; and defendant denies generally each and every allegation to the first count of said petition not herein admitted, and prays to be hence discharged, with his costs.

The answer to the second count of the petition consists—

First, of a denial that the plaintiff was compelled to pay the sum of \$1,000, or pay the additional sum of \$6,227, or any part thereof, to any bank or person whatsoever, and denies that by reason of the payment of any amount plaintiff is or should be subrogated to the rights of any banks in any liens or security under any deed of trust; and defendant avers that any payment made by plaintiff (as to which defendant avers he has no knowledge or information sufficient to form a belief, and hence requires proof) to any bank or other person were made by plaintiff voluntarily, and with the intention of applying the funds so paid to the payment of indebtedness, to the end that and with the purpose and intent that the indebtedness of defendant to plaintiff (through and under the last deferred payment to be made under said contract) might be increased in the amount of such voluntary payment made by said plaintiff, and defendant denies any liability on any such account.

Second, an averment that plaintiff, as part consideration for the execution of said contract, promised and agreed with defendant that plaintiff would secure extensions of any and all of said mortgage liens then against said lands to and until the date of the last deferred payment under said contract, and would consent to such extensions, whereas plaintiff has since refused to consent thereto, and has obstructed and prevented agreements by defendant with said creditors for such extensions to the damage of defendant in considerable amounts, whereof defendant prays an accounting by plaintiff, and due credit to defendant decreed, upon adjustment of the

final payment by plaintiff of the purchase price under said contract.

Third, an averment that he has paid promptly the interest on all such mortgage liens as such interest matured, and also paid a large amount of principal thereof (as demanded of this defendant by the mortgagees), and that said plaintiff, contrary to his said promise, has refused repeatedly to consent to the extension of said mortgage liens, and has thereby caused this defendant much inconvenience, expense, and loss, for which defendant prays accounting as above.

Fourth, a denial that he is indebted to plaintiff in the amount of \$17,823.15 in addition to said amount of \$7,227, but defendant admits that he is indebted to plaintiff in a considerable sum (subject to credit on the items of accounting herein prayed), but no part of which sum is due, however; but such indebtedness is not and was not, under any agreement by this defendant, to be evidenced by note or notes or mortgage to plaintiff until plaintiff has first tendered to defendant a complete abstract of title showing in the plaintiff a good, merchantable title to said lands, which has not yet been done.

Fifth, an averment that, by the execution and delivery of such note or notes and mortgage lien as demanded by plaintiff while the title to said lands is so imperfect and clouded, this defendant would be seriously damaged, and defendant is not equitably bound to do so.

Sixth, an averment that he is and has been at all times ready and willing to comply fully with his said contract of purchase with plaintiff; that defendant is, and has been at all times, ready and willing to execute notes and a mortgage to said plaintiff, according to said contract, but that the said ditches, drains, and waterways, a part of said drainage district, extend across said lands described in said contract, and occupy a considerable area thereof, to wit, 50 acres; that the rights and lien of the said drainage district to the occupancy and use of said ditches, drains, and waterways are and remain a cloud upon said title.

Seventh, a representation that a broad levee extends across said lands, occupying a considerable area, to wit, 50 acres; that it is a part of the said Elsberry drainage district, and is also a lien and a cloud upon said lands described in said contract, and not a part of the land for which defendant is bound to pay under said contract.

Eighth, an allegation that he is entitled to and should, receive a credit on, said deferred payment, under said contract for the land so occupied by said ditches, drains, waterways, and levee, in the amount, to wit, \$5,000; and, except as herein admitted, defendant denies each and every allegation in the second count of the petition, and prays to be hence discharged, and for his costs.

And for further answer, and by way of counterclaim herein, defendant avers that he made with plaintiff the said contract of purchase in good faith, and has faithfully performed same, so far as equitably bound; but, owing to the unreasonable demands of plaintiff, the accounts for the amount of land to be paid for by the defendant remain unadjusted, and the proper and just deductions, interest, and other items of credit (to which defendant is entitled before the final payment) are settled, and cannot be adjusted, without the aid of the court of equity; and defendant is desirous and offers to do full equity, and prays that he may be adjudged to receive the same; now, therefore, defendant prays an accounting by plaintiff in said premises, and that the court fix and ascertain the amount due to plaintiff (if anything), and require (as condition therefor) that plaintiff will perform said contract on his part in respect of said abstract of title and of said accounting; and that defendant have said relief, and such other and further relief as may be just and in accordance with equity, and have a decree accordingly with his costs.

The reply of the plaintiff was as follows:

"Now comes the plaintiff in the above cause, and, replying to defendant's answer filed herein, denies that he has failed or omitted to comply with the terms of this contract and agreement made between plaintiff and defendant. Further replying to said answer, denies that as an inducement to the defendant to enter into said contract, or for any other purpose or at any time, he stated, represented, or guaranteed to the defendant that the total drainage assessments for the completion of said drainage district would not exceed \$23 per acre.

"And further replying to said answer, denies that the ditches, drains, and waterways over and across said lands are a cloud upon the title to said lands, under the agreement made between plaintiff and defendant, and avers that the area covered by such ditches, drains, and waterways was under their agreement to be excepted from the covenants in the deed to be made by plaintiff to defendant. And further replying to said answer, denies that there is any levee of the Elsberry drainage district across or over said lands, which is a lien or cloud upon said lands under the agreement between plaintiff and defendant, and avers any levee over or across said land was under their said agreement to be excepted from the covenants in the deed to be made by plaintiff to defendant.

"And, further replying to said answer, denies that defendant is entitled to or should receive credit on the deferred payments for lands covered or occupied by ditches, drains, waterways, or levee in the sum of \$5,000 or any other sum.

"And replying to defendant's counterclaim, denies that, on account of anything stated thereon or in said answer, said defendant is entitled to any relief different or greater than stated in plaintiff's petition, and, having fully replied, prays to be granted the relief and judgment as in his petition asked."

The evidence for the plaintiff tended to show that defendant knew all about the location of the drainage ditches over the land, and that the contract between the parties was that he should collect the damages assessed, or the compensation allowed by the district, in lieu of the one hundred feet of ground that was to be taken for the ditches and drains, and that no deduction was to be made as to the number of acres purchased or the price to be paid therefor on account of said drains and ditches, and that through oversight and inadvertence that part of the agreement was omitted from the contract of sale; but in the light of the admissions made in the answer, and the fact that the plaintiff's evidence regarding this matter is uncontradicted, it will be useless to deal further with the evidence touching this branch of the case.

Regarding the other facts in the case: In addition to the admissions contained in the pleadings, the evidence for the plaintiff showed, and the trial court found, that the abstract of record, furnished by the plaintiff to the defendant in pursuance of the terms of the contract of sale, showed that the plaintiff had a perfect record title to about 1,050 acres of the 1,270 sold by the plaintiff to the defendant, and that as to the remaining 220 acres thereof the abstract failed to show a perfect record title in plaintiff. There is practically no dispute between the parties to those facts. This 220 acres is described by the trial court in its judgment in the following words and figures:

"All that part of the east half N. W.  $\frac{1}{4}$  Sec. 2, Twp. 51, range 2 east, which lies south of the 30 acres owned by Demeron, Lindsay & Harvey in the N. E. corner thereof. 2nd. 66 acres of land being the east part of the S.  $\frac{1}{2}$  of the S.  $\frac{1}{2}$  Sec. 2, Twp. 51, R. 2 E. 3rd. The west half of the northeast  $\frac{1}{4}$  of Sec. 14, Twp. 51, R. 2 E. 4th. The S. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$ , Twp. 51, R. 2 E."

The abstract, however, does show some 45 or 50 deeds of various kinds, mechanic liens, judgments of courts, etc., in the plaintiff's chain of title to this 220 acres; but, as previously stated, the evidence shows that there was a missing link therein which destroyed the plaintiff's record title. The evidence also shows that the plaintiff attempted to supply by affidavit this defect of title as shown by the abstract. They showed that the plaintiff, and those under whom he claims title to this 220 acres, were in possession of the same at the date of the execution of the contract of sale, and that they had been for a period of from 33 to 60 years; that their possession was actual, open, exclusive, continuous, and notorious, and adverse all that time, with a claim of ownership thereof.

That shortly after the execution of the contract of sale the plaintiff furnished the abstract mentioned to the defendant, who

accepted the same, and has ever since retained it, and, in so far as this record is concerned, he has never, in writing or otherwise, pointed out to plaintiff any specific objection thereto; but we presume that he must have made some kind of objection thereto, for the reason that the record shows that the plaintiff, from time to time, attempted to perfect the abstract by making additions thereto, and from the further fact that the defendant at all times has insisted that the abstract does not comply with the provisions of the contract of sale.

The plaintiff introduced in evidence the contract sued on, and showed by the evidence that he executed a general warranty deed conveying all the lands mentioned to the defendant, and placed the same in escrow as provided for by the contract, and demanded of defendant that he perform his part of the contract.

The evidence also tended to prove the second count of the petition.

The defendant introduced no evidence whatever, except the testimony of two witnesses which related exclusively to location, history, litigation, etc., of the drainage district mentioned, which is absolutely immaterial in the case as now presented, or as may hereafter be presented, in so far as we can now see.

Upon the admissions contained in the pleading and the evidence introduced the court rendered the following decree:

"Come again by their attorneys the parties in the above-entitled cause of Jamison v. Van Auker, and the court having heretofore heard the pleadings and evidence herein, and the arguments of counsel thereon, and said cause having been heretofore duly submitted by the said parties, and the court being now fully advised in the premises, doth find the issues herein joined as follows: First, the court finds in favor of the defendant on the issues joined in the first count of the petition; and, secondly, the court finds the issues joined in favor of the defendant on the second count of the petition for the reason that plaintiff, William D. Jamison, did not provide and furnish defendant, Frank Van Auker, an abstract to the lands described in the petition herein showing that plaintiff had good merchantable title to the same according to the terms of the contract of sale, for which reason no cause of action has accrued to the plaintiff at the time this suit was brought; and the court doth further find, as to the second count of the petition, that as to the following tracts of land to which the contract of purchase and said sales between said parties dated June 4, 1913, applied, the abstract of title submitted by plaintiff heretofore to defendant fails to show a good merchantable title in plaintiff, as required in said contract, as to the following pieces of land, to wit: (1) All that part of the east half of the N. W.  $\frac{1}{4}$  of section 2, Twp. 51, range 2 east, which lies south of the 30 acres owned by Demeron, Lindsay & Harvey in the N. E. corner thereof; (2) 66 acres of land, being the east part of the south  $\frac{1}{2}$  of the south  $\frac{1}{2}$  of Sec. 2, Twp. 51,

range 2 E.; (3) the west half of the northeast  $\frac{1}{4}$  of section 14, Twp. 51, R. 2 E.; (4) the southeast  $\frac{1}{4}$  of the northeast  $\frac{1}{4}$  of section 14, Twp. 51, R. 2 E.

"Wherefore the court doth consider, adjudge, and decree that as to the first and second counts of the petition herein the said petition is dismissed at the cost of the plaintiff.

"The court further finds the issues joined on defendant's answer and counterclaim, where the court is asked for affirmative relief on the issues herein joined against the defendant, and it is therefore further ordered, adjudged, and decreed by the court that defendant have and take nothing by reason of his counterclaim or any affirmative relief prayed for in his answer or counterclaim, and that said counterclaim be and is dismissed without prejudice; and it is further considered, adjudged, and decreed that defendant recover of plaintiff his costs in this behalf expended and incurred, and that defendant have execution therefor."

While the record is quite lengthy, and presents many legal propositions, yet when we view the case in the light of the position taken by counsel for the defendant, and adopted by the judgment of the trial court, the questions necessary for this court to consider are reduced to but two or three.

Dudley & Williams and O. H. Avery, all of Troy, for appellant.

Alvah S. Green, of Galesburg, Ill., and Barclay & Wallace, of St. Louis, for respondent.

WOODSON, J. (after stating the facts as above). [1] I. The admissions of the answer, and the uncontradicted evidence of the plaintiff regarding the alleged omission from the written contract of sale of a portion of the agreement whereby the defendant was to pay for the land to be occupied by the ditches, and collect from the district the compensation that it was to pay therefor, conclusively shows that such an agreement was made, and that it was inadvertently omitted from the written contract. In fact, this question is not disputed, briefed, or argued by counsel for the defendant.

We are therefore of the opinion that the contract should be reformed in conforming to the prayer of the first count of the petition.

[2] II. There is in reality but one vital question presented by this record for determination, and that is, did the abstract of the record presented by the plaintiff to the defendant conform to the terms of the contract of sale sued on, by showing that the plaintiff had a good merchantable title to the 1,270 acres of land described therein?

Counsel for the plaintiff maintain the affirmative of this proposition, while those for the defendant present the negative thereof.

There is no contention about the fact that the plaintiff has a perfect record title to about 1,060 acres of the land in controversy, and that the abstract of record furnished by

the plaintiff to defendant shows that fact. The dispute hovers over the title to the 220 acres described in the judgment of the trial court, the title to which the court found was not in the plaintiff, as shown by the abstract. The title to this land being alone in dispute, we will confine our remarks to it.

[3] Technically speaking, after a careful examination of the abstract and record in the case, we are of the opinion that it does not show a record title to this land in the plaintiff; but does that fact defeat the plaintiff's right to a specific performance of the contract? Counsel for defendant insist that it does, but the question is answered to the contrary by the plaintiff.

In support of defendant's insistence we are cited to the following cases: Thompson v. Dickerson, 68 Mo. App. 535; Bruce v. Wolf, 102 Mo. App. 384, 76 S. W. 723; Carabine v. Cox, 136 Mo. App. 370, 117 S. W. 616; Drury v. Mickelberry, 144 Mo. App. 212, 129 S. W. 237; Coble v. Denisen, 151 Mo. App. 319, 131 S. W. 719; Austin v. Shipman, 160 Mo. App. 203, 141 S. W. 425; Ives v. Kimlin, 140 Mo. App. 804, 124 S. W. 23; Wiemann v. Steffen, 186 Mo. App. 591, 172 S. W. 472; Boas v. Farrington, 85 Cal. 535, 24 Pac. 787; Day v. Mountin, 137 Fed. 756, 70 C. C. A. 190.

We will consider them briefly here.

The contract in the case of Thompson v. Dickerson, 68 Mo. App. 535, was in this language:

"And said first party hereby agrees to furnish to said second party a complete abstract of the title to said lands, showing fee-simple title to said lands in said first party, which said abstract shall be approved by Alf. F. Rector, as showing a complete title \* \* \* in said first party to said lands, which said abstract shall be delivered to said Rector by said first party within the next ten days."

In construing that contract the court said:

"It was likewise shown that plaintiff knew that the lands had been deeded to defendant by her father, and that the deed did not convey 40 acres of the tract, there having been a misdescription, the deed describing 40 acres that the defendant's father did not own. The evidence also showed that defendant had been in the open, notorious, and continuous possession of said 40 acres, claiming to be the owner, for more than 10 years. In other words, that plaintiff's title, in point of fact, was good by adverse possession. It was further shown that defendant had an abstract of title made out and delivered to Mr. Rector; that he examined it and pronounced the title insufficient; that he stated that defendant could, by proper proceeding in court, have the title perfected, if, in point of fact, she had been in adverse possession the requisite period.

"One of the principal points contended for by defendant is that, defendant having shown a good, legal title by adverse possession, it answered the demands of the case, and that plaintiff was not justified in rejecting the title. We

are of the opinion that the terms of the contract make it unnecessary for us to decide whether a title by adverse possession, not appearing of record, will constitute a good, legal, and marketable title, such as is required on an ordinary contract between vendor and vendee, wherein a good and complete title is contracted for, as has been stated in *Mitchner v. Holmes*, 117 Mo., 207 [22 S. W. 1070]."

In *Bruce v. Wolf*, *supra*, the contract read:

"I agree to make a good, satisfactory deed, and, if required to do so, to give a clear abstract of title to said real estate, showing the title to be fully vested in me."

In that case the court held that this contract did not mean good title in law by reason of occupation under color and chain of title, and that an offer to perfect the title by suit was insufficient, and could not defeat the broker's action for his commissions upon an admitted sale which could not be consummated by reason of the condition of the title.

The case of *Drury v. Mickelberry*, *supra*, has no application to the facts of this case. There the contract was to furnish an abstract within a certain time, which was not done. The court in that case held that time was of the essence of the contract, and that the plaintiff could not recover.

The case of *Coble v. Denisen*, *supra*, is identical with the case just mentioned, and likewise it has no application to the case at bar.

In *Austin v. Shipman*, *supra*, the contract read:

"I agree to convey and assure to the party of the second part, in fee simple, clear of all incumbrances whatever, by good and sufficient warranty deed and abstract of title."

In that case the court held that under the terms of the contract the vendor was bound to furnish an abstract showing a perfect title, and that the construction placed upon the contract by the court was justified by the correspondence of the parties, from which it appeared that such was the intention of the vendor to assure a clear title by the abstract of the record transfers.

In *Ives v. Kimlin*, *supra*, the contract was:

"The said party of the second part has this day deposited with the Crawford County Farmers' Bank the sum of one thousand dollars, which said sum is to be held by the said bank until the said party of the first part furnishes a full and complete abstract of the title showing a perfect title to said lands in the said party of the first part, and executes and deposits with said bank a general warranty deed conveying said farm to the said party of the second part, his heirs and assigns."

"The said party of the second part is to pay the balance of said purchase price of \$8,000 on or before the 15th day of October, 1908."

In due time an abstract was furnished to one Harrison, the attorney for *Espenchied*,

the purchaser of the land, who failed to approve the title as shown by abstract, and so notified *Espenchied* in writing, the latter being a resident of Illinois.

A foreword: *Kimlin*, the assignee of *Espenchied*, interpleaded in the case which was brought by *Ives* against the bank to recover the \$1,000 deposited therein under the terms of the contract before mentioned, and that is why *Kimlin* is named as the defendant in the case.

Shortly after receiving the letter of *Harrison* disapproving the abstract, *Espenchied* wrote the former approving his objection thereto. After *Harrison* received this letter from *Espenchied* he instituted suits as attorney for *Ives* to quiet the title to the lands described in the contract of sale, and had service by publication, and procured deeds from certain other parties for the same purpose. In October, 1908, judgments were rendered by default in the circuit court of Crawford county in said suits, and certified copies of the judgments thus obtained, and the deeds so procured were added to the abstract, and again presented to *Harrison* by *Ives* for approval, which he did, and he notified the attorney of *Espenchied*. Shortly after the receipt of this notice the attorney for *Kimlin* wrote to *Ives* that he had examined the abstract, and that the title was not good, and charged that *Harrison* knew that fact; and further stated that *Kimlin* had that day closed a deal for other lands, and would not need the *Ives* lands, and for that reason, as well as for the fact that he was to have a good title and that had not been furnished, he also demanded of the bank the \$1,000 deposited therein. The circuit court found for *Ives*, and rendered judgment accordingly, and *Kimlin* appealed.

In reversing the judgment of the circuit court the Court of Appeals on page 299 of 140 Mo. App., on page 25 of 124 S. W., used this language:

"The abstract, as perfected by *Harrison*, did not show a marketable title in *Ives* in the property, and therefore did not comply with the terms of the contract entered into on the 15th day of April, 1908. The judgments of the circuit court attempting to perfect the title show the suits were commenced against the unknown heirs of *Putnam Trask*, *Josiah B. Trask*, *Franklin Askins*, *William J. Farrar*, *Marvin A. Dunlap*, *R. P. Dunlap*, *Andrew H. Trask*, *Henrietta Paul*, and *Napoleon B. Trask*, and, of course, notice was given by publication.

"When *Harrison* approved the abstract the evidence does not show that the term of court had adjourned, and, even if it had, the parties defendants in that suit, under the provisions of section 777 and 778, Revised Statutes 1890, had three years' time in which to appear in court and have the judgment set aside by showing a meritorious defense. And even though it be admitted that the judgment perfected the title as to all the parties named therein, yet the abstract shows that there were serious defects in *Ives*' title other than the ones attempted to

be cured by the suits. The title to 80 acres of the land was in the following condition: One James Sanders, who owned the same, made a will on the 28th day of June, 1882, disposing of this tract of land as follows: 'I do hereby give and bequeath unto my grandchildren, James S. Paul and Henrietta Paul, minor heirs of Martha L. Paul, deceased, the following described real estate, to wit: The S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , and the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , of section 26, township 37, range 3, absolutely to them, their heirs, but, if they should die without issue, then said real estate shall revert and vest in my heirs equally, or share and share alike.'

"A warranty deed, dated June 1, 1883, from Martha H. Paul and James S. Paul to Mr. Ives to this tract of land was shown in the abstract. But the abstract did not show any conveyance from Henrietta Paul or that Martha H. Paul and Henrietta Paul were one and the same person.

"In making the unknown heirs of Henrietta Paul parties to the suit to quiet title, the attorney for Mr. Ives must have construed the will as giving to James S. Paul and Henrietta Paul an absolute fee-simple title to the land without condition or contingency. Our opinion is that whether we construe that clause of the will as vesting in James Paul and Henrietta Paul a life estate or an estate in fee it is immaterial to the issues in this case. If a life estate only vested, then upon their deaths the absolute title passed to their children, if any, and, if none survived, then to the heirs of James Sanders, and in that event the children took under the will of James Sanders and not from their parents. If a fee was transferred, then such estate was liable to be defeated upon the contingency of them dying without children. *Gannon v. Pauk*, 200 Mo. 75, 98 S. W. 471; *Gannon v. Albright*, 183 Mo. 238, 81 S. W. 1162 [87 L. R. A. 97, 105 Am. St. Rep. 471]; *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208; *Haring v. Shelton* [103 Tex. 10] 122 S. W. 13; *Hopkins v. Hopkins* [103 Tex. 15] 122 S. W. 15.

"The abstract did not show whether James Paul or Henrietta Paul was ever married, or that either of them was dead, and, if so, whether or not any children survived. If they died without leaving children, then under the terms of the will, as we have construed it, the title to the real estate willed to them vested at their death in the heirs of James Sanders. The heirs of James Sanders were not made parties to this suit, and neither were the heirs of James Paul, and therefore the title shown by the abstract was not the title that Ives agreed to give in his written contract.

"It is claimed by respondent Ives that the court found in its judgment that the title was perfected in Ives by limitation. Should we concede that the judgment perfected a title in Ives as against all the parties named in the suit in which they were rendered, yet the heirs of James Sanders were not parties to that suit, and therefore their interests in the property were not affected thereby.

"Under the laws of this state a purchaser of lands has the right to demand the title which shall protect him from anxiety. He should have a title which would enable him, not only to hold his land, but to hold it in peace, and, if

he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value. *Mastin v. Grimes*, 88 Mo. 478.

"Under the contract between the parties, Ives agreed to furnish a full and complete abstract of the title, showing a perfect title to said lands in him. Speaking of a similar contract in *Bruce v. Wolfe*, 102 Mo. App. 389, 76 S. W. 723, the Kansas City Court of Appeals said: 'The contract called for a clear abstract of title; that is, a perfect title. Whereas, he may have had a good title in law by reason of his occupation under color and claim of title, it could not be so shown by an abstract. The purchaser was not bound to take the land and incur the risk of successfully defending the title.'

In the case of *Kling v. Realty Co.*, 166 Mo. App. 190, 148 S. W. 208, the contract, among other things, provided that "a complete abstract of title to said property from the United States government to this date, with certificates of competent abstractors as to taxes, judgments, and mechanics' liens effecting the property," be furnished.

The plaintiff sued to recover the amount deposited with a real estate agency as a partial payment of the purchase price of the land described in the contract. The vendor acquired the land as devisee of a citizen of New Hampshire, who died testate. No administration of his estate in that state was had. The court held that the land in question was therefore subject to the lien of the debts of the testator not barred by the statute of limitations of that state.

In discussing the insufficiency of the abstract the Court of Appeals said:

"The question at issue here is whether or not the vendor did furnish the vendee an abstract of title showing a good title to the land vested in him. If he did, plaintiff was not justified in rescinding the contract and has no cause of action for the recovery of the deposit; if he did not, plaintiff acted within her rights in the rescission and is entitled to a return of the deposit.

"The term 'a good title' is synonymous with 'a good marketable title,' and the following definition of what constitutes a marketable title has received the approval of our Supreme Court in *Mastin v. Grimes*, 88 Mo. 478, *Mitchner v. Holmes*, 117 Mo. loc. cit. 205 [22 S. W. 1070], and *Green v. Ditsch*, 143 Mo. 1 [44 S. W. 799]:

"Every purchaser of land has a right to demand a title which shall protect him from anxiety, lest annoying, if not successful, suits be brought against him, and probably take from him or his representatives land upon which money was invested. He should have a title which would enable him not only to hold his land, but to hold it in peace, and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value.'

"There is no implied covenant that the title will be such as the vendee may be willing to accept or that his attorney may pronounce good and marketable. *Green v. Ditsch*, supra. And mere suspicion against the title, or a specula-



tive possibility that a defect in it might appear in the future, are not grounds on which the title may be denounced as unmarketable. As is said in one of the cases: 'A purchaser is not entitled to demand a title absolutely free from all suspicion or possible defect. He may claim a marketable title, and that means a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept.' Todd v. Savings Institution, 128 N. Y. 636 [28 N. E. 504]; Moser v. Cochrane, 107 N. Y. 35 [18 N. E. 442]; Hayes, Guardian, v. Cemetery, 103 Mass. 400. A reasonable doubt of a title, such a doubt as will render it unmarketable in the contemplation of the law, does not embrace mere shadows or possibilities, but probabilities. Moral, not mathematical, certainty that the title is good is all that may be demanded by the vendee. Atkinson v. Taylor, 34 Mo. App. 442."

The court then held that the abstract was insufficient.

In the case of Wiemann v. Steffen, 186 Mo. App. 584, 172 S. W. 472, the court states the facts as follows:

"This is a suit for money had and received. The money sued for came into the hands of defendant under a contract which plaintiff thereafter rescinded. The trial was had before the court without a jury, where the finding and judgment were for defendant, and plaintiff prosecutes the appeal.

"It appears that plaintiff and defendant entered into a written contract concerning the purchase of defendant's farm of 238 acres in Lincoln county. By the terms of the contract plaintiff purchased defendant's farm at the agreed price of \$11,700, and paid \$500 down as earnest money thereon. It was agreed that the balance of the purchase price should be paid in part, and in part secured by plaintiff to defendant, on the 1st day of March, 1911, at which time the deed was to be executed by defendant and his wife, and delivered to plaintiff, and possession of the premises given. It is stipulated in the written contract that defendant should, on that date, make and deliver to plaintiffs 'a general warranty deed to said lands with good and marketable title, free from all liens and defects except taxes due for the year 1911.' The controversy in the case relates to this matter, for the plaintiff insists that defendant did not tender a marketable title, whereas the court found he did.

"Plaintiff paid \$500 earnest money on the bargain, when the contract was entered into several months before, and it appears that he was ready, able, and willing to complete the purchase on March 1, 1911, and, indeed, extended the time until noon of March 2d of that year, to enable defendant to clear several defects in the title. Although there is no stipulation in the contract requiring defendant to furnish an abstract, it appears that he did so, and plaintiff's attorney examined it prior to March 1st. On such examination several minor defects in the paper title were discovered and pointed out, and it appears defendant corrected all of them, save one which relates to the apparent outstanding title of a one-eighth inter-

est in 65 acres of the land, which title, it is said, according to the records, resides in one Joseph Story. It appears that defendant had claimed to own the land for more than 32 years under a general warranty deed, and that, though he had resided thereon, cultivated it, paid the taxes, and exercised the usual acts of ownership with respect to it during that time, plaintiff objected to the title tendered because of such apparent outstanding one-eighth interest in 65 acres in Joseph Story. After waiting until noon of March 2, 1911, for defendant to correct the record title with respect to this interest, plaintiff declared a rescission of the contract, and demanded the return of the \$500 earnest money paid, because, as he asserts, the title tendered was not good and marketable, free from all defects. On the other hand, defendant insisted the title was sufficient, when considered together with his occupancy and claim of ownership under the statute of limitations, and therefore denied plaintiff's right to rescind.

"The case concedes that Joseph Story derived from his grandmother, through descent, in 1896, title to a one-eighth interest in the parcel of land referred to, consisting of 65 acres, and no deed from him appears. But, on the trial, the court received evidence showing that defendant's right to the identical land and interest had ripened into a complete title under the statute of limitations through adverse user and occupancy under claim and color of title attended with the usual indicia of ownership. But this evidence was objected to on the theory that the stipulation for a marketable title required the showing of such title by deeds or proper conveyances, and excluded the idea by establishing it through user under the statute of limitations. Moreover, the court refused to declare the law, on plaintiff's request, to the effect that he was not obligated to accept from defendant a title resting as to any part of the land contracted for by him on the statute of limitations."

In discussing that case the court on page 590 of 186 Mo. App., on page 473 of 172 S. W., used this language:

"It is urged the court erred in its view of the law thus disclosed, in that the covenant for a marketable title, free of defects, implies a title to be shown in proper conveyances alone, and may not be satisfied through showing an absolutely good title under the statute of limitations. But we are not so persuaded. The law implies that one selling land shall furnish a good title, and it is said that a good title and a marketable title are the same. See Kent & Obear v. Allen, 24 Mo. 98; Kling v. A. H. Greef Realty Co., 166 Mo. App. 190, 148 S. W. 203; 39 Cyc. 1442; 29 Am. & Eng. Encyc. Law (2d Ed.) pp. 610, 611. However, sometimes the parties stipulate in their contract, and it is certainly competent for them to do so, for a title of a particular kind and character, even where otherwise a different character of title would be sufficient; such, for instance, as where the contract specifically provides that the title shall be shown of record or by means of an abstract. In cases of that character, of course, it is essential to comply with the condition of the contract, and show a title of record or as by an abstract, etc. See Thompson v. Dicker-

son, 68 Mo. App. 535; *St. Clair v. Hallweg*, 178 Mo. App. 660, 159 S. W. 17; 89 Cyc. 1442, 1445, 1446, 1447. But the term 'marketable title, free from defects,' does not imply that no other title than one shown in proper conveyances or of record or revealed in an abstract from the record will suffice. Neither is there an implied covenant in those words to the effect that the title will be such as the vendee will be willing to accept or that his attorney may pronounce good and marketable. See *Green v. Ditsch*, 148 Mo. 1, 44 S. W. 799. It is said that the words 'marketable title' mean a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept. See *Kling v. Greef Realty Co.*, 166 Mo. App. 190, 195, 196, 148 S. W. 203; *Todd v. Savings Institution*, 128 N. Y. 636 [28 N. E. 504]; 29 Am. & Eng. Ency. of Law (2d Ed.) 613; 39 Cyc. 1452 et seq. But unless the contract calls for a record title or a title appearing in conveyances, as by an abstract or something of that nature, a good title by adverse possession under the statute of limitations is sufficient and regarded as a marketable title. It is said that such is the rule according to the great weight of authority. See 39 Cyc. 1460. It is certainly the rule in Missouri, as will appear by reference to the decision of the Supreme Court in *Scannell v. American Soda Fountain Co.*, 161 Mo. 606, 618, 619, 61 S. W. 889.

"The law on the subject is thus stated in 39 Cyc. 1460, 1461, 1462, 1463:

"Where the contract expressly or impliedly calls for a record title, a title by adverse possession, prescription, or limitations is not sufficient; but such a title is marketable and sufficient, according to the great weight of authority, where the contract does not call for a title of record. Where there is a possibility of an outstanding title, undisturbed possession for a long period of time renders the title marketable. The vendor must, however, clearly show that the facts are such that lapse of time gives title by adverse possession, and that the title is free from reasonable doubt. He must be able to show that the adverse claimant of the property was not under such disability that the statute would not run against him, that the possession was in hostility to such owner and exclusive, and that the time prescribed by the statute has not been prolonged by any act of the parties. The parol evidence to support such a title must be such as cannot be contradicted and will not be difficult to obtain."

"In this view the court very properly received the evidence showing good title in the defendant under the statute of limitations, and also in refusing the instructions requested by plaintiff, for it is obvious the title tendered by defendant was a marketable one, free from defects."

After a careful consideration of the cases in this state cited by counsel for defendant, we are of the opinion that the cases of *Thompson v. Dickerson*, *supra*, *Bruce v. Wolf*, *supra*, *Austin v. Shipman*, *supra*, and *Austin v. Kimlin*, *supra*, support the position taken

by counsel for the defendant, namely, that where the terms of the contract show that it was the intention of the parties that the vendor should furnish an abstract of title showing a perfect title in him to the real estate—that is, one shown by the records—and that the vendee was to purchase the land only upon such a showing made by such an abstract, the latter would be under no legal obligation to accept a title, though good and merchantable, if not shown by such an abstract.

We are not inclined to say that such a contract might not be drawn and execute, and, if so drawn, that the courts would not enforce it; but, when we consider the very object and purpose of an abstract, we seriously doubt that such a contract was ever intentionally drawn and executed.

[4] What we mean is that the purpose of an abstract of the record of the title to a piece of real estate is not simply to show that the paper title is perfect as it appears of record, but it is also to show in addition thereto that the vendor has the actual title thereto. The latter is of paramount importance, while the former is only incidental thereto, pointing out the evidences of the real title.

For illustration, the record title might be perfect, and of course a correct abstract of the record would show that fact, but at the same time the person in whom the record and abstract show is the owner of the title may in act have no real interest or title whatever in the land described thereby.

This is often shown where the husband, without the written consent of the wife, invests her separate money or means in real estate and takes the title in his own name. In such case the record title thereto would be in him, and a correct abstract should show that fact, if known, and in such case he would have no beneficial interest in the land whatever. And should any one purchase such real estate from the husband with notice or knowledge of the fact that the wife's money paid for it such a one would acquire no better title thereto than the husband had.

If you use the word "abstract" in the narrow and technical sense in which counsel for defendant contend for, then, of course, the wife's interest would not and could not be shown by the abstract, even though the affidavits of the husband and wife should be attached thereto setting forth those facts, for the simple reason, as they contend, the affidavits are no part of the abstract, and consequently could be considered for any purpose when the contract calls for an abstract showing a perfect record title. The foregoing is the logical conclusion deducible from the contention of counsel for defendant.

And if that contention is sound, then if, as a matter of fact, the affidavits of Jamison and his wife, and even others familiar with

the facts, should conclusively show that he purchased any or all of the land involved in this suit and paid for it without her written permission, with her money, yet the defendant would be compelled, under the strict terms of the contract, to accept his deed therefor and pay him the purchase price thereof, of \$57,000, notwithstanding the affidavits attached to the abstract showed that he had no real interest whatever therein. *Scannell v. American Soda Fountain Co.*, 161 Mo. 606, loc. cit. 618, 61 S. W. 889.

The same would be true not only where the husband invests the wife's money or means in real estate, and takes the title in his own name, but also in many other cases, such as resulting trusts, and where the title to real estate has been acquired by inheritance, marriage, adverse possession, or depends upon births, deaths, or upon any other matter by which a missing link must, from the very nature of the case, be supplied by parol evidence. In other words, in all of those cases where parol evidence must of necessity be resorted to in order to show a perfect title to real estate, an abstract, such as counsel for the defendant contends for, could never, in the very nature of the case, legally disclose the parol evidence which is required to fill in the gap or make the connecting link in the chain of title; and in all such cases, according to defendant's contention, a good and merchantable title could never be shown by an abstract of any kind. This is true for the reason that even at this late day, when a record is kept of marriages, births, deaths, etc., it is almost impossible to procure them in a given case, they being scattered throughout the world.

To make the point clear, let us view the case from a different angle, and suppose that the abstract in this case conformed to all the requirements contended for by counsel for defendant; that is, it showed a perfect record title in fee in the plaintiff to all the land described in the contract of sale, and also contained the affidavits before mentioned, showing that the husband, without the written consent of his wife, had purchased this land with her money, and that he had taken the title of the same in his own name; would counsel for defendant have advised his client that, under the terms of the contract, the affidavits were no part of the abstract, and that they must be ignored, and, therefore, according to the terms of the contract, the defendant was liable to pay, and must pay, the full purchase price of the land, when in fact the plaintiff had no real interest whatever in the land—at most, he would be considered a naked trustee, holding the legal title to the land for the use of his wife, which, if not executed by the statute of uses, would be enforced by a court of equity? I apprehend not, for the reason that he would have known that the wife, under those facts,

could recover the lands from the defendant the next moment.

It was because of these absurd results which counsel for defendant contend that caused us, in a previous part of this opinion, to state that we doubted if any such contract as interpreted by counsel for defendant was ever intentionally entered into by any one; but, be that as it may, let us return to the consideration of the cases cited by counsel for defendant in support of their position in this case.

The cases of *Drury v. Mickelberry*, supra, and *Coble v. Denisen*, supra, are not in point for the reasons previously stated; and if we correctly understand the other two cases cited, namely, *Kling v. Realty Co.*, supra, and *Wiemann v. Steffen*, supra, while, upon the facts stated, they support fifth contention made by counsel for defendant, yet they also recognize the rule contended for by counsel for the plaintiff.

Before proceeding further, it may not be amiss to recall the exact language of the pertinent part of the contract in this case. It reads: "Parties of the first part agree to deed by general warranty deed and will furnish an abstract showing good merchantable title." And in this connection it should be borne in mind that the uncontradicted evidence in the case shows that the plaintiff had acquired a fee-simple title to the 220 acres described in the judgment of the trial court, the only land the title to which is questioned in this case, by adverse possession under the 10, 24, and 30 years statute of limitations.

In addition to the two last cases heretofore considered, written by the Court of Appeals, this court has passed upon the meaning of a similar contract to the one we now have under consideration, which we will now briefly review.

The case is that of *Scannell v. American Soda Fountain Co.*, 161 Mo. 606, 61 S. W. 889. This was a suit for specific performance, and the contract in which provided—"that if any defect should be found in the title to either of said properties, so that this contemplated trade cannot be made, then the party whose title proves defective hereby agrees to pay to the other party the sum of \$250 as full compensation for the failure to consummate this contract; and in that event, and upon such failure being made, this contract shall be absolutely void as if the same had never been made, and the \$250 hereby receipted for shall be returned to said Scannell. If, however, said titles are found to be perfect, said deeds and lease shall be delivered without delay, not later than the 1st of July next."

The evidence disclosed that the plaintiff's record title went back no further than 1829, although the title to the property had emanated from the French Government in 1769, and for that reason the defendant refused to carry out the agreement; hence, that suit. The parol evidence, however, showed that the

plaintiff, and those through and under whom he claimed title, had been in the open, exclusive, continuous, and adverse possession of the property, claiming possession of the property and title thereto, from the time the title emanated from the French Government, in 1769, down to the year 1829, where the record title began.

It will be observed that the contract does not use the word "abstract," yet it does use the word "title," which an abstract represents, and has as full a meaning and significance as the word "abstract," would have had had it been used in the contract instead of the word "title."

This court, in that case, in decreeing specific performance used this language:

"The first question we encounter is, Was the defendant justified in refusing to perform the contract because the plaintiff's paper title went back no further than 1829, and did not connect with the concession from the French government, subsequently confirmed by the United States? Up to the time defendant positively refused to carry out the agreement the points in relation to the nine-inch strip and the three-foot easement had not been discovered, at least no mention of them had been made in the discussions, but, so far as could be learned from what was said by defendant's agent, the gap in the record from 1769 to 1829 was the only objection.

"It is insisted for the respondent that the contract in question demands not only a reasonably good, but an absolutely perfect, title. The learned circuit judge who tried the case notes in his opinion that the contract was not written by a lawyer, and on that ground accounts for some indefinite language employed. That fact may also account for the form of expression on this point. The language is, 'If any defect should be found in the title,' etc. The argument for respondent places the emphasis on the adjective; if *any* defect should be found, the contract should end. In their brief the learned counsel say that the parties 'meant just what those words express—any defect whatsoever in the record title notwithstanding that, by evidence of possession or other facts not of record, the defect in the record title might be so far supplied as to make the title good and marketable.' Of course, if the parties had seen fit, they might have contracted in those words or to that effect, and, if they had, the court would not enforce upon either of them different terms. But a contract calling for an absolutely perfect record title, and which would be satisfied with such, does not call for a perfect, or even a marketable, title—does not in fact call for as good title as this contract calls for. A man may have an absolutely perfect record title, yet it will avail him nothing if his adversary in possession has been there for such a period and under such conditions that the law will not allow him to be disturbed. But that is not the language of this contract. It is, 'If any defect should be found in the title to either of said properties so that this contemplated trade cannot be made, then,' etc. That form of expression neither condemns a title for lack of record evidence, nor requires a party to take a record title if it is overshadowed by a title outside the

record. And it will be noticed that the word 'perfect' is not used in that sentence, though it occurs in the sentence following: 'If, however, the titles are found to be perfect, said deeds and lease are to be delivered without delay, not later than the 1st of July next.' The only office that sentence serves is to fix the date for the performance of the agreement.

"A title acquired by adverse possession, under our statute, is in every respect as good for purposes of attack or defense as a title by deeds running back to the government. *Bank v. Evans*, 51 Mo. 335; *Shepley v. Cowan*, 52 Mo. 559; *Bledsoe v. Simms*, 53 Mo. 305; *Dalton v. Bank*, 54 Mo. 105; *Barry v. Otto*, 56 Mo. 177; *Ridgeway v. Holliday*, 59 Mo. 444; *Hamilton v. Boggess*, 63 Mo. 233; *Ekey v. Inge*, 87 Mo. 493; *Sherwood v. Baker*, 105 Mo. 472 [16 S. W. 938, 24 Am. St. Rep. 399]; *Long v. Stock Yards*, 107 Mo. 298 [17 S. W. 656, 28 Am. St. Rep. 413].

"Titles by deed often have to be helped out by parol evidence, as, for example, the record title shown by defendant in this case. The concession of the French government to Jacques Denis had to depend on the oral testimony of a witness who had made a study of old city maps. If plaintiff had shown a direct derivation of that title, it would not have come up to the requirement demanded by respondent in his brief, because 'it was not a title good beyond all reasonable doubt. It was open to possibility of attack.' The testimony in support of that title was admissible because it was the best that the circumstances of the case could afford, but it was far less satisfactory than the proof of plaintiff's adverse possession for 52 years. That period of time would seem, of itself, to put the plaintiff's title at peace under the first section in our statute of limitations. And it covers also the period of 24 years where-in the disabilities which would suspend the statute are allowed to operate by section 4265, Revised Statutes 1899. And if there was even a possibility of claim arising in behalf of the legatees under the will of *Aspasie des Ilets*, that would be quieted by the 30 years' limitation contained in section 4268, which no disability will affect. *Collins v. Pease*, 146 Mo. 135 [47 S. W. 925]; *Fairbanks v. Long*, 91 Mo. 628 [4 S. W. 499].

"A court of equity would not force upon a defendant a title in which there was any real defect, but it will not hesitate to require him to stand up to his contract when the title offered him is good beyond all reasonable apprehension. *Mastin v. Grimes*, 88 Mo. 478; *Grefet v. Williams*, 114 Mo. 106 [21 S. W. 459]; *Mitchner v. Holmes*, 117 Mo. 185 [22 S. W. 1070]; *Rozier v. Graham*, 146 Mo. 352 [48 S. W. 470].

"We conclude that the defendant was not justified in refusing to perform his contract when he did and upon the ground he did."

[5] The same is true regarding the contract now under consideration; it does not require the plaintiff to furnish an abstract showing a perfect record title, but an "abstract showing good, merchantable title." This language does not condemn a title for lack of record evidence, nor does it require a party to accept a title if it is clouded by another

title, lien, or incumbrance outside of the record title.

And, as said in the Scannell Case, a title acquired by adverse possession, under our statutes of limitations, is in every respect as good as one acquired by deed running back to the government.

[6] While the law will not compel a party to accept a title under such a contract, when there is any reasonable doubt as to the title acquired by adverse possession, yet it does not require him to show such a title beyond a reasonable doubt. In this case the undisputed evidence shows that plaintiff's adverse possession had continued for more than 33 years before the execution of this contract, which was some 5 years ago, making about 38 years now, yet, during all that long period, no one has laid claim to any of this land, or questioned the plaintiff's title thereto, except the defendant alone, who acquired the possession thereof under the contract of purchase, and still retains the same, and, on account of the defect in the record title to this 220 acres, he holds possession of the 1,270 acres, and refuses to pay for it, and has done so for five years, collecting the rents and paying no interest or rent therefor.

Even if any person ever had any valid claim to any of this 220 acres of land, it would, in all human probability, be barred by either the 10, 24, or 30 years statutes of limitations, as previously shown; and, as said by the Court of Appeals in the case of *Wiemann v. Steffen*, 186 Mo. App. loc. cit. 591, 172 S. W. 474:

"The term 'marketable title, free from defects,' does not imply that no other title than one shown in proper conveyances or of record or revealed in an abstract of the record will suffice. Neither is there an implied covenant in those words to the effect that the title will be such as the vendee will be willing to accept or that his attorney may pronounce good and marketable. *Green v. Ditsch*, 143 Mo. 1, 44 S. W. 799. It is said that the words 'marketable title' mean a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept."

In other words, he will not be permitted to reject the title upon the bare possibility that it may prove defective. *Todd v. Savings Institution*, 128 N. Y. 636, 28 N. E. 504; *Amer. & Eng. Ency. of Law* (2d Ed.) 613; 39 Cyc. page 1452.

See, also, *Attebery v. Ballr*, 244 Ill. 363, 91 N. E. 475, 135 Am. St. Rep. 342, where this question is exhaustively discussed.

And it should be added that such a title as the one just mentioned cannot always be shown by the abstract of the record alone, but resort must be had to all proper evidences which will fill in all of the missing

links, and piece out all of the defects of the character before mentioned; and by so doing we will have not only a paper skeleton of the record, but a complete abstract full of substance and life, showing a full and complete legal and equitable title to the land; such is the title a purchaser wants to buy, and such is the title the average person believes he is contracting for when he enters into a contract for the purchase of real estate. This is the kind of an abstract the parties contracted for, and the one furnished conforms to the terms thereof.

Moreover, common observation and experience teach us that practically all of the abstracts prepared and certified to by professional abstractors are of the character mentioned, and do not stop short, as contended for by counsel for defendant.

We are therefore of the opinion that specific performance of the contract should not be denied because of the defective condition of the title as pointed out by the defendant.

[7] III. There is another equally strong reason why specific performance should not be denied in this case, and that is because this court has repeatedly held that, where the defense is that the plaintiff has no title to a part of the land, the defendant may surrender possession of that part and insist upon performance as to the remainder, and ask for an abatement out of the purchase money for so much as the quantity of land falls short of that contracted for; but he cannot refuse to pay the purchase money and retain the possession, and, in order to avail himself of this defense and recovery, he must first offer to restore possession and rescind the contract.

This rule has been announced in the following cases: *Lanyon v. Chesney*, 186 Mo. 540, 85 S. W. 568; *Harvey v. Morris*, 63 Mo. 475; *Smith v. Busby*, 15 Mo. 388, 57 Am. Dec. 207; *Pershing v. Canfield*, 70 Mo. 140.

The undisputed facts are, defendant took possession of the land under the contract of purchase, and insists that the title to 220 acres thereof is defective, yet he retains possession of the entire 1270 acres, and refuses to pay the balance—about \$43,000—of the purchase money, and refuses to pay interest thereon or any rent for the land. This conduct of defendant outstrips that of *Shyllock*; he paid for the pound of flesh he contracted for, and only demanded that which he purchased; but here Van Auker has not paid for the land, but is also insisting upon his right to retain it without paying the contract price, or interest thereon, or rents for the land. This he cannot do under the sanction of a court of justice and equity.

[8] IV. Counsel for plaintiff next insist that the trial court erred in refusing him subrogation to the rights of the People's Bank and those of the *Elsberry Banking Company*.

to have the deeds of trust they formerly owned, conveying certain portions of the land in controversy, to secure the money mentioned, the payment of which defendant assumed to pay as a part of the purchase money, which he refused to do, and thereby necessitating the plaintiff's paying the same in order to protect the land from sale under said deeds of trust, declared a lien upon the same lands, and that the liens be foreclosed, the lands sold, and the notes secured by said deeds be paid out of the proceeds of the sale.

There is practically no dispute about those facts, except the answer charges that the plaintiff voluntarily made the payments, and did not do so to protect the land from sale under the deeds, and therefore subrogation was properly denied.

There is no evidence contained in this record which supports that charge, but, upon the contrary, when the notes became due the banks demanded their money, which defendant refused to pay, and thereupon the plaintiff did so, as previously stated.

We are therefore of the opinion that the trial court erred in refusing plaintiff subrogation as prayed.

For the reasons stated we are of the opinion that the plaintiff is entitled to a reformation of the contract as prayed for in the first count of the petition, a specific performance of the contract as reformed, and to the subrogation as before mentioned.

The judgment is therefore reversed and the cause remanded, with directions to the circuit court to enter a judgment reforming the contract, specifically enforcing the same, subrogating the plaintiff to all the rights and liens before mentioned, and to compute the balance due the plaintiff on the purchase price, with interest as stipulated for in the contract, and enter judgment accordingly.

GRAVES, J., concurs. BLAIR, P. J., concurs in paragraphs 1 and 4 and result. BOND, J., concurs in paragraphs 3 and 4 and result.

(277 Mo. 333)

RIGGS v. PRICE. (Nos. 19411, 19412.)

(Supreme Court of Missouri, in Banc. Feb. 15, 1919.)

**1. BANKRUPTCY §51—ADJUDICATION—CONCLUSIVENESS.**

Upon an adjudication of bankruptcy, the decree becomes as immune from collateral attack as any other judgment, particularly where proceedings were voluntary under Bankruptcy Act, § 4a (U. S. Comp. St. § 9588).

**2. BANKRUPTCY §56—VOLUNTARY PROCEEDINGS—ACT OF BANKRUPTCY.**

In view of Bankruptcy Act, §§ 4a, 18g, and section 7, subd. 8 (U. S. Comp. St. §§ 9588,

9602, and 9591), where a farmer files petition in voluntary bankruptcy the act of bankruptcy is committed upon the filing of the petition.

**3. BANKRUPTCY §51—ADJUDICATION—COLLATERAL ATTACK.**

In suit by trustee in bankruptcy to set aside fraudulent conveyance, the bankruptcy court's decree of adjudication of voluntary bankruptcy is conclusive as to the jurisdiction of the bankruptcy court and its authority to direct trustee to institute the action.

**4. BANKRUPTCY §177—TRANSFERS BY BANKRUPT—AVOIDANCE BY TRUSTEE—TIME TO BRING ACTION.**

The limitation of four months within which a trustee may sue to set aside transfers under Bankruptcy Act has reference to preferences under section 60a (U. S. Comp. St. § 9644), and to proceedings under 67e (section 9651), declaring transfers void if made within the time limited, and not to trustee's right of action under section 70e (section 9654) to set aside a fraudulent conveyance.

**5. BANKRUPTCY §185—FRAUDULENT CONVEYANCES—RIGHTS OF TRUSTEES.**

In view of Bankruptcy Act, § 47a, subd. 2, as amended June 25, 1910 (U. S. Comp. St. § 9631), and sections 70a and 70e (U. S. Comp. St. § 9654), trustee is subrogated to rights of bankrupt's creditors as to right to bring action to set aside fraudulent conveyances.

**6. BANKRUPTCY §184(1)—FRAUDULENT CONVEYANCES—TRUSTEE'S ACTION TO SET ASIDE—LIMITATIONS.**

In view of Bankruptcy Act, § 47a, subd. 2, as amended June 25, 1910 (U. S. Comp. St. § 9631), and sections 70a and 70e (section 9654), the time within which trustee is required to bring action to set aside bankrupt's fraudulent conveyances which any creditor might have avoided is prescribed by the state law as to proceedings to set aside conveyances, and not by the bankruptcy act.

**7. BANKRUPTCY §284—FRAUDULENT CONVEYANCES—ACTION BY TRUSTEE.**

Trustee suing to set aside fraudulent conveyance which any creditor could have avoided, under Bankruptcy Act, §§ 47a and 70e (U. S. Comp. St. §§ 9631, 9654), is not required to aver or show that some creditor has reduced his claim to judgment and issued execution thereon which has been returned unsatisfied.

**8. BANKRUPTCY §302(1)—FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—PLEADING.**

In trustee's action to set aside bankrupt's fraudulent conveyance under Bankruptcy Act, § 70e (U. S. Comp. St. § 9654), the petition held to meet all the requirements of a bill in equity.

**9. BANKRUPTCY §245—TRUSTEE—STATUS—ACTION TO SET ASIDE CONVEYANCE.**

While the trustee, suing to set aside fraudulent conveyance, under Bankruptcy Act, § 70e (U. S. Comp. St. § 9654), may be said to be the alter ego of the creditors in that his action is for their benefit, he is, in law and fact, but an arm of the court, and acts, not

for creditors individually or collectively, but for the estate.

**10. BANKRUPTCY — 245—RIGHTS OF CREDITORS.**

After adjudication of bankruptcy and allowance of claims, creditors can neither sue nor be sued in proceeding to collect, control, preserve, or recover the assets; the entire administration of estate being invested in the trustee to be exercised under direction of court.

**11. BANKRUPTCY — 302(1) — FRAUDULENT CONVEYANCE—SUIT TO SET ASIDE—PLEADING.**

Trustee, suing to set aside bankrupt's fraudulent conveyance, under Bankruptcy Act, § 70e (U. S. Comp. St. § 9654), need not allege names of creditors, since the identity of creditors is merged in the estate; the petition being sufficient if it is alleged that there were unsecured creditors at time of conveyance, giving aggregate amount of claims, and that the assets are insufficient to satisfy such claims.

**12. BANKRUPTCY — 353—FRAUDULENT CONVEYANCE—RECOVERY OF PROPERTY.**

Where bankrupt's fraudulent conveyance is set aside in trustee's action therefor, the property recovered becomes a part of general assets of the estate and inures, not to the benefit alone of the unsecured creditors, existing at time of transfer, but to all creditors having provable claims, including those whose claims accrued subsequent to the transfer.

**13. BANKRUPTCY — 302(1) — FRAUDULENT CONVEYANCES—SUIT TO SET ASIDE—PETITION.**

In trustee's action to set aside fraudulent conveyance of bankrupt's property under Bankruptcy Act, § 70e (U. S. Comp. St. § 9654), petition need not state the amount or nature of any claim to which property sought to be recovered can be applied, since the property, if recovered, will become part of the estate.

**14. BANKRUPTCY — 303(2) — FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—EVIDENCE.**

In trustee's action to set aside fraudulent conveyance of bankrupt's property under Bankruptcy Act, § 70e (U. S. Comp. St. § 9654), where petition alleged that assets of estate were insufficient to satisfy claims against the estate, evidence as to all the claims, whether secured or unsecured, was admissible to sustain the allegation.

**15. BANKRUPTCY — 303(2) — FRAUDULENT CONVEYANCES—ACTIONS TO SET ASIDE—EVIDENCE.**

In trustee's action to set aside fraudulent conveyance of bankrupt's property under Bankruptcy Act, § 70e (U. S. Comp. St. § 9654), testimony as to all allowed claims was admissible; such claims being in the nature of judgments.

**16. HUSBAND AND WIFE — 193—RIGHTS OF WIFE—CONVEYANCE OF PROPERTY.**

Under Married Woman's Act, § 8304, wife, as to control and conveyance of her separate property, is sui juris, and as such is clothed with the right to sell her land and make a deed thereto independent of husband.

**17. CURTESY — 2—CURTESY INITIATE.**

Married Woman's Act, § 8304, giving wife right to dispose of her property independent of husband, held to destroy tenancy by curtesy initiate and to reduce such interest to a mere interest in expectancy.

**18. WITNESSES — 53(2)—HUSBAND'S TESTIMONY IN SUIT AGAINST WIFE—MARRIED WOMAN'S ACT.**

In action against wife to set aside fraudulent conveyance, husband, who was not joined in the action, was an incompetent witness under Rev. St. 1909, § 6359, not having an interest in the land conveyed so as to render him competent under section 6354, since husband's tenancy by curtesy initiate in wife's land was destroyed by Married Woman's Act, § 8304.

**19. JUDGMENT — 251(1) — CONFORMITY TO PLEADINGS.**

In suit to set aside fraudulent conveyance where no issue was raised by pleadings as to existence of mortgage placed on land by defendant, finding that decree should be made subject to such mortgage was unauthorized.

Appeal from Circuit Court, De Kalb County; Alonzo D. Burnes, Judge.

Suit by Zadock T. Riggs, trustee, against Ivie Price. From judgment rendered defendant appeals, and from a finding plaintiff appeals. Reversed, with directions.

Hewitt & Hewitt, of Maysville, for Price. Williams & Robison, of Maysville, Kendall B. Randolph, of St. Joseph, and Edward G. Robison, of Maysville, for Riggs.

**WALKER, J.** This appeal seeks a review of a judgment rendered in the circuit court of De Kalb county, in a suit brought by plaintiff, as trustee in bankruptcy of the estate of Thomas Price, to set aside as fraudulent deeds to certain land in said county, transferring the title to same to the defendant, the wife of Thomas Price. The trial court adjudged the deeds fraudulent and decreed that the title to the land was in the trustee, subject to a homestead interest of \$1,500, a mortgage for \$5,500 of prior date to said deeds, and a mortgage for \$1,000 made by the defendant subsequent to the transfer of the land to her. Neither party being content with the findings of the trial court, both appealed; the defendant from the entire judgment, and the plaintiff from the finding as to the \$1,000 incumbrance. A single review will suffice to determine all of the matters at issue.

**Pleadings.**—After the formal allegations, proper in a proceeding of this character, concerning which there is no controversy, the petition avers in substance the ownership by Thomas Price on October 8, 1913, of the land, describing it; that the same was incumbered by a mortgage theretofore given by him to secure a debt of \$5,500; that, at the time of

the making of the deeds, Thomas Price was indebted to various persons, firms, and corporations in the sum of \$44,647, and was insolvent, and had no property with which to pay his debts; that, while so insolvent, he and his wife, Ivie Price, with the intent to hinder, delay, and defraud his creditors then existing, made a general warranty deed whereby, for a fictitious purported consideration of \$7,500 they conveyed the land to one John Price, a brother; that the deed thereto was without consideration and was made and executed for the purpose of transferring the title of said land to grantor's wife, Ivie Price; that, on the day immediately after the execution of the deed to John Price, the latter quitclaimed and released the land to Ivie Price for a purported consideration of \$10; that no consideration in fact passed; that John Price was a mere conduit for the purpose of transferring the title to the land from Thos. Price to his wife, Ivie Price; that each of said conveyances was made while Thos. Price was insolvent, for the purpose of defrauding his creditors, and that his insolvency and the purpose of said transfers were known at the time to each of said grantees; that Thos. Price has no property out of which his creditors can satisfy their debts, and has not had since October 8, 1913; that the trustee has no adequate remedy at law to subject said land to the payment of the debts of Thos. Price, nor for obtaining assets with which the claims of his creditors may be satisfied; that the land cannot be subjected to the payment of Thos. Price's debts, and become available to the trustee in bankruptcy for that purpose, unless the conveyances aforesaid be annulled and set aside and the land declared to be the property of Thos. Price, bankrupt; that, at the time of said conveyances, the land was occupied by Thos. Price as a homestead and he resided thereon; that the value of same at the time, and at all times since, has been \$12,500; that Thos. Price was entitled to a homestead therein of the value of \$1,500; that the value of the land, exclusive of the mortgage for \$5,500 and the homestead interest in same, is \$5,000, which sum should be devoted to the payment of the claims of his creditors; that, of the indebtedness of Thos. Price existing at the time of said transfers, there has been adjudicated claims in bankruptcy in the United States District Court against his estate in the sum of \$14,622.97; that additional claims have since been presented for allowance; that the entire assets of said estate, exclusive of the land, amount to no more than \$166.

The prayer asks that the deeds to said land be canceled, and for naught held, and that Ivie Price take nothing thereby, except the value of the homestead, and that said property be ordered sold subject to the mortgage for \$5,500, and that the proceeds, after paying Ivie Price \$1,500, be paid to plaintiff,

as trustee in bankruptcy for the benefit of the creditors of Thos. Price and for such other orders, judgment, and decree as are proper in the premises.

The answer admits the marriage relation; the ownership of the land; that it is the homestead of Thos. Price; that deeds were executed as stated, and the existence of the incumbrance. All other allegations are denied generally. After a hearing, the court took the case under advisement, and in October, 1915, rendered a judgment therein for plaintiff.

**Judgment.**—After formal findings as to the bankruptcy of Thos. Price, the trusteeship of plaintiff, and his authority as such herein, the court finds that the defendant is the wife of Thos. Price; his ownership of the land, describing it, and the conveyances of same, and his insolvency at the time; that the transfer to John Price and his deed to Ivie Price were made without consideration and for the purpose of placing the title to said land in the defendant, Ivie Price, and were voluntary and void as to the creditors of Thos. Price, and as to his bankrupt estate, and as to the plaintiff, as trustee of same; that Thos. Price and his wife, Ivie Price, the defendant, occupied said land as a home; that said Ivie Price is entitled to retain a homestead therein of the value of \$1,500; that the deeds made by Thos. Price to John Price and by John Price to Ivie Price be canceled and for naught held, except as to the homestead; and that the title to said real estate be vested in plaintiff, as trustee in bankruptcy of the estate of Thos. Price, subject to the incumbrance of \$5,500, and one for \$1,000, and the homestead right of said Ivie Price.

It was developed by the testimony, but does not otherwise appear in the record, that the \$1,000 mortgage on the land was placed thereon by the defendant after the fraudulent conveyance of same to her.

**The Facts.**—The facts disclose that Thomas Price was adjudged a bankrupt on his voluntary petition in the United States District Court for the Western District of Missouri March 19, 1914; that his indebtedness at the time the deeds to said land were made, and at the time of his adjudication as a bankrupt, was even greater than alleged in the petition; that his assets at said times were insufficient to satisfy same. In other respects, the facts are in substantial accord with the averments of the petition. The main issue at the trial was whether on the 8th day of October, 1913, the financial condition of Thomas Price was such as to endanger the claims of his creditors by the transfer of the title of said land to his wife, the defendant. Incidental to this issue are other matters of fact, a presentation and discussion of the legal force and effect of



which will, where necessary to the determination of this case, be made in the opinion.

The defendant's assignments of error are as follows:

The absence of jurisdiction; the insufficiency of the petition; the improper admission on the part of the plaintiff, and exclusion on the part of defendant, of testimony; and the refusal to permit Thomas Price to testify on the part of his wife, the defendant. Other assignments, formal in their nature, are incidental to and dependent for their determination upon the conclusions which may be reached in regard to the foregoing. The plaintiff's assignment of error is that the judgment is not responsive to the pleadings.

I. *Jurisdiction*.—The defendant contends that the making of the deeds in controversy more than four months prior to the filing of the petition herein divested the bankruptcy court of power to direct the trustee to prosecute this action and that the state court consequently acquired none.

[1-3] First, as to the validity of the act of the bankruptcy court: Upon an adjudication of bankruptcy, the decree becomes as immune from collateral attack as any other judgment. *Chapman v. Brewer*, 114 U. S. loc. cit. 169, 5 Sup. Ct. 799, 29 L. Ed. 83; *Lamp Chimney Co. v. Brass Copper Co.*, 91 U. S. loc. cit. 661, 23 L. Ed. 339; *Michaels v. Post*, 88 U. S. [21 Wall.] 398, 22 L. Ed. 520; *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226; *Golden & Co. v. Loving*, 42 App. D. C. 489; 5 Cyc. 237n; *Collier's Bankruptcy* (11th Ed.) pp. 12, 121. If possible, the conclusiveness of the decree is emphasized where, as here, the proceeding was voluntary. Not being subject, as a farmer, to the coercive provisions of the act, the bankrupt invoked the jurisdiction of the court (*Bankruptcy Act July 1, 1898*, c. 541, § 4a, 30 Stat. 547 [U. S. Comp. St. § 9588]), which is required to make an adjudication, or dismiss the proceeding, upon the filing therein of a petition (section 18g [section 9602]), accompanied as it was with a verified schedule of the bankrupt's property and the names of his creditors, and the statement that he owes debts he is unable to pay, and is willing to surrender all of his property for the benefit of his creditors (section 7, subd. 8 [section 9591]). Under this state of facts, the act of bankruptcy is held to have been committed upon the filing of the petition (*Hanover Nat. Bk. v. Moyses*, 186 U. S. loc. cit. 190, 22 Sup. Ct. 857, 46 L. Ed. 1113). The finality of the decree, therefore, obviates any objection to the general jurisdiction of the bankruptcy court, and, as a consequence, its authority to direct the trustee to institute the action at bar.

[4] In addition, it is clearly indicated by the language of the statute that the limitation of four months within which a trustee may sue to set aside transfers has refer-

ence to preferences under section 60a (section 9644), and to proceedings under 67e (section 9651) of the act, in which transfers are declared to be void if made within the time limited (*Bush v. Export Sto. Co.* [C. C.] 136 Fed. 918; *Collier on Bankruptcy* [11th Ed.] p. 1062 and cases), and not to the right of action of the trustee under section 70e (section 9654) to set aside a fraudulent conveyance (*Underleak v. Scott*, 117 Minn. loc. cit. 140, 134 N. W. 731).

The provisions of the act in regard to the character of the trustee's title to the property of the bankrupt estate, and the powers conferred on him in the care and management of same, are further illustrative of the unsoundness of defendant's contention in regard to the application of the bankruptcy statute of limitations to this case.

[5, 6] Section 47a, subd. 2, of the Bankruptcy Act, as amended June 25, 1910 (section 9631), provides:

"That as to all property not in the custody of the bankruptcy court [the trustee] shall be deemed vested with all the rights \* \* \* and powers of a judgment creditor holding an execution duly returned unsatisfied."

This provision must be construed together with these portions of sections 70a and 70e (*In re Hammond* [D. C.] 188 Fed. 1020) of the act, which further emphasizes the vesting of the title of the bankrupt's property in the trustee, and expressly includes property transferred by him in fraud of his creditors, and authorizes the trustee to institute actions to avoid any of such transfers which any creditor might have avoided by a suit in a bankruptcy court, or in a state court, which would have jurisdiction if bankruptcy had not intervened. (*Parker v. Sherman* [D. C.] 195 Fed. 648, 28 Am. Bankr. Rep. 379). The trustee is thus subrogated to the rights of the creditors, and the limitation as to his right of action is that prescribed by the state law as to proceedings to set aside fraudulent conveyances, and not to the four months of the bankruptcy act. *Baldwin v. Kingston* (U. S. Dist. Ct. N. J.) 40 Am. Bankr. Rep. 641, 247 Fed. 163; *Manders v. Wilson*, (D. C.) 230 Fed. 536; *Holbrook v. Inter. Tr. Co.*, 220 Mass. 150, 107 N. E. 665; *Bllick v. Nimmo*, 121 Md. 139, 88 Atl. 116; *Hobbs v. Frazier*, 61 Fla. 611, 55 South. 848; *Newcomb v. Bimer* (D. C.) 199 Fed. 529; *Hall v. Glenn* (D. C.) 39 Am. Bankr. Rep. 54, 247 Fed. 997; *McKenna v. Simpson*, 129 U. S. 506, 9 Sup. Ct. 365, 32 L. Ed. 771.

[7] II. *Powers of Trustees and Rights of Creditors*.—It is not necessary to the maintenance of an action under sections 47a and 70e for the trustee to aver or show that some creditor has reduced his claim to a judgment and issued execution thereon which has been returned unsatisfied, as in a like proceeding in equity. *Bean v. Parker*,

38 Am. Bankr. Rep. loc. cit. 903, 89 Vt. 532, 96 Atl. 17. The reason therefor being that, after an adjudication, no creditor can reduce his claim to a judgment in the ordinary way, nor can the trustee do so in his behalf. This renders the relation of those whose claims have been allowed against the estate that of judgment creditors, and affords a reason for the uniform ruling of the courts in that behalf that a judgment returned unsatisfied as in an ordinary proceeding in equity is not a prerequisite to the right of action of the trustee, but that in the exercise of this right he may, as a sort of alter ego of all of the creditors (*Blake v. Meadows*, 225 Mo. loc. cit. 26, 123 S. W. 863, 80 L. R. A. [N. S.] 1), file a bill to avoid any transfer by the bankrupt of his property, which any creditor might have avoided had bankruptcy not intervened (*Coleman v. Hagey*, 252 Mo. loc. cit. 128, 158 S. W. 829; *Hook v. Blair St. Bank*, 3 Neb. [Unof.] 432, 91 N. W. loc. cit. 705; *Southard v. Benner*, 72 N. Y. 424; *Beasley v. Coggins*, 48 Fla. 215, 37 South. 213, 5 Ann. Cas. 801, 12 Am. Bankr. Rep. 355; *Mueller v. Bruss*, 112 Wis. 406, 88 N. W. 229, 8 Am. Bankr. Rep. 442).

*Mueller v. Bruss*, supra, is but one of a type of many cases we have cited holding that jurisdiction may be exercised by the court of a state, under section 70e, to set aside a conveyance of real estate, made by the bankrupt six months prior to the filing of the petition in bankruptcy; and that a judgment and return of an execution are not a necessary prerequisite to such a suit, since, under the Bankruptcy Act, neither the trustee nor the creditors whom he represents could obtain such a judgment. The requirement as to a judgment and the return and issue nulla bona of an execution required in equity before proceeding to have a fraudulent transfer set aside is to show that all other remedies have been exhausted.

A New York court, in discussing this question in a ruling in harmony with the cases above cited, says:

"To hold that a trustee cannot attack a fraudulent conveyance made by the bankrupt more than four months before the filing of the petition, without showing that some creditor had obtained a judgment and issued an execution thereon, so that he could maintain a similar action, would be simply to provide an easy and convenient method for a dishonest debtor to dispose of his property." *Thomas v. Roddy*, 122 App. Div. 851, 107 N. Y. Supp. 473.

[8] There is nothing in the rulings in *Coleman v. Hagey*, supra, which militates against this conclusion. What was said in that case in regard to the rights of creditors was arguendo, in reference to such rights in proceedings not in bankruptcy. In that case we held the petition insufficient only on account of the omission therefrom of allegations that the trustee had no adequate remedy at law, or an equivalent allegation,

showing the presence of jurisdiction peculiar to a court of equity. The petition in the case at bar not only does not lack any of the averments held essential in the *Coleman-Hagey Case*, but in other respects meets the requirements of a bill in equity. *O'Farrell v. Poston*, 37 Am. Bankr. Rep. 470, 105 S. C. 30, 89 S. E. 483.

In *Davis v. Gates* (D. C.) 37 Am. Bankr. Rep. 818, 235 Fed. 192, the sufficiency of such a petition as is here under review was exhaustively considered. There the pleading was held good, except as to a failure to allege that the defendant, to whom the property had been transferred, had knowledge of and participated in same. The trustee was permitted to amend on the testimony showing such fact, and a decree entered in accordance with the prayer of his petition. All of the questions as to good faith and the existence of creditors at the time of the fraudulent act are fully discussed in this case. The rulings therein define the requisites prescribed for a bill of this character, and the petition at bar is in conformity therewith.

A petition even more general in its terms was held good by the United States District Court for the Southern District of Georgia, in *Johnston v. Forsyth Mer. Co.*, 11 Am. Bankr. Rep. 669, 673, 127 Fed. 845. The court said that, while the charges in the bill might have been more elaborately stated, they are set forth with sufficient particularity to enable the defendant to traverse and meet them. In this case, a demurrer was interposed, but it was not accompanied by a denial of fraud. The demurrer might have been denied on that ground. In the instant case, there was no demurrer, but simply a general denial.

The Supreme Court of Alabama, in *Cartwright v. West*, 185 Ala. 41, 64 South. 293, in ruling upon a petition brought by a trustee in bankruptcy, as in the case at bar, says generally that—

"If the property was obtained by the defendant in fraud of the bankrupt act, plaintiff was entitled to recover the same, and this is the only question involved."

And further, as to the proof required and the effect of the decree, that court says:

"In order that we may not be misunderstood, we hold: First. That, when a bill is filed by a trustee to set aside a voluntary conveyance made by the bankrupt, he need only show one existing creditor who could have avoided the conveyance, and the state court will set aside the conveyance in favor of all existing creditors who file and prove their claims in the bankrupt court, and which last fact is to be determined and the fund distributed by said court. Second. When the trustee files a bill to set aside a conveyance as fraudulent and void as to subsequent as well as existing creditors, the averment of bankruptcy is sufficient to charge the existence of creditors, and that their de-

mands are due, and, if relief is granted, the conveyance will be set aside as to all creditors of the bankrupt, and the property will become assets of the estate, and subject to the claims of all creditors who have properly filed and proven their claims, and which last fact is to be determined by the bankrupt court."

**III. Naming Creditors.**—It is further contended that the petition identifies no creditor entitled to the remedy. We take this to mean that a designation of the creditors by their names is an essential allegation. The terms of the act defining the relation sustained by the trustee to the estate and as a consequence to the creditors are sufficiently definite and ample to furnish an answer to this contention.

Section 70 of the act, so far as same is pertinent hereto, provides that the trustee, upon appointment and qualification, shall be vested with the title to the bankrupt's property as of the date of the adjudication, excluding that which is exempt and including that transferred by him in fraud of creditors. By subdivision (e) of the same section, it is provided that—

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whomever may have received it, except a bona fide holder for value."

[9-11] While in a sense the trustee, in the exercise of the powers authorized under this and other sections of the act, may be said to be the alter ego of the creditors in that his action is for their benefit, he is, in law and in fact, but an arm of the court and acts, not for the creditors individually or collectively, but for the estate. In *re Bothe*, 173 Fed. 597, 97 C. C. A. 547. The powers of the creditors as such cease upon the adjudication of bankruptcy and the allowance of their claims, and thereafter they possess neither power to sue nor be sued in any proceeding to collect, control, preserve, or recover the assets; the entire administration of the estate being invested in the trustee to be exercised under the direction of the court. *Coleman v. Hagey*, supra; *Blake v. Meadows*, 225 Mo. loc. cit. 26, 123 S. W. 868, 30 L. R. A. (N. S.) 1. The merger of the identity of the creditors in the estate, therefore, in that they are stripped of all power after the adjudication, renders their specific designation in a petition of the character here under review unnecessary. *Barret v. Kaigler* (Ala.) 76 South. 320, 40 Am. Bankr. Rep. 101; *Cartwright v. West*, 185 Ala. 41, 64 South. 293.

[12] The nature of the decree to which the trustee is entitled, when a fraudulent conveyance is set aside, is a further indication

of the immateriality of the allegation urged. Upon the rendition of the decree, the property inures, not to the benefit alone of the unsecured creditors, existing at the time of the transfer, and who, in the absence of bankruptcy, would have been authorized to attack the conveyance, but to all of the creditors having provable claims including those whose claims accrued subsequent to the transfer. In *re Kohler*, 159 Fed. 871, 87 C. C. A. 51; In *re Farmers' Co-op. Co.* (D. C.) 202 Fed. 1008. Considering therefore the nature of the proceeding and the character of the decree that may be rendered therein, it will be sufficient for the petition, in so far as the contention here made is concerned, to allege that there were unsecured creditors existing at the time of the transfer, the aggregate amount of their claims, and that the assets of the estate are insufficient to satisfy the same. *Treseder v. Burgor*, 130 Wis. 201, 109 N. W. 957; *Davis v. Gates* (D. C.) 37 Am. Bankr. Rep. loc. cit. 842, 235 Fed. 192. This requirement is met by the petition.

Nor is it necessary that the creditors be designated to inform the defendant of the nature of the action. Their particular identification can constitute no element of the defense; and, if necessary for any of the purposes of the proceeding, their introduction therein must be regulated by the rules of evidence, and not of pleading.

**IV. Amount or Nature of Claims.**—The further contention is made that the petition does not state the amount or nature of any claim to which the property sought to be recovered can be applied. Much of the reasoning and the authorities cited in support of same to show the unsoundness of the preceding contention may well be applied to demonstrate the lack of tenability of that here made.

[13] It will only be necessary, therefore, to say in addition that when a decree is rendered, setting aside a conveyance, the property recovered becomes a part of the general assets of the bankrupt estate, and is so distributed in the pro rata payment of all claims of a like character. The assumption therefore that, upon a recovery of property by a trustee in a proceeding of the character here involved, it can be applied to the payment of any particular claim, is wholly unfounded.

Sustained by reason, and approved by numerous authorities, we hold the petition herein sufficiently states all of the material allegations necessary to clearly present the issues involved, and that the objections made thereto by the defendant are not tenable.

[14] **V. Testimony.**—The admission of testimony to show the amount of secured claims against the estate is assigned as error. A material allegation had been made in the petition that the assets of the estate then in possession of the trustee were insufficient to satisfy the claims against the estate. The

introduction of testimony, therefore, as to all of the claims, whether secured or unsecured, was necessary to sustain this allegation.

[16] Objection to the admission of testimony as to other claims are based upon the ground that they had not been reduced to judgment, and hence were not such claims as were admissible as tending to show the financial condition of the bankrupt. The testimony admitted was only in regard to claims which had been allowed by the bankruptcy court, and, as we have shown, partook of the nature of judgments. No error was committed, therefore, in their admission in evidence. The rulings in *Crim v. Walker*, 79 Mo. 335, and in *Davison v. Dockery*, 179 Mo. 687, 78 S. W. 624, cited by defendant in support of this contention, have reference to claims of unsecured creditors in ordinary proceedings in equity, and not in bankruptcy; hence they have no application here.

[16, 17] VI. *Testimony of Husband*.—Error is also assigned in the refusal of the trial court to permit the bankrupt to testify in behalf of his wife, the defendant. This contention is based on the assumption that the husband is a tenant by the curtesy initiate in the land conveyed to his wife; and that the interest thus created renders him, under section 6354, R. S. 1909, a competent witness in this proceeding and removes his common-law incompetency and the limitation by exclusion to his testimony under section 6359. This reasoning would have been more cogent if he had been made a party to the suit and his right to testify had been based on an interest acquired in his wife's property prior to the enactment of the Married Woman's Act in 1889, when the husband was, upon the birth of living issue, seized of an estate for life in his own right as a tenant by the curtesy initiate. Since the enactment of this statute, however, the wife as to the control and conveyance of her separate property is *sui juris*, and as such clothed with the right to sell her land and make a deed thereto independent of her husband. The consequent effect of this grant of power is to destroy the tenancy by the curtesy initiate because it can no longer exist as an estate or interest in the husband in the presence of the wife's complete power of disposal of her property, but is reduced to a mere interest in expectancy.

This conclusion finds its sufficient support in the language and purpose of the Married Woman's Act itself, which provides, as to the matter here at issue, that she shall be deemed a feme sole, so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against

her; and that, in law or equity, she may sue or be sued without her husband being joined as a party. Section 8304, R. S. 1909.

In construing this statute, we have explicitly held, in *State ex rel. Farmers' Bk. v. Hagelucken*, 165 Mo. 446, 65 S. W. 728, 88 Am. St. Rep. 434, that it empowers a married woman to convey her real estate without joining her husband in the deed.

Further than this, that she may grant power to an agent to make a binding contract for the sale of her land or to ratify such a sale when made. *Kirkpatrick v. Pease*, 202 Mo. 471, 101 S. W. 651.

These rulings are in evident accord with the spirit and purpose of the act, the effect of which, as we have stated, in conferring upon a married woman the absolute power of disposal of her property, destroys whatever present estate the husband may have therein, which would prior to the enactment of the statute, have qualified him, by reason of interest, to testify in a suit brought by or against her concerning her separate property.

A contrary ruling is impliedly announced in *Roberts v. Bartlett*, 190 Mo. loc. cit. 702, 89 S. W. 858, in which it was held, in a suit brought by wives and husbands, as joint plaintiffs, after the enactment of the Married Woman's Act, concerning the separate property of the former, that the latter were competent witnesses on account of their marital interests in the properties, as tenants by the curtesy initiate. This ruling is erroneous, so far as it is based upon the assumption that the interest named exists in the husbands to the extent of rendering them competent to testify under section 6354; such interest being, as we have shown, nonexistent since the enactment of the Married Woman's Act. Aside from this ruling, based as well upon the fact that the husbands were coplaintiffs, not the case here, the current of authority is in harmony with that announced in the *Hagelucken Case*, as to the complete dominion and right of disposal by the wife of her separate property, and the consequent absence of such an interest therein by the husband as to render him a competent witness in a suit against her.

Whatever doubt may seem to be cast on the *Hagelucken* ruling by certain language employed in *Myers v. Hansbrough*, 202 Mo. 495, 100 S. W. 1137, is dissipated by an analysis of the facts in that case, in which the question involved was one of tenancy by the curtesy consummate, and not initiate. The wife died, seized of real estate. Issue had been born alive, and, upon the wife's death, curtesy was cast upon the husband. The sole question upon which the language of the court could have any ruling force was one of preference between the creditors of the wife who had no lien, and the husband,

as the owner of the estate by the curtesy consummate. This was independent of any consideration of the interest of the husband during the life of the wife. The expression, therefore, in that case, that curtesy initiate constitutes a vested interest, cannot reasonably be construed as more than a passing remark, and, being responsive to no issue, is determinative of nothing. Otherwise construed, the effect of the Myers Case is to declare that a husband can have a vested interest by the curtesy initiate in his wife's real estate, contemporaneously with her power under the statute of 1889, to convey same and invest the grantee with an absolute fee therein. Such a construction limits the letter and destroys the purpose of the Married Woman's Act. It is repugnant to reason, and, despite the remark made in *Teckenbrock v. McLaughlin*, 246 Mo. loc. cit. 717, 152 S. W. 89, that "there are two lines of authority in this state on this question," the rulings here and elsewhere will be found in accord with that in the *Hagelucken Case*. The *Teckenbrock Case* did not attempt, nor was it necessary for it to define the nature of a husband's interest as a tenant by the curtesy initiate in his wife's property since the enactment of the Married Woman's Act. All that it did decide was that, when suit was brought by a husband and wife to set aside a will, it could not be maintained on the ground of the husband's interest as tenant by the curtesy initiate in the property of his wife acquired by descent since the statute of 1889; that nothing therein gave any authority to the maintenance of an action of this character under section 555, R. S. 1909, defining who may contest the validity of wills; and for the additional reason that the issue was *res adjudicata*, in having been determined in a former proceeding identical in its character.

Apposite precedents affirming the rule announced in the *Hagelucken Case* are to be found in *Kirkpatrick v. Pease*, 202 Mo. loc. cit. 490, 101 S. W. 651; *Harvey v. Long*, 260 Mo. loc. cit. 391, 168 S. W. 708; *Moseley v. Bogy*, 272 Mo. 328, 198 S. W. 847; *Haguewood v. Britain*, 273 Mo. loc. cit. 92, 199 S. W. 950; and *Regal Realty Inv. Co. v. Gallagher* (Mo.) 188 S. W. loc. cit. 153.

[18] The ruling of the trial court, therefore, as to the incompetency of the husband to testify, was not error: First, because he was not a party to the proceeding; and, second, because he had no material interest in the judgment to be rendered within the meaning of section 6354. See *Layson v. Cooper*, 174 Mo. loc. cit. 223, 73 S. W. 472, 97 Am. St. Rep. 545, and cases cited, discussing the competency of husband and wife

as witnesses under facts similar to those at bar.

VII. *Decree*.—The relief sought was the setting aside of the fraudulent conveyance under which it was alleged that the defendant held the land. Other than formal allegations necessary to properly plead this character of action, the petition specified the existence of a prior lien, evidenced by a mortgage and homestead interest in the land, to which it was prayed that the decree, if rendered, be made subject. The answer contained nothing which in any way extended the issue, its defensive character being limited wholly to a general denial.

[19] Aside from the introduction in evidence of the existence of a mortgage for \$1,000 placed on the land by defendant, subsequent to its transfer to her, the record is silent on this subject. Despite this fact, the trial court, while finding the conveyance to the defendant fraudulent, and that the decree should be rendered subject to the pre-existing mortgage and homestead interest, also found that it should be subject to the \$1,000 mortgage placed on the land by the defendant. This latter finding was unauthorized. It was not an issue in the case, and was not admitted to be so made by the parties. *Wolz v. Venard*, 253 Mo. 67, 161 S. W. 760; *Davidson v. R. Est. & Inv. Co.*, 249 Mo. 474, 155 S. W. 1; *Howard v. Scott*, 225 Mo. 685, 125 S. W. 1158; *Charles v. White*, 214 Mo. 187, 112 S. W. 545, 127 Am. St. Rep. 674; *Schneider v. Patton*, 175 Mo. 684, 75 S. W. 155.

The rule, therefore, that in a chancery case any relief may be granted consistent with the pleadings, can have no application here. *Ames v. Gilmore*, 59 Mo. 537.

Nor need the rule, in the condition of the pleadings, be invoked that, if the conveyance be fraudulent, the defendant got no title, and hence could convey none. *Peyton v. Rose*, 41 Mo. 257.

But it will suffice to say that the decree should have been limited to a determination of the character of the conveyance under which the defendant held the land, subject to pre-existing liens, as stated in the petition. A finding other than this did not respond to the issues, and was consequently error.

This will necessitate a reversal and remanding of this case, with directions to the trial court to enter a decree in accordance with the views herein set forth. It is so ordered.

All concur, except BLAIR, J., not sitting.

FARIS and WILLIAMS, JJ., concur in the result and in all except paragraph VI.

STATE ex rel. SIMMONS (now HATTON) v.  
AMERICAN SURETY CO. OF NEW  
YORK. (No. 19523.)

(Supreme Court of Missouri, Division No. 1.  
March 1, 1919. Motion for Rehearing and  
Motion to Transfer to Court in Banc Denied  
March 28, 1919.)

1. COURTS  $\Leftrightarrow$ 488(1)—TRANSFER OF CAUSES  
TO SUPREME COURT—HEARINGS.

Overruling of motion in Supreme Court to  
transfer cause back to Court of Appeals does  
not relieve Supreme Court from duty to deter-  
mine its jurisdiction, when called upon to ex-  
ercise it upon final hearing.

2. COURTS  $\Leftrightarrow$ 231(19)—TRANSFER OF CAUSES  
TO SUPREME COURT—JURISDICTION—CONSTITUTIONAL  
QUESTIONS.

To sustain jurisdiction of Supreme Court on  
ground that construction of Constitution is in-  
volved, it is not only necessary that question  
be fairly debatable one, but also that it be still  
alive, and that it has not been set at rest by  
competent judicial interpretation and adjudication.

3. JURY  $\Leftrightarrow$ 32(4) — TWO-THIRDS MAJORITY  
—VALIDITY.

Const. art. 2, § 28, as amended in 1900, and  
Rev. St. 1909, § 7280, providing that a two-  
thirds majority of a jury may render a verdict  
in all civil cases, are valid.

4. COURTS  $\Leftrightarrow$ 231(23) — TRANSFERS TO SUPREME  
COURT—JURISDICTIONAL QUESTIONS.

Constitutional objection, such as would give  
the Supreme Court jurisdiction of appeal, cannot  
be considered where first presented to trial  
court in motion for new trial, where opportunity  
was presented during trial to raise such  
objection.

5. APPEAL AND ERROR  $\Leftrightarrow$ 231(1)—MATTERS  
REVIEWABLE—OBJECTIONS.

Where introduction in evidence of settlement  
and judgment of probate court was objected  
to on ground that defendant surety was  
not party to proceeding, and at close of evidence  
court instructed jury that settlement was prima  
facie evidence of what it contained, surety cannot  
complain that question of validity or constitutionality  
of Rev. St. 1909, § 461, relating to settlement of  
administrators' account, was raised for determination,  
so as to warrant its review on appeal.

Appeal from Circuit Court, Cass County;  
Andrew A. Whitsitt, Judge.

Action by the State of Missouri, on the  
relation of N. R. Simmons, curator of the estate  
of Greenberry Simmons, a minor, against the  
American Surety Company of New York. By order  
of court, J. H. Hatton was substituted for N. R.  
Simmons, as curator. From a judgment for plaintiff,  
defendant appealed. Transferred to Supreme Court.  
Cause retried to Kansas City Court of Appeals.

R. F. Porter, of Kansas City, and D. C. Barnett,  
of Harrisonville, for appellant.  
Allen Glenn & Son, of Harrisonville, for respondent.

BROWN, C. This is an action instituted July 7,  
1914, at the relation of N. R. Simmons, curator of  
the estate of Greenberry Simmons, a minor, against  
the defendant, as surety on the bond of his predecessor  
as curator of the same minor. The amount sued for  
is \$906.65, with interest from June 8, 1914.

G. B. Simmons, the father of the minor, was  
appointed his curator in September, 1905, and died  
January 12, 1914, having made six annual settlements,  
the last of which was filed and approved April 27,  
1912. His widow, Nellie Simmons, was appointed  
administratrix of his estate, and the relator was  
appointed curator of the minor. The administratrix  
thereupon made final settlement with the relator  
as curator, which was duly approved June 8, 1914;  
by which she, the administratrix, was charged with  
the balance of \$906.65 as the balance due from her  
as such administratrix to the estate of the minor,  
and judgment rendered for that amount. The estate  
of G. B. Simmons was insolvent.

This cause was tried in the circuit court to a  
jury. At the trial the plaintiff offered in evidence  
the settlement of the administratrix with the curator,  
and it was admitted against the objection of defendant:

"That it was not binding on this defendant, this  
defendant not having any part in the settlement,  
not appearing, and the judgment, whatever judgment,  
is not binding on this defendant."

The defendant has excepted to this ruling.

When all the evidence was in, the court at the  
instance of plaintiff instructed the jury as follows:

"The court instructs the jury that the final  
settlement by Nellie H. Simmons, administratrix  
of the estate of G. B. Simmons, late curator for  
ward, is prima facie evidence of what it contains,  
and the burden of proving the contrary is on the  
defendant."

To the giving of this instruction the defendant  
excepted at the time. No other objection appears.

The court then of its own motion instructed  
the jury that nine of their number might return  
a verdict in the case, to which the defendant  
excepted.

The jury returned into court a verdict for  
plaintiff for \$906.65, signed by the foreman and  
nine other jurors, and upon this the judgment  
appealed from was entered.

The defendant thereupon filed its motion for  
a new trial, charging, among other grounds  
therefor, that the instruction of the court to the  
jury that nine of its number

could render and sign a verdict "is in conflict with section 30, article 2, of the Constitution of the state of Missouri, and with the first part of section 28 of said article," and that "the latter part of said section 28, article 2, permitting nine men to render a verdict, is in conflict with section 1, article 14, of the Constitution of the United States, in that it abridges its privileges and immunities as a citizen of the United States, and deprives him of his property without due process of law," and because said last part of section 28 of article 2 of the state Constitution is permissive only, and no provision has been made by the Legislature for carrying it out. It also charges as follows:

"Because section 461 of the Statutes of 1909, of the state of Missouri, under which the final settlement of the administratrix of G. B. Simmons, deceased, above referred to, and which was held *prima facie* binding on defendant at the trial, over defendant's objection, is unconstitutional and void, because it violates the provisions of section 30, article 2, of the Constitution of the state of Missouri, and section 1, article 14, of the Constitution of the United States, in that it does not provide for bringing in parties interested in said settlement and who may be affected thereby, or giving them opportunity to have their day in court."

These statements in the motion for a new trial were the first suggestion of the constitutional objections therein stated. The appeal was on October 23, 1914, and in due time, granted to the Kansas City Court of Appeals, which, on the suggestion of appellant that constitutional questions were involved, certified the cause to this court for determination on October 15, 1915. On November 11, 1917, the respondent filed in this court its motion to transfer the cause to the Kansas City Court of Appeals, which we overruled on the 17th of the same month.

[1] The overruling of the respondent's motion to transfer does not relieve us from the duty to determine our jurisdiction, when called upon to exercise it by our judgment upon a final hearing. It is invoked solely on the ground that the appeal involves the construction of the Constitution of this state and of the United States (1) with respect to the validity and effect of the amendment to section 28 of article 2 of our state Constitution, adopted at the general election of 1900, providing that a two-thirds majority of the jury may render a verdict in all civil cases, and the validity of the provision of section 7280 of the Revised Statutes of 1909 to the same purpose and effect; and (2) with respect to the action of the court in admitting in evidence the settlement we have mentioned, and instructing the jury that it was *prima facie* evidence of the liability of the defendant for the amount stated in it to be in the hands of the administratrix of the deceased curator belonging to the estate of his ward.

[2] I. To sustain the jurisdiction of this

court on the ground that the construction of the Constitution is involved, it is not only necessary that the question be a fairly debatable one, but also that it be still alive—that is to say, that it has not been set at rest by competent judicial interpretation and adjudication. Were this otherwise, a question once fairly before us would remain forever a monument of our jurisdiction, to be exercised at the option of such litigants as should prefer us to a court subject to the controlling authority of our last previous rulings on any question of law or equity, whether jurisdictional or otherwise.

[3] Immediately after this constitutional provision became operative (October term, 1902), the validity of verdicts rendered under its provisions by a less number than the entire jury of twelve, came before us in the twin cases of *Gabbert v. Railway Co.*, 171 Mo. 84, 70 S. W. 891, and *Crawford v. Railway Co.*, 171 Mo. 68, 66 S. W. 350, in both of which we sustained such verdicts against the constitutional objections now urged. We have ever since adhered to those decisions. *Roefeldt v. Railway*, 180 Mo. 554, 79 S. W. 706; *Franklin v. Railroad*, 188 Mo. 533, 87 S. W. 930; *Chrismer v. Telephone Co.*, 194 Mo. loc. cit. 196, 92 S. W. 378, 6 L. R. A. (N. S.) 492; *Nugent v. Armour Packing Co.*, 208 Mo. loc. cit. 494, 106 S. W. 648; *Lohmeyer v. Cordage Co.*, 214 Mo. loc. cit. 688, 113 S. W. 1110. In the case last cited we said:

"There is nothing in the point to give us jurisdiction."

[4, 5] II. The other constitutional objection is equally unavailable. It was first presented to the trial court in the appellant's motion for a new trial. While we are not prepared to say that this may not be done in cases where no opportunity was presented before the trial had ripened into a judgment or verdict, it must be confined to such cases. *Hartzler v. Railway*, 218 Mo. 563, 117 S. W. 1124; *Speer v. Railroad*, 264 Mo. 267, 174 S. W. 381; *Lohmeyer v. Cordage Co.*, *supra*. In this case the opportunity necessarily occurred when the settlement and judgment of the probate court thereon was offered in evidence by the respondent. The appellant objected to its admission on the ground that it was not a party to the proceeding but did not suggest any constitutional objection to its admissibility. At the close of the evidence the court instructed the jury, upon the request of respondent, that the same settlement was *prima facie* evidence of what it contains, and that the burden of proving the contrary was upon the defendant. This involved the same constitutional question, but the appellant still withheld his constitutional objection, until he had tested the temper of the jury and found it to be as exhibited in the verdict against him, and then raised the question for the purpose of overthrowing the

result of the trial. Under these circumstances it cannot be said that the trial court determined, or was invited to determine, it in the trial. Upon principle, as well as upon the authorities we have cited, the question, having not been raised in the trial, is not now in the case.

It follows that the cause must be transferred to the Kansas City Court of Appeals.

RAILEY, C., not sitting.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court.

All concur.

#### TORRANCE v. PRYOR et al. (No. 19401.)

(Supreme Court of Missouri, Division No. 1. March 1, 1919. Motion for Rehearing and Motion to Transfer to Court in Banc Denied March 28, 1919.)

#### 1. RAILROADS $\S$ 301 — INJURIES TO PERSONS UPON TRACK — INJURY OCCURRING UPON HIGHWAY.

A plaintiff receiving injuries while walking upon defendant's track and while within a public street at a crossing was not a trespasser, and it is immaterial that she intended after crossing the street to continue upon defendant's track and become a trespasser.

#### 2. APPEAL AND ERROR $\S$ 193(9)—REVIEW—OBJECTIONS NOT RAISED BELOW—GENERAL DEMURRER TO PETITION RAISED.

If a petition fails to state a cause of action, the matter may be raised for the first time on appeal; but this rule does not apply to awkwardly or defectively stated facts.

#### 3. RAILROADS $\S$ 344(8) — PLEADING — HUMANITARIAN DOCTRINE.

A petition, in an action against a railroad company for negligent injury received by plaintiff while upon defendant's track at a street crossing, held to plead facts under the theory of the humanitarian rule.

#### 4. APPEAL AND ERROR $\S$ 882(12)—CHANGE OF THEORY—PERSONAL INJURY—HUMANITARIAN DOCTRINE—INSTRUCTIONS.

Defendant in an action for personal injuries, having asked and received an instruction upon the humanitarian doctrine, is estopped to allege error in giving an instruction for plaintiff on the same theory, where defendant's demurrer to the evidence did not specifically challenge the evidence under such theory.

#### 5. RAILROADS $\S$ 350(13) — CONTRIBUTORY NEGLIGENCE — DUTY TO LOOK — QUESTION FOR JURY.

Where plaintiff, while at a crossing, before starting to walk down defendant's main track, looked and saw an engine thereon behind her start in on a switch, and concluded that the train was going upon the switch, and continued to walk upon defendant's main track and was

overtaken and injured by cars sent up the main track in making a "drop switch," it cannot be said as a matter of law that she was guilty of contributory negligence.

#### 6. RAILROADS $\S$ 351(12)—INJURIES TO PERSONS ON TRACK—CROSSING—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In an action for personal injuries received by plaintiff while walking up defendant's main track and within a public street crossing, instruction on contributory negligence that, if plaintiff did not know and by the exercise of ordinary care did not discover the approaching of the cars behind her in time to avoid being injured, she was not guilty of contributory negligence, held sufficient.

#### 7. DAMAGES $\S$ 132(10) — EXCESSIVE DAMAGES—LOSS OF FOOT.

Where plaintiff had her left foot so crushed and mangled that it had to be amputated above the ankle, and received other minor injuries and bruises, a verdict for \$10,000 cannot be held excessive, particularly where the assignment thereto is abandoned in the brief.

Appeal from Circuit Court, Adair County; Charles D. Stewart, Judge.

Action by Mamie Torrance against Edward B. Pryor and another, receivers of the Wabash Railroad Company. Verdict and judgment for plaintiff, and defendants appeal. Affirmed.

J. L. Minnis and N. S. Brown, both of St. Louis, and Higbie & Mills, of Lancaster, for appellants.

Weatherby & Frank and Chas. E. Murrell, all of Kirksville, for respondent.

GRAVES, J. Action for personal injury, grounded upon negligence. By the petition it is alleged, and the proof so shows, that defendant's line of railroad runs through the city of Kirksville in a northeasterly and southwesterly direction. The defendant, between Jefferson street on the north and Scott street on the south, not only maintained its main line track, but also several side tracks. These three streets are mentioned in the evidence, i. e. Jefferson street, Pierce street, and Scott street. These we have named in order beginning at the north. These streets cross the main line track and other side tracks, practically at right angles, as they run east and west. The main switch stand at the south end of the yard is some distance south of Scott street. Plaintiff at the time of her injury was walking north on main line of defendant's track, and was struck by some disconnected cars that were "shunted" in on this track. She was within the crossing of Scott street, but toward the east side of such street, and beyond the main traveled way of such street. There was abundant evidence to show a long-continued use of defendant's track at this point, by persons in that por-



tion of the city. In other words, plaintiff, when injured, was at a place and traveling a route which for years had been continuously used by the public in going north from points south of the place of accident. The public user is clearly shown. The charge in the petition is:

"The defendant's main track passes through said city of Kirksville in a northeasterly and southwesterly direction. That defendant has for many years prior hereto maintained and operated three switch tracks immediately west of and running parallel with defendant's main track, beginning at a point south of the Scott street crossing above referred to and extending northeasterly to a point at and near the intersection of the main line of defendant's railroad with the railroad of the Quincy, Omaha & Kansas City Railroad Company, north of defendant's said station.

"Plaintiff further states: That for many months and years prior to the injury herein-after alleged the right of way, main track, and switch tracks of the defendant aforesaid has been constantly used by the public as a footpath and passway. That numbers of people live in that portion of Kirksville, in the vicinity of Scott street crossing, many people living south thereof, and that great numbers of people living in said portion of said city used the main track and switch tracks of defendants and its right of way in going from their homes to the business portion of said city and returning. That for months and years prior hereto there was hardly an hour in the day but what defendant's main track, switch tracks and right of way, at all the points aforesaid and far south of said Scott street crossing, was being used by the people of that section of the city as a footpath and passway to and from their homes, all this with the knowledge and acquiescence of the defendant.

"That at all times herein mentioned, and for a long time prior thereto, defendant maintained a switch stand at a point about 100 yards south of said Scott street crossing; at which point one of defendant's switch tracks join the main track.

"Plaintiff further states that it became and was the duty of the defendant, its agents and servants, in charge of and operating locomotives and trains of cars over and along its said tracks in said city, and over and along its said tracks and crossing above referred to, to keep a sharp and constant lookout for persons on or dangerously near the said tracks, and for persons crossing or about to cross said tracks at the street crossings, and for persons who might be on said tracks using same as a footpath, and to at all times keep the movement of its locomotives, car, or cars under control, and in operating said locomotives or car or cars over and along said tracks at the points aforesaid on approaching said street crossings to warn all persons who might be about to enter upon or near said tracks at said crossings of the near and dangerous approach of said locomotive, car, or cars, by an adequate signal, and to so operate said locomotive, car, or cars so as to avoid injuring persons on said street crossings or persons using said tracks as a footpath, and to at all times operate said locomotive and cars on said tracks in a careful and prudent manner so

as not to injure any person who might be on said tracks at the points aforesaid or about to enter thereon, and to discover persons on said tracks in a position of peril, and to stop said locomotive, car, or cars, if necessary in order to avoid injuring such person and to avoid making what is known as a flying switch, or kick or shunt cars over street crossings and at points where the public uses said tracks as a footpath, or to in any manner operate said car detached from the engine at said points.

"Plaintiff further states that on the 27th day of August, 1915, she was on the main track of the defendant, on Scott street crossing aforesaid, intending to pass from that point north along the main track of the defendant to the home of a neighbor, who lived east of said main track and about 100 yards north of said Scott street crossing, and, while so on said crossing as aforesaid, the defendant, by its agents and servants in charge of and operating a locomotive with a train of cars thereto attached, carelessly and negligently so managed and operated said train of cars that, without warning to plaintiff of their intention so to do, they detached some four or five cars from said locomotive and carelessly and negligently propelled same with great speed on said main track behind plaintiff and toward her while the remainder of said train with the locomotive thereto attached was driven on the switch track connecting the main track at the switch stand south of said Scott street crossing as aforesaid, and negligently and carelessly allowed and permitted said detached cars as aforesaid, without signal and without warning to plaintiff, said agents and servants in charge of said locomotive and cars as aforesaid, knowing that plaintiff was unaware of their intention so to propel said cars on the main track behind her and was unaware of her dangerous and perilous position, to run against and over plaintiff when said agents and servants aforesaid knew of the presence of plaintiff on said crossing and main track, or could have known thereof by the exercise of ordinary care on their part; that said agents and servants as aforesaid carelessly and negligently detached said cars from said locomotive and propelled same on said main track as aforesaid and on and over said Scott street crossing and along and over the main track of defendant at a point where they knew same was being constantly used by the public as a footpath, thereby losing the control of the movement of said cars, and by reason of the negligent acts herein alleged plaintiff while on said main track at the point aforesaid was run against and over by said detached cars."

Damages were asked in the sum of \$25,000. Answer was: (1) General denial; and (2) plea of contributory negligence. The record shows no reply, but cause was tried as if one in the nature of a general denial had been filed. Verdict and judgment for plaintiff in sum of \$10,000, and defendant has appealed.

[1] I. It is urged that plaintiff was a trespasser. This is answered by the fact that at the time of the injury she was upon and within a public street crossing. She was in Scott street when struck. She had been in

Scott street for nearly the width of the street (50 feet) before she was struck. It is true that she was going across Scott street from south to north; but she was in Scott street, and at a public crossing. One within a public street, at a public crossing, is not a trespasser. The general public has rights in streets as well as railroads crossing such streets. Whilst in a public highway, as here, a person cannot be a trespasser. Her intention to shortly leave the public highway would not change her right to be in the street, and would not make her a trespasser upon the railroad property in the street. We fail to see the force of this contention under the practically undisputed facts of the case. She might have intended to become a trespasser; but so long as she was in a public highway, where the public has at least a qualified right to be, she could not be a trespasser. This we rule without any reference to the continuous user of the railway track mentioned in the statement, *supra*.

[2] II. It is urged that plaintiff's petition fails to state a cause of action under the humanitarian doctrine, and, if this is true, there might be trouble in upholding the judgment because this doctrine (with others) is submitted to the jury in plaintiff's instructions. It would seem that this suggestion is an afterthought in the case, for the defendant asked and was given (slightly modified by the court) an instruction upon the humanitarian rule. See defendants' instruction No. 1, which as asked was an instruction under the humanitarian rule pure and simple. The slight modification made by the court did not change the character of the instruction. The defendant, therefore, both asked and received an instruction upon this theory of the case, and is not in much position to question it now. It would be only on the idea that there was a total failure to plead facts involving this theory that the question could now be raised. Defectively stated facts would avail nothing for defendant. The rule is that, if a petition fails to state facts sufficient to show a cause of action at all, then the matter can be raised in this court for the first time. This rule, however, does not apply to awkwardly or defectively stated facts. Defendants have other remedies for this situation, which must be sought in the trial court.

[3] But when the petition is read carefully, it will be seen that it is sufficiently alleged that plaintiff was in a position of peril, and was not aware of her peril, and that defendants knew, or by the exercise of ordinary care might have known, of her perilous position in time to have averted the injury. Among other things in the petition, we find this language:

"And negligently and carelessly allowed and permitted said detached cars as aforesaid, without signal and without warning to plaintiff,

said agents and servants in charge of said locomotive and cars as aforesaid knowing that plaintiff was unaware of their intention so to propel said cars on the main track behind her and was unaware of her dangerous and perilous position, to run against and over plaintiff when said agents and servants aforesaid knew of the presence of plaintiff on said crossing and main track, or could have known thereof by the exercise of ordinary care on their part."

Elsewhere in the petition it is charged as one of the duties of the defendant:

"To discover persons on said tracks in a position of peril, and to stop said locomotive, car, or cars, if necessary in order to avoid injuring such person."

So that it will not do to say that there is no pleading of facts under the theory of the humanitarian rule. The most that might be said is that the facts are loosely and awkwardly pleaded, or perhaps defectively pleaded; but this will not avail the defendant upon complaint in this court, for the first time. This contention will have to be ruled against the defendant. It clearly appears to be an afterthought.

[4] III. There was a demurrer to the evidence, and ordinarily this would raise the point as to the sufficiency of the evidence under the humanitarian rule. In other words, had the defendant stood upon its demurrer to the evidence, there would be no question that the sufficiency of the evidence to support the humanitarian theory of the case would be a matter for consideration here. The demurrer to the evidence (in the nature of an instruction) was a general one, and not specifically directed to the humanitarian theory of the case. It reads:

"The court instructs the jury that under the pleadings and all the evidence in this cause your verdict must be for the defendants."

But the defendant did not, by this demurrer, seek to separate the wheat from the chaff. This demurrer placed it up to the trial court to say whether or not a case had been made upon any theory within the purview of the pleadings. The court said that there had been a case made, but of course did not specify the theory upon which it deemed the evidence sufficient to make a case.

So far as we are advised, it might have been upon the humanitarian theory, or it might have been upon what we have denominated primary negligence upon the part of the defendant. Under this status of the case, the defendant asked and was given an instruction upon the humanitarian rule. The question is: Should it be ruled that the defendant is now estopped from denying that this theory was in the case? Had the demurrer been a specific one, challenging the sufficiency of the evidence under this particular theory of the case, and such demur-

rer had been overruled, there would be no question that defendant could urge his demurrer here. This, for the reason that, after defendant has made his point clear, he is not estopped by the theory contained in his other instructions, which theory is forced upon him by the action of the court. To illustrate, if plaintiff's case is founded upon several alleged acts of negligence, and defendant, by demurrer, challenges the sufficiency of the evidence as to one of the grounds of negligence, it should not be said that he is precluded from asking instructions on the theory adopted by the court in overruling the demurrer. To so hold would force the defendant to stand upon his demurrer before the jury. But the supposed case is not this case. Here the demurrer challenged the whole case, and the evidence upon all of the several alleged grounds of negligence. In overruling such a demurrer, the court does not indicate its theory upon any particular ground of negligence. In such case, it is sufficient for the trial court to find (in his own mind) that the evidence does sustain one or more of the alleged grounds of negligence. Nor does such a general demurrer call upon the court to indicate the ground in mind. So that, when this general demurrer was overruled in this case, the defendant was in no position to say that the court, in overruling it, has said that violation of the humanitarian rule is in the case, and the defendant thereby authorized to ask instructions thereon per force of the ruling of the court. Under the status we have in this case, we should, and do, rule that defendant, having asked and received an instruction upon the humanitarian doctrine, cannot now plead error upon the part of the trial court in giving one for plaintiff on the same theory. Had the demurrer to the evidence specifically challenged the sufficiency of the evidence upon this point, then we would have a different rule. The defendant in such case should not be estopped by getting the best instructions he could under the theory of the case adopted by the court. In this case, however, the defendant is now estopped from saying that the humanitarian doctrine is not in the case, and a review of the evidence upon that question is not necessary.

[8] IV. It is also urged that plaintiff was guilty of contributory negligence. Of course, this would be no defense under the humanitarian doctrine; but, as the case was not submitted wholly upon that idea, it does become material. However, the evidence does not justify the contention. The defendant was engaged in what was called a "drop switch." This particular kind of a "switch"

is made by having the engine in front of the cars intended to be run into and upon certain tracks. With all the cars attached, the engine speeds the train so that the cars following the engine may be cut off from the engine, and then of their own momentum proceed down the track, after the engine has been switched to another track. In the instant case the engine was attached to a short string of cars. It was south of the switch stand which we have located. The purpose was to run the last eight cars of the bunch on north on the main track. To do this, the train was given about an eight miles per hour speed, south of this switch stand, and the switch turned so the engine and head cars started in on the side track, when the switch was again turned so that the last eight cars, which had been detached, would continue on north on the main line track. Plaintiff says that, before she started to walk down the tracks, she looked, and saw the engine start in on the switch track, and concluded that the train was pulling in on that track. So thinking, she concluded it safe to walk on the main track, and was so walking, when these detached cars overtook and struck her. Under these facts, we cannot say that she was guilty of contributory negligence as a matter of law.

[9] V. It is urged that plaintiff's instruction No. 2 erroneously submits the issue of plaintiff's contributory negligence. We find the alleged contributory negligence submitted to the jury in the instruction in this language:

"And that plaintiff did not know, and by the exercise of ordinary care did not discover, that said cars were approaching on the track behind her in time to avoid being injured."

This, in our judgment, sufficiently presents to the jury the question of the exercise or the nonexercise of ordinary care by the plaintiff.

The point is ruled against defendant. Other technical criticisms are made of this instruction and instruction 3 for plaintiff, but we find no substance in them. So, too, it is alleged that there is a conflict between instruction 5 for plaintiff and instruction 4 for defendant. There is no substance in this contention.

[7] Plaintiff was seriously injured. With other minor injuries and bruises, she had her left foot so crushed and mangled that it had to be amputated above the ankle. Whilst the motion for new trial says that the verdict was excessive, the question is abandoned in the brief.

Finding no error, the judgment is affirmed.

All concur.

**BERRY v. MAJESTIC MILLING CO.**  
(No. 2376.)

(Springfield Court of Appeals. Missouri.  
Feb. 25, 1919. Rehearing Denied  
April 7, 1919.)

**PARENT AND CHILD — 7(3)—LOSS OF SERVICES OF CHILD—CONSENT TO EMPLOYMENT.**

Mother entitled to services of 15 year old son could not recover at common law for injury to boy while in employment of milling company, which had procured written consent of mother permitting boy to work in mill, though boy was given duty to hold sacks under a spout, a safe employment, but did other things in connection with operation of mill attended with danger.

Bradley, J., dissenting.

Appeal from Circuit Court, Jasper County;  
J. D. Perkins, Judge.

Action by Laura A. Berry against the Majestic Milling Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

J. A. Potter and I. V. McPherson, both of Aurora, and Howard Gray, of Oarthage, for appellant.

Carr McNatt and John L. McNatt, both of Aurora, for respondent.

**FARRINGTON, J.** The plaintiff took an involuntary nonsuit with leave to set the same aside. A judgment for nonsuit was entered, and in due time a motion was filed, which was denied by the trial court, and the case is brought here by plaintiff on appeal.

The plaintiff is the mother of Raymond Berry, who was employed by the defendant to assist in operating its corn or meal grinding machine used in connection with its milling. His hand was injured by being caught in the rolls which grind the meal. The mother's petition contained two counts, the first alleging that her son was 15 years of age and was hired in violation of such statute to work around dangerous machines. This count was dismissed, and the trial proceeded on the second count, under which count she alleged that her son was a minor, and that the defendant had employed him to work in and around a dangerous and hazardous employment without having gotten the consent of his mother; she being his only living parent and entitled to his services during minority. The suit is for loss of services by a parent, occasioned, as alleged, by a wrongful hiring of her minor son to do a dangerous work without her consent.

The undisputed testimony shows that the boy was 15 years old, and that an agent of the defendant with power to hire help solicited him to work in the corn mill, and that he was placed in a part of the mill and given the duty to hold sacks on a spout. It is not contended that this employment

was within itself a dangerous one, but it is charged that in the room where he was there was being operated dangerous machinery, and that her son was seen by the vice principal to do other things in connection with the operation of the corn mill which were attended with danger, in that, he had been seen by the foreman unchoking spouts, greasing the machinery, cleaning the cogs, and working around the place where this machine was being operated, doing practically everything that was necessary to keep the mill going. Plaintiff contended that while the defendant had given the boy employment, such as holding the sacks, which was not a dangerous employment, yet by implication he had employed him to do whatever was necessary with the machinery to keep it going, and produced evidence, testified to by the son, that he had done a number of things which would amount to a dangerous work in the presence of the foreman of the corn mill.

The defendant pleaded several grounds of defense, but denied that it employed the plaintiff's minor son without procuring the consent of his mother, the party who was entitled to his services. In the trial it developed, and was admitted by the plaintiff, that she had given her written consent for her son to work at this mill. The mother at the time of his employment was away from home, when she gave her written consent, but says on examination that she did not know what kind of work her son would be required to do at the mill.

The case for decision here, when narrowed down, amounts to this: Can a parent who is entitled to the services of her minor child recover at common law for an injury to her child received while in the employ of the defendant, who had procured the written consent from the parent permitting the minor to work in the mill of the defendant? The trial court held that no recovery could be had, and we are inclined to the same view. The law is well settled as to the right of a parent to recover for loss of services from one who had employed a minor in a dangerous business without the consent of the parent, where he is injured. *Soldanels v. Railway Co.*, 23 Mo. App. 516; *Coleman v. Land & Lumber Co.*, 105 Mo. App. 254, 79 S. W. 981; 20 *Ruling Case Law*, § 29, p. 620; *Labatt's Master and Servant* (2d Ed.) vol. 7, § 2641, p. 8128. See note, citing many cases, *Ann. Cas.* 1913C, 234.

These cases further hold that the right to maintain this action is based purely on the wrongful hiring of the minor without the consent of the parent, and that the question of negligence, assumption of risk, acts of fellow servants, and the usual defenses in negligence cases have no place, or is no defense to such action.

The law is also well settled that if a parent

gives consent for the minor to work at a dangerous occupation, then the action for loss of services, occasioned by an injury to the minor, cannot be maintained. See cases above cited and also, 29 Cyc. p. 640, subsec. 6. See, also, *Hendrickson v. Railroad Co.*, 137 Ky. 562, 126 S. W. 117, 30 L. R. A. (N. S.) 311; *Haynie v. Electric Power Co.*, 157 N. C. 503, 73 S. E. 198, 37 L. R. A. (N. S.) 580, Ann. Cas. 1913C, 232; *Railway Co. v. Redeker*, 75 Tex. 310, 12 S. W. 855, 16 Am. St. Rep. 887; *Daniels v. Thacker Fuel Co.*, 79 W. Va. 255, 90 S. E. 840, 14 N. O. C. A. 833, loc. cit. 841; *Dimmick Pipe Co. v. Wood*, 139 Ala. 282, 35 South. 885; *Pecos & N. T. Ry. Co. v. Blasen-game*, 42 Tex. Civ. App. 66, 93 S. W. 187; *Wolf v. Railway Co.*, 88 Ga. 210, 14 S. E. 190.

These cases further illustrate the rule that if a parent gives consent for a minor to do a certain kind of employment, the defendant or master will be held liable if he places the minor at a different and more hazardous and dangerous service.

As we understand the contention the appellant makes here, it is that she did consent for her son to work at defendant's corn mill, but that she impliedly consented that he would not be put at a dangerous and hazardous work, and that her permission for him to work for defendant at its mill would only carry with it the implied consent that he be put at a reasonably safe place for a boy 15 years old to work.

The only case cited by appellant which would seem to uphold this contention is that of *Lumber Co. v. Westbrook*, 25 South. 914 (121 Ala. 179), the syllabus of which holds that the parent did not impliedly consent to the employment at the wheel of defendant's plant because she knew that the boy worked at the mill. On reading that case, however, it will be seen that the boy had been hired by defendant to do a certain work prior to the time he was working when he was injured, and plaintiff gave consent for him to work at this mill, and the court held that the consent would be limited to the character of work which she knew he had been doing, and that the defendant would be liable if he took him out of that work and put him at a more dangerous work. This case, when analyzed, holds no more than the other cases above cited, and that being that consent to do a certain work does not give the master or an employer the right, after having gotten that consent, to place the minor at a more dangerous and hazardous work, because, when he does place him at a more dangerous and hazardous work he has done so without the consent of the parent. In the case at bar, the plaintiff admitted that she gave her written consent for her son to work in defendant's mill, and she admitted that she did not know the character of work that he would be required to do when she gave that consent. The consent was general, the

giving of which she had a right to do, and under the law, if she gave him a right to be used in dangerous work, then she cannot recover for the loss of his services if he is injured in it, and there is nothing in the case from which any one could draw the inference and there was an implied consent for him to do a certain character of work, or that the master had, without the consent of this plaintiff, the parent, changed the character of the minor's employment to a more dangerous employment than was implied and carried with the general consent for him to work in the mill.

The court was clearly right in sustaining a demurrer to the evidence, and the judgment will be affirmed.

STURGIS, P. J., concurs.

BRADLEY, J. (dissenting). I do not agree with my Associates in the conclusion reached in the majority opinion. The record shows that the defendant hired the minor in the beginning without the knowledge and consent of plaintiff, his mother, who was at that time away from home. The boy was employed by defendant on October 31, 1916, and was 15 years old on November 6th, thereafter. He had worked three weeks and four days before the injury. At the time plaintiff's son was employed he was going to school; but after he had been at work about two weeks plaintiff's daughter and son-in-law wrote her, asking permission for Raymond to work at defendant's mill. In answer to the letter plaintiff "wrote the folks at home" that "Raymond may go ahead and work. It will be allright with me. If they want me to sign anything send it to me."

Plaintiff's contention is that her general consent would not extend to work in the mill that would be dangerous for the ordinary youth of 15 years to undertake to perform. Defendant does not challenge this contention in its answer, but rather confirms it. In its answer defendant says:

"Further answering said second count, defendant avers that the plaintiff's son was working for defendant, and was employed to perform service not dangerous, and the plaintiff well knew and consented to said employment."

Further emphasizing this feature, defendant avers:

"Defendant denies that the plaintiff's son was injured by the negligence of the defendant, as pleaded in said second count, but avers and alleges the fact to be that the plaintiff's son, if he was injured at the time and place and in the manner set forth in said petition, was at the time not engaged in any duty or in the act of employment of the defendant, but that, if he was injured, it was due solely to his own negligence and carelessness in voluntarily violating orders of the defendant, in this, to wit: The plaintiff's son had abandoned his place of duty to the defendant, and had voluntarily and

negligently placed his fingers and hand in a place of danger, thereby receiving said injury, without the fault of this defendant."

Plaintiff showed by an experienced mill man that:

"The work of operating this corn mill is a work of skill, operating the rolls and keeping them in proper tune, etc. The business of operating a corn mill like that, when undertaken by one not skilled, is dangerous. A 'greeny' might go in there and endeavor to operate that and get his hands in the wrong place, which would be easy because of his lack of knowledge. For a skilled man it is not dangerous."

To give a fair idea of plaintiff's son's skill and the scope of his employment and his duties, I quote in part his evidence:

"When I went to work at the mill my mother was in Clarence, Ill. She had been there a month or two. When she left Aurora I was going to school in the eighth grade. The other persons living at home with my mother were three brothers, two sisters, and a brother-in-law. I had never worked in a mill before the time I was hurt, and knew nothing about the operation of a mill. I had never been in a mill, and did not hardly know what one was. The way I came to work at the mill I was at home one morning getting ready to go to school, and Mr. Jester called up. He is the elevator foreman. Mr. Jester first talked to my sister when he called up that day. I went down to the mill about a half hour after that. My home was about five or six blocks away. When I got to the mill I saw Mr. Jester. He was in the warehouse, and I went in, and he asked me how old I was, and I believe I told him I was 15. He asked me if I was going to school, and I told him yes, and he said he did not know that. He told me he would take me down to the corn mill and show me what to do. He took me in, and his son Lonnie was the only one in there. He showed me about the sacks, how to sew them up, and then he went out. Showed me how to put the sacks on the spout. He told me he wanted me to work in the corn mill there and help Lonnie to make meal. I worked three weeks and four days before I was hurt. During that time I did the following kinds of work: I helped clean up, and if I didn't have anything else to do I would start the rolls; sometimes I would go down and put the rolls in gear, and sometimes clean the machinery and unload coal. I also oiled the machinery three or four times a week. We had lots of trouble with these machines choking down. They would choke up on an average every hour. When a choke-up occurred the meal would run out of those spouts, and we would have to shut down the rolls and take the meal out of them and get them started again. This occurred on an average once an hour. Sometimes they would go half a day; sometimes we had a choke-up every hour. Sometimes Mr. Jester wouldn't come in the corn mill all day. And sometimes he would come two or three times a day. He would just come and monkey around a little and go out. He was in there one day when I was unchoking the machine. I was taking this meal out, holding this conveyor. If we did not shut it down every time it would start running again. These conveyors that I spoke of are belts with

cups on them like a chain, and they go upstairs. When a choke-up occurs they stop, and they start up again when you unchoke it. You get to the belts by taking a piece out of the side of the spout. Lonnie and I were the only persons who worked in this corn mill while I worked there. He was 16 years old. It took two persons to unchoke this corn mill when it choked down. One would have to stay on the floor where we stayed, and one would have to go upstairs and take a broomstick and loosen it up and go downstairs and rake it out, so these conveyors cups can pass by them, and one has to stand by and hold these cups, for they start up again when you get the meal out, and they are apt to catch the hand. It was also our duty to look at the meal and see if it was getting too fine or too coarse. To examine the meal while the machines were running as it came over these rolls, we would lift up a little lid and stick our hands in there, and get a handful of the meal and examine it and feel of it to see how coarse or fine it was. When you opened this place to get a handful of meal while the machines were running you could not see anything on account of the dust. I examined the meal in this way several times a day during the entire time I worked there, and Mr. Ed Jester saw me do it two or three times every day. I was examining the meal in this way when I was hurt. The mill had been choked down, and Lonnie was the only one present. We unchoked it like I said, had it started again, and had it all right. I had been holding the cup. The power had not been turned off. After we got it started Lonnie came upstairs, and I stayed around there, and I went over and lifted up that lid and examined the meal. I raised up this lid and stuck my hand in there and got a handful of it and threw it back in just as I examined it. Lonnie was around by the rolls where I could not see him, and he hollowed and said, 'Let's catch up on this,' and just as he hollowed it caught my fingers."

On cross-examination plaintiff's son testified:

"The instructions Mr. Jester gave me were to go and help make meal. I do not remember everything Jester said that day. He would come around there and show us what to do. The first thing Mr. Ed Jester told me to do, or showed me to do, was to put sacks on the spout and to take them off. The next thing he showed me was about cleaning machines. He told me to clean the pulleys and around the rolls and things like that. The machine was stopped then, and he showed me how to clean the grease off of it. He told me how to regulate the feeder. He told me not to run it too fast or it would choke up. I got hurt about 4 o'clock in the afternoon. We had just been unchoking the machine. When I got hurt I had my hand in this meal to see how fine it was. I thought I could tell if it was fine enough. I don't remember now how it was, but think it was all right. I knew there were rolls in there, but did not know where they were. I saw where the pulleys were on these rolls. I had cleaned these pulleys when the machine was stopped, but I didn't know exactly where the rolls were. I hadn't been around the mill enough to know when the rolls were set close enough to grind meal. I put my hand in above the roll to get

this meal to see whether it was too fine or too coarse. I just stuck my hand in and got a handful and was looking at when he called me. I then threw it back in there. I was standing right close to the machine. I just stuck my arm straight out from my body to get this meal. It was not necessary to get my hand down in around the rolls to throw the meal back. I just threw it back where I got it and my hand went too far in. The palm of my hand was towards me when it was caught in the roller. I didn't know at the time how far it was from the place where I got the meal down to the rolls where my fingers got caught. It was somewhere down in there. My arm was hanging over like this. I knew there was something in there, but didn't know just what it was. I do not know that I ever heard the mill called a roller mill. This spout or packer where Mr. Jester showed me where to put sacks on was about four or five feet from the roll where I got hurt."

One of defendant's contentions is that it hired plaintiff's minor son "to put sacks on a spout, take them off, and sew them up," and that this was not dangerous; and that the injury was due to causes for which defendant would not be liable irrespective of consent. Another contention is that the plaintiff's general consent covered the hazardous work, as well as the nonhazardous.

It seems clear, considering the evidence offered for plaintiff from the viewpoint of a demurrer, that defendant employed the minor to do any and all kind of work about its mill necessary to the operation of the mill in the manufacture of meal. Plaintiff's son was employed by defendant's foreman "to work in the corn mill there and help Lonny make cornmeal." The evidence is that that is exactly what plaintiff's son did, and defendant not only knew it, but expected him to do the very work he was doing daily.

It appears, as above pointed out, that defendant concedes that plaintiff did not consent for her son to do dangerous work; but, eliminate this part of the answer and say that defendant charges in its answer as well as in its brief and argument that plaintiff's general consent is sufficient (in the character of case here) to relieve it of liability to plaintiff for any injury that might befall her son while in its employ. If this position be sound, then it must be held that plaintiff when she gave her consent for her son to work at defendant's mill must have contemplated that defendant would or might put her son at a character of work dangerous for a boy of the age and experience of plaintiff's son. If such contemplation was not within the scope of the general consent, then how can plaintiff be said to have consented for her son to do the work at which he was injured? Plaintiff ought to be indulged in the presumption that she would not knowingly consent for her 15 year old son, wholly inexperienced as to machinery, and who had never been in a mill, to attempt to do any and all

kinds of work at defendant's mill, hazardous and nonhazardous alike. The majority opinion not only deprives plaintiff of this reasonable presumption, but goes further and holds in effect that, if a parent gives a general consent, it will be presumed such parent contemplates that the employer might put the minor at work hazardous for such minor to perform.

In *Marbury Lumber Co. v. Westbrook*, 121 Ala. 179, 25 South. 914, plaintiff's minor son, 14 years old, was employed at a sawmill. Defendant claimed that the boy was engaged to work "in and about said mill" with the consent of the parent. Plaintiff testified that—

"She knew that her son had been formerly employed by defendant, but in the capacity of carrying stacker sticks, and that setting the head block of the carriage was a much more dangerous occupation, and that she did not consent to her son's employment by the defendant for the doing of this work."

For aught that appears in the case as reported, the consent in the *Westbrook Case* was general as in the case at bar, and that is the clear inference aside from that specific claim by the defendant. The only difference in the *Westbrook Case* and the case at bar touching the question of consent is that in the *Westbrook Case* the plaintiff knew the character of the work her son was first engaged in. If the consent was general and would cover all character of work, defendant had a right without further permission, to change the character of work which the plaintiff's son was first given. The court in the *Westbrook Case* said:

"The plaintiff could not be held to have consented to the employment of her son upon dangerous work or in a dangerous place because of her knowledge that he was employed at the mill and failure within a reasonable time to object, when she had no knowledge that he was upon this particular work, and, to the contrary, had a right to assume that he was employed upon the less dangerous work upon which he had been previously engaged with her consent."

In order to harmonize the majority opinion with the *Westbrook Case* it must be held that the mere knowledge of the parent, who has given a general consent, of the character of work at which the minor is first put qualifies the scope of the consent, and limits the character of work to that which the minor first performed; while, if the parent who has given a general consent has no knowledge of the character of work at which the minor is first put, then the employer may put the minor at hazardous work, and not be responsible to the parent who bases his cause upon a breach of the contract of employment. The able brief of defendant in the case at bar cites no cases holding that general consent of the parent is as broad as the majority opinion now makes it, and the majority opin-

ion cites no such case, and I find none. It appears that we are breaking new ground; then why should we not lay the furrow in the field of the reasonable and the just, and say that, where general consent, and nothing more, is given by a parent that his or her minor son may enter the employ of another, that other is required to exercise reasonable care and caution to see that such minor is put at such work only as a minor of that age, experience, instinct, and disposition may do with reasonable safety?

**MERCANTILE TRUST CO. v. PAULDING STAVE CO. (No. 2206.)**

(Springfield Court of Appeals. Missouri. Feb. 25, 1919. Rehearing Denied April 7, 1919.)

**1. PRINCIPAL AND AGENT §54—DELEGATION OF AUTHORITY.**

The basis of the rule which forbids an agent to delegate his authority to another is that the business to be transacted is such that it requires judgment or skill on behalf of the agent, and that the principal is entitled to the judgment and skill of the agent which he selects.

**2. PRINCIPAL AND AGENT §173(3)—AUTHORITY—RATIFICATION—EVIDENCE.**

In action on note, where defense was that maker's employé, who signed note, was not authorized to so do, evidence that plaintiff notified defendant of its purchase of the notes, and that defendant did not repudiate them, or raise any question as to their validity, until after the notes became due, tended to show that notes were either issued by authority in the first instance, or that defendant ratified the act of its agent done without authority.

**3. EVIDENCE §185(1) — BEST EVIDENCE—FOUNDATION OF INTRODUCTION FOR SECONDARY EVIDENCE.**

Where defendant denied having received notices sent by plaintiff, plaintiff could introduce testimony as to contents thereof without having first taken proper steps to require defendant to produce original, where carbon copies of the notices were produced by witness testifying to the fact that the notices had been sent, and such carbon copies, though not introduced in evidence, were open to inspection of both parties, and no question as to their contents was raised; carbon copies being for such purpose originals.

**4. BILLS AND NOTES §370—INNOCENT PURCHASER—FAILURE OF CONSIDERATION.**

Under Rev. St. 1909, §§ 9999, 10022, failure of consideration is no defense as to innocent purchaser for value before maturity.

**5. TRIAL §210(3)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.**

Where the evidence was contradictory, and it was not entirely clear that a known witness

had willfully sworn falsely to a material fact, the giving of an instruction on the credibility of witnesses was not an abuse of the court's discretion.

**6. APPEAL AND ERROR §1001(1)—REVIEW—VERDICT.**

Verdict of jury, to whom issues were properly submitted, where supported by substantial evidence, is conclusive on appeal.

Appeal from Circuit Court, Bollinger County; Peter H. Huck, Judge.

Action by the Mercantile Trust Company against the Paulding Stave Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John T. McKay, of Kennett, W. J. Vesey, of Ft. Wayne, Ind., and W. M. Morgan, of Marble Hill, for appellant.

Fred L. Byrkit, of Kennett, and R. L. Ward, of Caruthersville, for respondent.

STURGIS, P. J. This is a suit on three promissory notes, resulting in a judgment for plaintiff, and defendant appeals.

These notes purport to have been executed by the defendant, and are payable to Hanna Brackenridge Company of Ft. Wayne, Ind., from whom the plaintiff claims to have purchased the same in good faith and for value before maturity. The defendant denies the execution of the notes and pleads failure of consideration. The answer also raised the issue of the plaintiff having purchased these notes in good faith and for value before maturity, but plaintiff made ample proof of such facts, and that question is settled here. The plaintiff is doing business in Chicago, Ill., and is shown to deal extensively in commercial paper. These notes were offered to it for sale by the Hanna Brackenridge Company shortly after the respective dates thereof, and the plaintiff purchased same after due investigation of the solvency of the defendant, paying full value for same. There is hardly a suspicion raised against the plaintiff being an innocent purchaser for value in due course of business, and that feature of the case may be considered as not before this court, except as incidentally bearing on the question of the notes being executed by the defendant.

The defendant is an Indiana corporation, located at Ft. Wayne, Ind. It is or was engaged in manufacturing staves and similar lumber products, having its factory located at Paulding, Mo. Its manufacturing was done in Missouri, but its commercial business was transacted at its office in Indiana. The notes in question are dated at Ft. Wayne, Ind., are regular in form, and are signed "The Paulding Stave Company, by El Klein." The evidence shows that the notes were



signed by the use of a rubber stamp kept at the office for that purpose; the company name being stamped thereon, with the word "by," and the signature "E. Klein" written with pen and ink. That the notes were so signed at the office of defendant, by E. Klein, an employé, and delivered to the payee, Hanna Brackenridge Company, is not questioned; but defendant denies the authority of E. Klein to bind it by such written obligations. This is the vital question in the case, and is one of fact, rather than of law.

The evidence further shows that A. T. Vail was the president and controlling stockholder of the defendant company, and in charge of its Indiana office and business. The only other stockholders were his wife and E. A. Vail his brother; the latter having charge of the factory in Missouri and residing there. A. T. Vail had also organized another Indiana corporation, the Vail Cooperage Company, which was the selling corporation of defendant's manufactured products. A. T. Vail was the president and active manager of this corporation also, and the two corporations maintained a joint office at Ft. Wayne, with the same officers and employés in charge of both. E. Klein was an employé in this office, and says he was such and worked for both corporations. The letter head of the Vail Cooperage Company shows that he was assistant manager of that corporation, and according to his evidence his powers and duties were the same in each company, and all his work was done under the direction and supervision of A. T. Vail, president and active manager of both corporations.

E. Klein, who performed the manual act of signing the notes in question, was a witness for plaintiff and testified that he did so by direction of A. T. Vail, who controlled and managed the entire business of the office. He says he signed the correspondence of the defendant company, frequently signed checks for it, and at times signed notes and other documents, when directed by Mr. Vail. As to the notes in question he testified:

"Q. Did you ever sign any notes, promissory notes? A. Yes; I recall signing some notes.

"Q. State, if you can, how you happened to sign checks and notes as you stated. A. I was authorized to sign checks for the Paulding Stave Company and Vail Cooperage Company, and if I signed any notes it was under the instructions of Mr. Vail to sign them.

"Q. You state that you were authorized to sign them. What do you mean by that? State whether or not anybody told you to sign. If so, who? A. Why, I had authority to sign checks on four or five different banks that Mr. Vail did business with; authority was given to the banks to accept my signature on checks.

"Q. In the instructions to you, if you received any, directing you to sign checks and notes, by whom were such instructions given, if any? Who told you to do it? A. Mr. A. T. Vail.

"Q. Did he give you the instructions orally or in writing? A. Orally."

Hands note to witness:

"A. Yes, it is my signature.

"Q. State how, or by what authority you executed that note in the name of the Paulding Stave Company, by E. Klein? A. I signed by the authority of Mr. Vail; A. T. Vail. I cannot recall the exact time I signed these notes. I could not answer the question; but I signed the notes, and I would not sign the notes without any authority from Mr. Vail."

And on cross-examination he said:

"Q. Do you recall whether Mr. Vail was at your desk or in the office when you signed them? A. He probably was, as I would not sign any notes without his telling me to."

There was other evidence showing that E. Klein was the chief office assistant of A. T. Vail in transacting the business of both these companies, and that he continued in this position long after the notes in question were signed.

[1] The defendant invokes the doctrine that E. Klein, whether an assistant manager or merely an office clerk, had no authority to sign commercial paper, and that A. T. Vail, though having such authority himself, could not delegate such authority to his subordinate. 10 Cyc. 929. We will grant that such is the law, but that is not the question here. If the evidence for plaintiff is to be believed, then the act of Klein in signing the notes in question was a mere ministerial or clerical act, done for and at the instance of A. T. Vail, and such acts were Vail's acts, just as truly as if he himself had used the rubber stamp and guided the pen which traced the name E. Klein. The basis of the rule which forbids an agent to delegate his authority to another is that the business to be transacted is such that it requires judgment or skill on behalf of the agent, and that the principal is entitled to the judgment and skill of the agent which he selects. *Grady v. American Central Ins. Co.*, 60 Mo. 116, 123; *Brown v. Railway Passenger Assurance Co.*, 45 Mo. 221, 224; *Barrett v. Railroad*, 138 Mo. App. 135, 141, 119 S. W. 980.

Each of these cases, however, points out that this rule does not apply to ministerial or clerical acts, done at the direction and under the supervision of the responsible and authorized agent. In the *Grady Case*, *supra*, the court said:

"It is true, as insisted by the defendant in this case, that an agent cannot delegate his authority to act for his principal, without special authority from the principal to do so, or unless the act of the agent, who delegates the authority, is ratified by the principal with knowledge of the facts; but this rule does not apply to mere ministerial acts to be performed by the agent. It is not necessary that the agent should do such acts in person, if he direct the act to be done, or with a full knowledge of the act, adopt it as his own, it is sufficient."

According to the evidence favorable to plaintiff, the act of executing the notes sued

on was the act of A. T. Vail, and his authority in the matter is abundantly shown. Not only did he own some 75 per cent. of the capital stock of the defendant corporation, but the board of directors, consisting of himself, his wife, and brother, was merely nominal. While his brother was in charge of the manufacturing plant in Missouri, and personally looked after that work, A. T. Vail was in practically unlimited and sole charge of the financial and commercial business transacted through the office in Ft. Wayne.

[2] There is also evidence in the case that on plaintiff's purchasing these notes it gave notice by mail to defendant of that fact, and that defendant did not then repudiate same, or raise any question as to their validity, until after the notes became due. This evidence tends to show that the notes were either issued by authority in the first instance or that defendant ratified the act of its agent done without authority. *St. Louis Gunning Advertising Co. v. Wanamaker & Brown*, 115 Mo. App. 270, 279, 90 S. W. 737.

[3] The defendant claims error in this same connection in permitting plaintiff's clerk in charge of its collection department to testify to the contents of the notices mailed to defendant without taking proper steps to require the defendant to produce the originals as being the best evidence. The defendant, however, was taking the position that it had never received any such notices, and, if so, there were no originals to be produced. The real point at issue was whether plaintiff had given and defendant received notice of plaintiff's purchase of these notes, and not as to the contents of such notices. Of course, plaintiff must show that such notices were given and received before it could ask that the originals be produced, and whether such notices were given and received was the whole controversy. To show that such notices were given and received, this clerk testified to having mailed such notices to defendant's proper address and produced carbon copies of the notices so sent by mail. These carbon copies, while not formally put in evidence, were produced by the witness and were open to the inspection of both parties, and no question was raised as to the contents of these; the objection being that the originals should first be accounted for, which plaintiff was trying to prove were sent to defendant and defendant was denying it had received. Certainly defendant cannot now take the position that the originals were available to plaintiff on proper notice and demand, for to do so is to admit that same had been received and were in its possession—the very thing it was denying. Besides, the carbon copies are for this purpose originals. *Bond v. Sanford*, 134 Mo. App. 477, 484, 114 S. W. 570.

[4] The court refused to allow defendant

to go into the question by failure of consideration for these notes. This evidence was rejected, and we think properly so, since, if plaintiff was as the evidence clearly shows, an innocent purchaser for value before maturity, then the defense of failure of consideration is not open to defendant. A negotiable promissory note is a "courier without luggage," and when purchased in good faith before maturity by one having no knowledge of any infirmity it is elementary that such defense is precluded. Sections 9999 and 10022, R. S. 1909.

[5] The giving of an instruction on the credibility of witnesses was not an abuse of the court's discretion. The evidence was contradictory, and it was not entirely clear that no witness had willfully sworn falsely to a material matter. *Dawson & Lyon v. Flinton*, 195 Mo. App. 75, 80, 190 S. W. 972.

[6] Finding that the verdict is supported by substantial evidence, and that the issues were properly submitted to the jury, its verdict is conclusive, and the judgment is affirmed.

BRADLEY and FARRINGTON, JJ., concur.

#### BARNETT v. LOGAN. (No. 2382.)

(Springfield Court of Appeals. Missouri. Feb. 25, 1919. Rehearing Denied April 7, 1919.)

#### 1. CONTRACTS — 156 — CONSTRUCTION — WORDS OF GENERAL AND SPECIFIC DESCRIPTION.

Rule that where, in a contract, words of a general description are followed by a specific and minute description, the latter limit the former to the property particularly described, is not conclusive, if the real intention of parties can be ascertained from the instrument, or from their interpretation and construction.

#### 2. EVIDENCE — 450(8), 460(5)—PAROL EVIDENCE — AMBIGUOUS CONTRACT — UNDERSTANDING OF PARTIES.

Bill of sale in terms of a mining mill on a certain 40 acres, "including all equipment of every kind and character \* \* \* more fully described in inventory attached," with inventory containing 68 items, but not having a general descriptive clause, and making no mention of a motor on another section for pumping water by pipes to the plant sold and two others, is ambiguous, allowing evidence of conversation of parties, at time of execution, that motor was not included.

Error to Circuit Court, Jasper County; R. A. Pearson, Judge.

Action by G. A. Barnett against Walter H. Logan. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

R. M. Sheppard and E. F. Cameron, both of Joplin, for plaintiff in error.

Dick Rice, of Miami, Okl., and Grover C. James, of Joplin, for defendant in error.

BRADLEY, J. Plaintiff in error sued in replevin to recover a 15 horse power electric motor with its equipment, and a four-room frame house situate on a mining lease. On trial before the court a judgment went for defendant, and plaintiff brings the cause here by writ of error. The parties for convenience and brevity will be referred to as plaintiff and defendant.

The petition and affidavit are in the conventional form. The answer disclaims any interest in the house, and pleads ownership of the motor in defendant by virtue of a bill of sale executed by the Barnett Mining Company No. 2, by and through the plaintiff herein as its representative. The reply denied generally the new matter.

On February 14, 1918, the Barnett Mining Company No. 2 in consideration of \$80,000 sold to defendant, acting as trustee for himself and others, as appears in the bill of sale, "one certain mining mill and concentrating plant, known as Barnett Mining Company's mill No. 2, located on the southeast quarter of the northwest quarter of section thirty-four (34), township twenty-eight (28), range thirty-two (32), near Porto Rico, Missouri, including all equipment of every kind and character, the same being more fully described in an inventory attached hereto and marked Exhibit A, the same to include all machinery and equipment used in connection with said mill." The inventory referred to contains 68 separate items, but does not contain a general descriptive clause, as is in the bill of sale proper, and does not mention the motor in question.

There was a contract in connection with the bill of sale, executed by the same parties and contemporaneous therewith, which contract in the preamble recited, among other things, that \$20,000 of the consideration for the mining mill and concentrating plant had been paid, and that the bill of sale and the contract should be put in escrow with a trust company, and that defendant would pay the remaining \$10,000 on or before March 5, 1918, and, failing to so pay, defendant forfeited the \$20,000 paid as liquidated damages, and the bill of sale was to be returned to the party of the first part, the Barnett Mining Company No. 2. The defendant, however, paid the \$10,000 according to agreement, and the bill of sale was delivered to him.

Plaintiff claims that the motor was his individual property, and, though it was used in connection with the mining plant of the Barnett Mining Company No. 2, that it did not belong to that company, and that he did not intend to sell it, and that it was not in fact

included in the bill of sale. Plaintiff testified in effect that the motor was not to be included, and that he in the presence of the defendant, after the bill of sale was drawn and signed, and after he had looked it over, reminded his (plaintiff's) attorney that the attorney had forgotten to except certain items, and named, among others to be excepted, the motor, and suggested that the sale bill be rewritten; that the defendant thereupon said that he was in a hurry to catch a train, and it was then late, and that he (defendant) understood that the items named by plaintiff were not included, and that it was not necessary to rewrite the bill of sale in order to except the motor and the other items. The attorney referred to testified substantially to the same effect. Plaintiff does not bring up the evidence offered by defendant, but states in the abstract that defendant's evidence tended to contradict the oral evidence offered by plaintiff.

The mining plant proper sold to defendant was, as we understand the record, on the north 40 of three 40-acre tracts mentioned in the record, and the motor was on the south 40, and the distance from the mining plant to the pumphouse, where the motor was, was about one-half mile. The motor was used to pump water from a deep well, which supplied the plant of the Barnett Mining Company No. 2 and two other mining plants. The mining plant sold to defendant was connected with the pumping station with pipes, and practically all the water supply came from this pumping station. It is shown that this motor had been used to pump water for the Barnett Mining Company No. 2 plant and two other mining plants for about two years, and that the other mining plants paid a rental to the Barnett Mining Company No. 2, and not to plaintiff, and that the Barnett Mining Company No. 2 did not pay plaintiff any rental. Defendant at the outset objected to any oral evidence which tended to contradict or vary the bill of sale, but the court heard such evidence subject to the objection, and stated that, as the matter was before the court, they could thresh that question out in the argument. The record, however, does not disclose that the court ever passed on this objection.

At the close of the case plaintiff asked this declaration of law:

"The court declares the law to be: That if the court finds that, after the contract and bill of sale between the Barnett Mining Company No. 2 and the defendant Logan was signed, it was agreed between the Barnett Mining Company and the defendant Logan that the one 15 horse power Westinghouse electric motor described in plaintiff's petition was not to be included as a part of the property mentioned in said contract and bill of sale, then the court should find the issues in favor of the plaintiff."

The court modified the requested declaration by adding:

"Provided the court further finds such agreement was supported by a consideration, and was done and had after the delivery of said contract and bill of sale, and after it had become of full force and effect between the parties."

Plaintiff makes three assignments of error, as follows: (1) That the court erred in holding that the written contract (bill of sale) could not be modified by oral agreement after the execution thereof; (2) that the court erred in holding that the motor in question was embraced within the terms and provisions of the bill of sale; (3) that the court erred in modifying plaintiff's declaration of law. Judging by the declaration, the court did not hold that a parol modification could not be made in the bill of sale subsequent to its execution, so that question is out of the case.

[1, 2] Defendant claims that he bought the motor, plaintiff denies this. Plaintiff says that after the contract and bill of sale were signed up, but before delivery in fact that he called attention to the fact that the motor was not excepted, defendant denies this. The trial court found for the defendant; therefore he must have found that the motor was included in the bill of sale. It would appear from the modified declaration that the court found that the motor was included in the bill of sale, and that after the bill was signed up there was an agreement to except the motor, but that there was no consideration to support this agreement. We say such might appear to be the finding of the court, in view of the language used in the modification of the instruction; but, of course, we cannot say just what the trial court found in view of all the facts here, in the absence of a finding of facts.

The 40 acres on which the mining plant proper was located was some half mile distant from the plant and on a different 40 and section. Defendant relies largely upon the description in the bill of sale:

"The same to include all machinery and equipment used in connection with said mill."

Plaintiff, in answer to defendant's contention that the general description covers the motor, says that there was an inventory attached to and made a part of the bill of sale, in which the motor is not mentioned, and invokes the rule that, where words of general description are followed by a specific and minute description, the latter limits the former to the property particularly described. 11 C. J. 498. See, also, *Meyers v. Wood*, 173 Mo. App. loc. cit. 571, 158 S. W. 909. This rule, however, is not conclusive, if the real intention of the parties can be ascertained from the instrument itself, or from their in-

terpretation and construction. There is nothing in common in the attitude of the parties to the bill of sale here under consideration, from which we might gather some idea as to how they interpreted the bill and contract in the first instance. Plaintiff says that the motor was not included, and was not intended to be, and defendant makes the contrary contention.

The inventory, although containing 68 separate and specific items, makes no mention of the motor, though it was of much more value than a number of items specified. It is true that the motor was used in connection with the mining plant, but no more than was the pump in the well, and it is not contended that the pump was included.

It is shown that the conversation (if any was had) about excepting the motor was contemporaneous with the signing, and possibly before plaintiff had parted with the physical possession of the instrument after signing, and before the delivery in escrow. As we view the bill of sale, it is, considered from any angle, ambiguous. If the parties conceded, at the time of the execution of the bill of sale, as plaintiff's evidence tends to show, that by the contract the motor was not to pass or be included, then under the ambiguous terms thereof plaintiff should recover. The question is as to the intent of the parties in making the sale as to including the motor, and not as to making a new agreement requiring a new consideration. The mill is described as being on a particular 40-acre tract, yet it is conceded that the pipe line from the pump situate on another 40 was included, although the greater part of this pipe line was not on the 40 where the mill proper was located. We see no room for the contention that the motor was included in the bill of sale, and afterwards by agreement taken out. The only question we can reasonably deduce from this record is: Was the motor ever included? The contract being ambiguous, parol evidence is admissible to aid in its construction, but not to vary or modify its terms; and any conversation had between the parties at the very moment of its execution is competent to show how the parties themselves understood the contract as to the motor. *Stover v. City of Springfield*, 167 Mo. App. 328, 152 S. W. 122; *Counts v. Medley*, 163 Mo. App. 546, 146 S. W. 465; *Coal & Iron Co. v. Coal Co.*, 176 Mo. App. 407, 158 S. W. 420. Did the Barnett Mining Company intend to sell, and did it sell, the motor? The determination of this question settles the controversy.

The judgment below is reversed, and cause remanded.

STURGIS, P. J., and FARRINGTON, J., concur.

**ABBOTT v. CITY OF SPRINGFIELD.**  
(No. 2386.)

(Springfield Court of Appeals. Missouri. Feb. 25, 1919. Rehearing Denied April 7, 1919.)

**1. MUNICIPAL CORPORATIONS — 771—SIDEWALKS—PRESENCE OF SNOW AND ICE—NEGLIGENCE.**

A general condition of snow and ice accumulations on sidewalk, due to alternate thawing and freezing and the tracking and disturbance by pedestrians, unless specially dangerous, does not render the city negligent.

**2. MUNICIPAL CORPORATIONS — 772—SIDEWALKS—ACTIONABLE DEFECT—CONCEALED RIDGE OF ICE.**

A ridge or ball of ice on the sidewalk, just outside the single beaten path, caused by overflow from downspout on adjoining building, and concealed by covering of snow, is an actionable defect in case of injury therefrom to pedestrian; the city having knowledge thereof.

**3. MUNICIPAL CORPORATIONS — 821(20)—SIDEWALKS—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.**

A pedestrian, injured by slipping on ridge of ice, caused by overflow from downspout on adjoining building, concealed by snow and just outside single beaten path in middle of sidewalk, was not negligent, as a matter of law, in stepping to side when meeting another, or in not noticing downspout and surmising presence of ridge.

Appeal from Circuit Court, Webster County; C. H. Skinner, Judge.

Action by Annie M. Abbott against the City of Springfield. Judgment for plaintiff, and defendant appeals. Affirmed.

Fred Moon, of Springfield, for appellant.

McLain Jones, L. L. Collins, and Hamlin & Hamlin, all of Springfield, and Seth V. Conrad, of Marshfield, for respondent.

**BRADLEY, J.** Action to recover for injuries resulting from falling on an icy sidewalk. A jury trial resulted in a verdict and judgment for plaintiff, and defendant prosecutes this appeal.

Plaintiff, a single woman, about 43 years old at the time, fell on the sidewalk on the east side of South street just off the public square in the city of Springfield, Mo., resulting in serious and permanent injuries. It is charged in the petition that the sidewalk on account of the negligence of the city through its officers and agents was covered with an accumulation of snow and ice and a formation of rough and uneven snow and ice, and liable to cause pedestrians to slip and fall and injure themselves. It is charged that the city knew of this alleged dangerous condition of the sidewalk at this particular

time and place, or in the exercise of ordinary care in the premises could and would have known thereof. It is alleged that on the 5th day of February, 1913, plaintiff, while in the exercise of due care, and while walking over said sidewalk, slipped on the ice thereon, and fell, breaking her leg near the hip joint. The answer is a general denial, and a plea of contributory negligence.

On February 2, 1913, two or three inches of snow fell in Springfield and vicinity, and about the same amount fell on the 3d. There had been some slight alternating thawing and freezing since the snow had fallen. Also pedestrians had beaten out a single path on this sidewalk where plaintiff was injured. The city and property owners had cleared the sidewalks around the public square of the snow, and also the sidewalk on the west side of South street leading off the public square, but the sidewalk where plaintiff was injured had not been cleaned. There was a leaky downspout alongside the building by which this sidewalk ran, and the water escaping from this downspout ran out over the sidewalk and froze in ridges. The downspout was supposed to convey the water from the roof, and discharge it underneath the sidewalk, but because the downspout was old and leaky a great quantity of water was permitted to flow across the sidewalk. It seems that this froze in ridges like, and the ridges were highest nearer the wall, and sloped from there to the edge of the walk.

Plaintiff had been transacting business on the public square, and going home she turned south down the sidewalk on the east side of South street, walking in the beaten path. At this downspout she met a man in the path walking north. She stepped her left foot out of the path to the left, that she and the other pedestrian might pass, and in doing so set her foot on one of these balls or ridges of ice from the downspout and fell, resulting in the injuries mentioned. The balls or ridges of ice from the downspout were covered with snow so that they were not visible, but the downspout itself was much bedecked with clinging ice and icicles unmistakably indicating numerous leaks. Plaintiff, describing the condition of the walk at the place of her injury, said that it was very uneven; that there were rolls of snow and ice there, "and up against the building where I stepped out it was rolled up in billows." Plaintiff offered evidence tending to establish that she was injured in the manner herein set out, and that the city officers whose duty it was to remedy dangerous conditions in the sidewalk either actually knew of this condition at the downspout or should have known if in the exercise of ordinary care. Defendant interposed and stood on a demurrer at the close of plaintiff's case.

[1] The demurrer goes primarily to the

proposition that the city is not liable for injuries resulting from snow and ice accumulations on the sidewalk where that condition is general, and due to alternate thawing and freezing, and the tracking and disturbing by pedestrians. Reasonable care on the part of the city did not require it to remedy a general condition naturally consequent from the alternate thawing and freezing of snow on sidewalks; unless there was some especially dangerous condition. While such condition renders walking on the sidewalk somewhat unsafe, yet it is not sufficient, unless especially dangerous, to constitute negligence, when the condition may be said to be the natural, general, and prevailing condition, and due to weather conditions and the use of the sidewalk by pedestrians. *Vonkey v. City of St. Louis*, 219 Mo. 37, 117 S. W. 733; *Reedy v. Brewing Association et al.*, 161 Mo. 523, 61 S. W. 859, 53 L. R. A. 805; *Albritton v. Kansas City*, 192 Mo. App. 574, 188 S. W. 239; *Livingston v. St. Joseph*, 174 Mo. App. 636, 161 S. W. 304. In *Reedy v. Brewing Association et al.*, supra, 161 Mo. loc. cit. 538, 61 S. W. 862, 53 L. R. A. 805, it is said:

"The water which was frozen here did not fall in rain or snow from the clouds; the city was not confronted with a thousand miles of ice-covered sidewalks to look after, nor were the people using the sidewalk at this point admonished by the general conditions surrounding them that ice was to be expected. The weather was dry, clear, and cold; there was ice at that point for a distance of about 15 feet, but not elsewhere. That the condition was dangerous is demonstrated by the plaintiff's fall; that the danger could have been removed with little labor or expense is beyond question. Therefore the city is not excused as it is when its powers are overcome by nature covering the face of the earth with ice and snow."

While the general rule is as above stated as to the liability of the city for snow and ice upon the sidewalk, yet a city is required to exercise reasonable care to keep its sidewalks free from all dangerous obstructions which do not belong to a generally dangerous condition due to natural causes, and the law recognizes that snow and ice which have been suffered to accumulate on a sidewalk and to assume an especially dangerous form is such an obstruction as will constitute negligence if known actually or constructively, and not remedied within a reasonable time. *Albritton v. Kansas City*, supra; *Vonkey v. St. Louis*, supra; *Reno v. City of St. Joseph*, 169 Mo. 642, 70 S. W. 123; *Barker v. Jefferson City*, 155 Mo. App. 390, 137 S. W. 10; *Cantterberry v. Kansas City*, 149 Mo. App. 520, 131 S. W. 120; *Fogg v. Kansas City*, 187 Mo. App. 252, 173 S. W. 712.

In *Reno v. City of St. Joseph*, supra, it is said:

"It may be conceded that a city is not liable for accidents occasioned by mere slipperiness caused by ice upon its sidewalk, but if the ice

is so rough and uneven, or so rounded up, or at such an incline as to make it an obstruction, and to cause it to be unsafe for travel with the exercise of ordinary care, then it is liable for injuries sustained by a pedestrian under such circumstances. \* \* \* Or when snow and ice are permitted to accumulate upon a sidewalk of a city, and are permitted to remain there until by thawing and freezing they become an obstruction and the sidewalk unsafe for travel, and the city has knowledge thereof for a sufficient length of time before an accident, and injury occurs to one traveling thereon in the exercise of ordinary care, to remove the obstruction and fails to do so, it will be held to respond in damages for the injury."

[2] The condition of the sidewalk at the place where plaintiff was injured was not a general condition caused by alternate thawing and freezing and use by pedestrians. Plaintiff was successfully escaping any dangers which might have existed from any rough and uneven condition due to natural causes, and she did not come to grief until she stepped one foot out of the beaten path, and set it on a ridge or ball of ice caused from the overflow or leak of the downspout, and was a condition specifically local to that particular spot and place, and was not a condition that prevailed generally.

In *Albritton v. Kansas City*, supra, a demurrer was under consideration, and the court said:

"The evidence most favorable to plaintiff, which, of course, we must accept as true in our consideration of the demurrer to the evidence, tends to show that the heavy snow which had fallen almost a week before the injury had not been removed from the sidewalk on Prospect avenue adjoining the laundry property, and that the pedestrian travel, which was heavy, had beaten down a pathway about 18 inches wide, and with the aid of alternate freezing and thawing the path had been converted into ice which, at places, had formed into ridges and mounds, which made the surface extremely ragged, uneven, and dangerous. This condition, which had continued three or four days, is described by plaintiff and her witnesses as one which presented a far more difficult and dangerous obstruction to travel than that which is spoken of in some of the reported cases as a general condition of snow and ice which ordinarily would result from not removing fallen snow from the sidewalks."

Of the condition described in the *Albritton* Case the court held that it was within the class of actionable defects. The condition there seemed to fall within that condition described as especially dangerous, yet due from natural causes, while the condition of the sidewalk in the case at bar was especially dangerous at that particular place, and due to causes not naturally consequent, but to a leaky downspout which increased the dangers incident to natural causes. It was shown that this downspout had been in a defective condition for quite awhile, and some of the city officers had their office in the

building on which was the downspout, and daily passed by this downspout on their way to and from their offices. There is no reasonable foundation for the contention that the city had no knowledge of the condition of the sidewalk at this downspout. The demurrer should not have been sustained on the theory that the condition of which plaintiff complains was one for which the city would not as a matter of law be liable.

[3] Nor do we think the plaintiff as a matter of law was guilty of contributory negligence. The sidewalk was covered with snow, and only a narrow pathway beaten out near the middle. She did no more than any courteous person might do when she stepped one foot out of the path to permit another pedestrian to pass. The ridged "billows" of ice extending from the foot of the downspout were covered with snow. She did not know of the condition underneath the snow where she set her foot. It is true that the downspout was "decorated" with ice and icicles, and a reasonable person might have concluded from the appearance of the downspout that there was likely a similar condition from the foot of the downspout across the walk. But is a pedestrian required at his or her peril to observe all the visible conditions apart from the sidewalk which might indicate that a certain place in a sidewalk was dangerous? The relative duty of the city and a pedestrian in *Ryan v. Kansas City*, 232 Mo. loc. cit. 482, 134 S. W. 569, is stated in this wise:

"To say that the city must keep its sidewalks reasonably safe, and that the pedestrian may assume that such duty has been performed, does not mean that the pedestrian may walk thereon studying the stars, or blinded as a bat. Reasonably safe means that such walks can be used by a person in the exercise of ordinary and usual care. It means that whilst they are not absolutely safe, yet the pedestrian can use them with safety to himself, if he uses ordinary and usual care for his own safety. As stated above, the pedestrian cannot be engaged in the study of astronomy and blindly fall into a ditch when the light of day, or its substitute, arc lights at night, would show the danger if such there was. Nor does it mean that the pedestrian must keep his eyes riveted upon the sidewalk at each step of his progress. Ordinarily prudent and careful persons do neither. Such persons are not stargazing, nor are they guarding each individual step they take. They do, however, use their senses to see that they do not encounter danger, and this without considering that they may assume that the city has fully performed its duty."

Plaintiff did no more than any ordinary prudent person would do who knew nothing about the ice from the downspout, and at most the question of her negligence was for the jury. It is true that she says that she knew the walk was dangerous, but the danger in mind was the general condition, and

not the special condition, arising from the ice from the downspout.

Defendant makes other assignments of error based upon instructions; but, in view of the record here, and considering all the instructions together, we find no reversible error in the instructions. Nor do we find any error in the admission or exclusion of evidence. The judgment below is affirmed.

FARRINGTON, J., concurs.

STURGIS, P. J., concurs in separate opinion.

STURGIS, P. J. (concurring). The plaintiff's first instruction which purports to cover the whole case and authorizes a finding for plaintiff on the conditions therein stated is copied in substance from *Reno v. City of St. Joseph*, 169 Mo. 642, 70 S. W. 123. The substance of this instruction is that it is defendant's duty to use reasonable care to keep its sidewalks in a reasonably safe condition for travel thereon, and if by reason of an accumulation of ice and snow and a formation of rough and uneven ice and snow on the sidewalk in question the same became and was in an unsafe condition for travel thereon, then this condition, with knowledge of the city and plaintiff's injury by falling thereon, entitled plaintiff to a recovery. This instruction was held error by the Kansas City Court of Appeals in *Albritton v. Kansas City*, 192 Mo. App. 574, 578, 188 S. W. 239, and I think rightly so, for the reason that it does not distinguish between the general and naturally dangerous condition of sidewalks resulting from ice and snow thereon when traveled over in such condition, for which condition the city is not liable, and a specially dangerous condition peculiar to the place in question resulting from some natural or artificial local cause and amounting to an obstruction to public travel different from the general dangerous condition produced by natural causes, for which specially dangerous condition the city is liable. As said in the *Albritton Case*, this instruction is so broad as to include both the actionable and nonactionable dangers from snow and ice on sidewalks and predicates liability on the mere fact the sidewalk was in an unsafe condition for travel by reason of the formation of rough and uneven ice and snow thereon without regard to the cause of its being so, or whether it was different from the natural and general condition. As further said in the *Albritton Case*, this objection to the instruction was not called to the attention of the Supreme Court in the *Reno Case*, and if the Supreme Court meant to approve the law as stated in this instruction, it has in effect overruled same in *Vonkey v. City of St. Louis*, 219 Mo. 37, 44, 117 S. W. 733, and other later cases.

This error would be reversible in the pres-

ent case if there was any substantial dispute as to the facts bearing on this particular point. The defendant, however, offered no evidence and all the witnesses in the case testified to the specially rough, uneven, and dangerous condition of the sidewalk at the place of plaintiff's injury, due to the water escaping from the leaking downspout, spreading over the sidewalk, and with the snow and slush freezing in ridges or balls of ice, making the walk specially rough, uneven, slippery, and dangerous at that particular place. The cause and fact of its being peculiarly and especially dangerous at this place and different from the general condition resulting from the snowstorm is uncontradicted, and the only disputed question in the case was whether it was so dangerous to travel thereon as to speak negligence of the city in not removing or preventing such dangerous condition. This the jury was required to find by the instruction, and a finding for plaintiff in this respect entitled her to a verdict.

This instruction, moreover, was followed by instructions given for defendant, telling the jury in positive terms that the city was not required to keep its walks clear of snow and ice resulting from a general snowstorm, or to remove from the sidewalks snow or ice

which produced a slippery condition; nor is it responsible for injuries sustained solely by reason of its sidewalks being in a slippery condition, or because the ice or snow is rough and uneven, unless such ice and snow where plaintiff fell was so rough and uneven as to constitute an obstruction; that the city is not an insurer against injury upon its sidewalks; that every obstruction of ice or snow that causes injury does not make the city liable if the city has exercised reasonable care to keep the walks in a reasonably safe condition. "Therefore, you are instructed that, even though you may find and believe from the evidence that there was rough and uneven ice and snow upon the walk at the place where plaintiff fell, and that such rough ice and snow amounted to an obstruction, and that plaintiff was injured thereby, still, if you believe from the testimony that the walk at the point where plaintiff is alleged to have been injured was at that time in a reasonably safe condition for travel in the ordinary modes upon a sidewalk under the prevalent weather conditions, the jury will find for the defendant city."

This first instruction was therefore harmless under the facts of this case; and, taking the instructions as a whole, they properly submitted all the issues of this case.



(141 Tenn. 412)

HICKMAN, County Judge, v. WRIGHT, Sheriff.

(Supreme Court of Tennessee. March 8, 1919.)

1. CLERKS OF COURTS ⚡11—COUNTIES ⚡78(2)—EQUITY ⚡394—REGISTERS OF DEEDS ⚡3—SHERIFFS AND CONSTABLES ⚡28—"THROUGHOUT THE STATE"—FEES—STATUTES.

Acts 1917, c. 47, providing that clerks of court, masters in chancery, county trustees, registers of deeds, and sheriffs throughout the state shall be deprived of their fees and compensated only by salary as hereinafter provided, must be construed as depriving such officers of their fees in counties of less than 30,000 population, though salary for such officers was not thereinafter provided.

2. STATUTES ⚡203—CONSTRUCTION—OMISSION.

A pure casus omissus occurring in a statute can never be supplied or relieved against by the court under any rule or canon of construction or interpretation.

3. STATUTES ⚡190—CONSTRUCTION—AMBIGUITY.

If actual language and provisions of statute are plain and clear, and are devoid of contradiction, or any affirmative ambiguity, so that statute, as result of express provisions, is not reasonably susceptible of twofold meaning, there is no room for applying any other rules or canon of construction.

4. CLERKS OF COURTS ⚡12—CONSTITUTIONAL LAW ⚡208(1), 277(2)—COUNTIES ⚡39—REGISTERS OF DEEDS ⚡3—SHERIFFS AND CONSTABLES ⚡29—FEES—DUE PROCESS OF LAW—CLASS LEGISLATION.

Acts 1917, c. 47, depriving clerks of courts, sheriffs, registers of deeds, masters in chancery, and county trustees throughout the state of fees, and providing salaries for only a part of them, is unconstitutional, as depriving part of such officers of compensation, contrary to "the law of the land," and as "class legislation" (Const. art. 1, § 8, and article 11, § 8).

5. STATUTES ⚡93(10) — SPECIAL LAWS — CLASSIFICATION OF OFFICERS — COMPENSATION.

Acts 1917, c. 47, classifying certain officers for purposes of compensation according to population of their respective counties, making the minimum of one class and the maximum of the succeeding class the same, violates Const. art. 11, § 8, as allowing one in a certain class to enjoy a greater benefit than others in the same class.

6. CONSTITUTIONAL LAW ⚡61—DELEGATION OF LEGISLATIVE POWER—IMPOSITION OF NON-JUDICIAL DUTIES ON JUDICIARY.

In view of Const. art. 11, § 9, Legislature, in passing Acts 1917, c. 47, did not violate Const. art. 2, §§ 1, 2, relating to delegation of legislative power and imposition of nonjudicial duties upon judiciary, when it delegated to the courts authority to determine the number of deputies of county officers unable to perform all

the duties of the office and the salaries they were to receive.

Error to Criminal Court, Davidson County; J. D. B. De Bow, Judge.

Suit between Litton Hickman, County Judge, and Joe W. Wright, Sheriff. Judgment for the latter, and the former brings error. Affirmed.

W. E. Norwell, Jr., and Pitts & McConico, all of Nashville, for Wright.

Frank M. Thompson, of Chattanooga, T. J. McMorrough, of Nashville, and R. Lee Bartels, of Memphis, for Hickman.

McKINNEY, J. This suit involves the constitutionality of chapter 47 of the Acts of 1917, known as the "anti-fee bill."

The lower court held the act to be unconstitutional, and the case has been brought to this court by appeal.

The caption and the first two sections of the act are as follows:

"An act to be entitled, 'An act fixing the salaries of certain county officials in the state, to wit: The several clerks and masters of the chancery courts, clerks of the various county and probate, circuit, criminal and special courts, county trustee, register of deeds and sheriffs; to provide for the disposition of the fees of their offices; to fix the salaries of said offices and to provide for the payment thereof; to provide for the appointment and removal of deputies and assistants of said officers and to prescribe the manner of fixing their salaries and the payment thereof, and to provide for the payment of the expenses of the offices, and to provide punishment for the violation of certain provisions of this act, and otherwise regulate the rights, duties and liabilities of the said officers, and to provide for a system of auditing for said offices.'

"Section 1. Be it enacted by the General Assembly of the state of Tennessee, that the clerks and masters of the various chancery courts, the clerks of the various circuit, county and probate, criminal and special courts, county trustees, registers of deeds, and sheriffs throughout the state shall be deprived of all their fees, commissions, emoluments and perquisites that shall hereafter accrue, or be received by virtue of their respective offices; and they shall be compensated for their services by salaries alone as hereinafter provided, the same to be payable as hereinafter provided, which salaries shall be in lieu of all other compensations, provided that nothing in this act shall be construed to apply or refer to any fees, commissions, emoluments or perquisites in which said officers shall have a vested right at the time this act goes into effect.

"Sec. 2. Be it further enacted, that for the purposes of determining the salaries to be received by the various officers mentioned in section 1 of this act, the several counties of the state, except counties having a population under 30,000 according to the federal census of 1910, or any subsequent federal census, are hereby divided into classes as follows:

"Counties having a population of not less than 190,000 shall constitute counties of the first class.

"Counties having a population of not more than 190,000, and not less than 140,000, shall constitute counties of the second class.

"Counties having a population of not more than 140,000, and not less than 85,000, shall constitute counties of the third class.

"Counties having a population of not more than 85,000, and not less than 37,500 shall constitute counties of the fourth class.

"Counties having a population of not more than 37,500, and not less than 30,000 shall constitute counties of the fifth class, and provided that the population of the several counties for the purpose of this act, shall be determined by the federal census of 1910 and by each succeeding federal census."

The third section fixes the salaries of the various officials in the five classes of counties enumerated in the second section.

It is admitted that the counties contained in said five classes are as follows: First class, Shelby; second class, Davidson; third class, Hamilton and Knox; fourth class, Gibson, Madison, and Maury; and fifth class, Fayette, Giles, Green, Montgomery, Rutherford and Weakley—making a total of 13 counties, while there are 83 counties that are not classified, and for whose officials no compensation, either as salaries or fees, is provided.

It is insisted by the appellee that the caption and section 1 of the act declare in plain language an intent to deprive the county officials in all counties throughout the state of all fees, emoluments, etc., thereafter received by them, and that all such offices should thereafter be compensated by salaries alone, which would be fixed by the provisions of the act, but that the act failed to carry out this purpose and plan, and overlooked providing such salaries for officials of the counties having a population of less than 30,000.

On the other hand, it is insisted by the plaintiff in error that it was the intention of the Legislature to limit the act to officials in counties having a population of 30,000 or over; that is to say, that the words "throughout the state," contained in section 1 of the act, followed by the words "as hereinafter provided," had reference to those officials "throughout the state" in the counties of 30,000 in population or over as thereafter provided.

[1] The act is not susceptible to this latter construction. The language is plain, unambiguous, and uncontradictory. The caption of the act says:

"An act fixing the salaries of certain county officials in the state, to wit: The several clerks and masters of the chancery courts, clerks of the various county and probate, circuit, criminal and special courts," etc.

There is nothing in the language used to suggest that the deprivation of fees was only applicable to officials in the 13 counties composing the five classes, or that salaries

were to be paid only to such officials within said 13 counties. And the same is true of section 1 of the act, which says:

"That the clerks and masters of the various chancery courts," etc., "throughout the state shall be deprived of all their fees, commissions," etc., "and they shall be compensated for their services by salaries alone as hereinafter provided."

Webster's International Dictionary defines the word "throughout" to mean "from one extremity to the other of; in every part of." The meaning of this part of the act is that all the clerks, trustees, sheriffs, etc., in the entire state, are deprived of their fees, etc.

This construction is strengthened by the fact that section 1 of the acts of 1917 is almost a verbatim copy of section 1 of chapter 124 of the Acts of 1897, known as the "Estes fee bill." In this latter act we know that, in using the identical language as that used in the act under consideration, the Legislature intended to deprive such officials in all of the counties in the state of their fees, etc., for, in a subsequent part of the act, they provided salaries for all such officials, and when the Legislature used this language in the act of 1917, they evidently intended the language used to bear the same construction as was intended by the language used in the act of 1897.

It is apparent, therefore, that the Legislature intended to deprive all state officials, enumerated in the act, of their fees, and to put them on a salary basis; but, for some unexplained reason, they overlooked fixing salaries for such officials in the 83 counties having a population of less than 30,000. Such an oversight is termed in law a "casus omissus."

[2] A pure "casus omissus" occurring in a statute can never be supplied or relieved against by the court under any rule or canon of construction or interpretation. *Lewis' Sutherland, Statutory Construction* (2d Ed.) vol. 2, §§ 605, 606; 11 *Corpus Juris*, p. 31, note 69; 26 *Am. & Eng. Ency. of Law* (2d Ed.) p. 601; *Kelly v. State*, 123 *Tenn.* 516, 132 *S. W.* 193; *State ex rel. Board, etc., of Benton County v. Boice*, 140 *Ind.* 506, 39 *N. E.* 64, 40 *N. E.* 113.

[3] The foregoing conclusion is not in conflict with our liberal rules of construction and interpretation of statutes. The universal rule seems to be that if the actual language and provisions of the statute are plain and clear, and are devoid of contradiction or any affirmative ambiguity, so that the statute, as the result of the express provisions, is not reasonably susceptible of a twofold meaning, then there is no room for applying any other rules or canon of construction to the act. *Lewis' Sutherland, Statutory Construction* (2d Ed.) vol. 2, § 589; 36 *Cyc.* p. 1106; 26 *Am. & Eng. Ency. of Law* (2d Ed.) p. 597; *Miller v. Childress*, 2 *Humph.* 319; *Kirk v.*

State, 1 Cold. 344; State v. Manson, 105 Tenn. 232, 58 S. W. 319; Samuelson v. State, 116 Tenn. 470, 95 S. W. 1012, 115 Am. St. Rep. 805; Darnell v. State, 123 Tenn. 663, 134 S. W. 307; Heiskell v. Lowe, 126 Tenn. 475, 153 S. W. 284; State v. Wheeler, 127 Tenn. 58, 152 S. W. 1037; Palmer v. Express Co., 129 Tenn. 116, 165 S. W. 236.

For the court to arbitrarily and dogmatically say that the intent was to withdraw the fees from county officials only in 13 counties, when the act says such officials "throughout the state" are deprived of their fees, would result in the court making laws rather than construing them.

[4] As a result of this "casus omissus," trustees, clerks, sheriffs, etc., in 83 counties of the state are deprived of their salaries and of all other compensation, in violation of "the law of the land" and the "class legislation" provisions of our state Constitution (article 1, § 8, and article 11, § 8).

[5] It is further insisted that said act violates these several provisions of the Constitution in this: That the minimum of the first class and the maximum of the second class are the same (190,000); the minimum of the second class and the maximum of the third class are the same (140,000); the minimum of the third class and the maximum of the fourth class are the same (85,000); and the minimum of the fourth class and the maximum of the fifth class are the same (37,500). From which it follows that any county that may have a population of exactly 190,000 now or hereafter is or will be in two classes, the first and second, at the same time; that any county that may have a population of exactly 140,000 now or hereafter is or will be in two classes at the same time, etc.

This being true, it is insisted that the official in this situation would have the right to choose the higher salaries of the two classes, when no other county in the lower class would have that right, and thus he would enjoy a greater benefit and receive a larger salary than other officials in the same class. This would be true, and therefore violates said constitutional provisions.

Again, Gibson county one of the three counties of the fourth class, has two chancery courts and two clerks and masters, one at Trenton and one at Humboldt; also two circuit courts and two circuit court clerks, one at Trenton and one at Humboldt. The two courts at Humboldt are special courts created by a special act. Hence their clerical officers are clerk and master and clerk of "special courts," and as such they are deprived of all their fees by the first section of the act under consideration, and by the act they are left in that condition. After the first section, special courts and clerks of special courts are never mentioned again in the act.

It follows, therefore, that the clerk and master of the chancery court and the clerk

of the circuit court at Humboldt are now allowed neither fees nor salaries, and are deprived of all compensation for their official services, while the clerk and master of the chancery court and the clerk of the circuit court at Trenton, by the second and third sections of the act, are allowed annual salaries of \$2,250 and \$2,000. No good reason has been suggested for this distinction, which, we think, renders the act obnoxious to those provisions of the Constitution with which we have been dealing.

It is still further insisted that the act in question, when taken and construed in pari materia with more than 90 statutes of the state applicable to the compensation of county officials in counties of under 30,000 inhabitants, clearly amounts to arbitrary and capricious class legislation.

This insistence is made, as we understand it, upon the theory that the court holds the act was intended to apply to only the 13 counties embraced within the five classes.

Having, however, construed the act to apply to all counties in the state, this insistence is no longer pertinent.

Under these sections of the Constitution it is further insisted that section 5 of the Salary Act of 1917 is arbitrary and capricious, in that it requires excess fees collected by certain county officials in 13 counties to be paid into the state treasury, and the excess fees collected by other county officials to be paid into the county treasury. Section 5 is as follows:

"Sec. 5. Be it further enacted, that all the excess fees, commissions, perquisites and emoluments, no matter whether such sums arise from fees, commissions, perquisites or emoluments by order or by direction of court, or for pay for special services as trustee, receiver or otherwise that are now or may hereafter be receivable, directly or indirectly by virtue of their offices, by the clerks of the circuit, criminal and special courts and the clerks and masters of the chancery courts shall be paid into the state treasury as a part of the state revenue and are hereby declared to be the property of the state; that all such excess fees, commissions, emoluments and charges of the offices of the trustee, sheriff, clerks of the county and probate courts and registers of deeds shall be paid to the county trustee as a part of the county revenue, and the same are hereby declared to be the property of the respective counties wherein the same are collected."

It is insisted that, to the extent that excess fees from any of these county officers in the 13 larger counties are given to the state, for the benefit of all the other 83 counties and the taxpayers thereof, to just that extent the people and taxpayers in the 13 larger counties are having their tax burdens increased for the benefit of the taxpayers in the other 83 counties, who are having their tax burdens correspondingly lightened. This contention seems to be based, also, upon the idea that the act was intend-

ed to apply to only the 13 counties, while we have held that the act was intended to apply to all of the counties of the state. It is unnecessary, therefore, to pass upon this question.

The question as to the reasonableness of such division of the revenues resulting from excess fees between the state, on the one hand, and the county, on the other, where officials in all of the counties of the state are put upon a salary basis, as was done in the Estes fee bill, does not arise in this case, for the reason that the Legislature omitted to put the officials in the other 83 counties on salaries.

[6] It is next insisted that the act is unconstitutional, because it undertakes to delegate legislative power, and also attempts to impose nonjudicial duties upon the judiciary of the state by attempting to saddle upon the judges and chancellors below, and appellate judges on appeal, without any statutory limitation or rule to guide them, the raw political function and duty of fixing the number and salaries of all the deputies of all the county officers in all of the counties to which the act applies, in violation of both section 1 and section 2 of article 2 of our state Constitution.

The act does not provide for any deputies whatever, but by section 6 and section 7 it is provided that, when the officer is unable

to perform the duties of the office by putting in his full time, then he may file a petition before the circuit or criminal judge, or the chancellor, as the case may be, etc., asking for the appointment of a deputy or deputies. To this proceeding the county judge or chairman shall be made a party, and, after hearing the evidence, the court shall determine how many deputies shall be appointed and the salaries they are to receive.

Article 11, § 9, of the Constitution of Tennessee provides that—

“The Legislature shall have the right to vest such powers in the courts of justice, with regard to private and local affairs.”

As to the policy of delegating to the courts the authority to determine the number of deputies and the salaries they are to receive this court has nothing to do; but if the Legislature sees proper to confer this power on the courts, then under the foregoing provision of the Constitution we think it has a right to do so, and that it would not be a wrongful delegation of power, and would not be imposing nonjudicial duties on the courts.

Several other constitutional objections are interposed to the act, which we have carefully considered, and which we think are not well taken. The learned criminal judge was correct in holding the act wholly void, and his judgment is affirmed, with costs.

(133 Ky. 739)

**CECIL'S EX'RS AND TRUSTEES v. EMBRY et al.**

(Court of Appeals of Kentucky. March 28, 1919.)

**1. WILLS §402—WILL CONTEST—COSTS.**

Contestant of will must take the chances of losing his costs and expenses if unsuccessful, and, if successful, can recover costs exactly and only as any other litigant.

**2. WILLS §684(10)—CONTEST—COSTS—"SUPPORT."**

Where testator directed trustees to pay his children annually such sums as trustees deemed necessary for their "support," the children were not entitled, as a part of such support, to an amount to enable them to contest the will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Support.]

**3. WILLS §405—CONTEST BY TESTATOR'S CHILDREN—COSTS—EXCEPTIONAL CIRCUMSTANCES.**

Testator's children were not entitled to an allowance, out of trust fund created by will, for purpose of contesting will upon a showing of exceptional circumstances justifying belief that contest would be successful; such lump sum given contestants, in advance, to contest will being contrary to the letter and spirit of law requiring litigants to take chances on outcome.

**Appeal from Circuit Court, Boyle County.**

Will contest by Margaret C. Embry and others against the Grandville Cecil's Executors and Trustees. Order directing trustees to pay contestants a sum to enable them to prepare for contest, and executors and trustees appeal. Reversed and remanded with directions.

Chas. C. Fox, Henry Jackson, Bagby & Huguey, and C. H. & Nelson D. Rodes, all of Danville, C. D. Minor, of Perryville, L. L. Walker, of Lancaster, and Sam M. Wilson, of Lexington, for appellants.

Edward C. O'Rear, of Frankfort, Franklin & Talbott, of Lexington, J. W. Rawlings, of Danville, and A. S. Moore, of Lexington, for appellees.

CLARKE, J. Granville Cecil died in 1915, leaving a will by which he disposed of an estate worth considerably more than \$200,000, the title to all of which he vested in his brother and another as trustees during the lives of his children and until his youngest grandchild becomes 21 years of age, when the property is to be divided among the descendants of his children. The trustees are charged with the entire management of the estate, and out of the income therefrom are to pay to each of testator's three children "annually or half-yearly such

sum or sums as they [the trustees] deem proper for the support of each."

The three children in this action are contesting the will upon the grounds of mental incapacity and undue influence, a judgment rendered in their favor in the circuit court having been reversed upon appeal to this court in an opinion reported in Cecil's Ex'rs v. Anhler, 176 Ky. 198, 195 S. W. 837, where a copy of the will and a more detailed statement of the facts may be found. After the return of the case to the circuit court, upon motion of the two daughters, their allowances for support were increased to \$4,200 annually, to correspond with the amount allowed by the trustees to the son, from which order there is no appeal, and upon motion of all three of testator's children, the trustees were ordered to pay to them out of the income the sum of \$1,500 to enable them to prepare for the trial of their contest of the will.

[1] That the contestants of a will should be allowed in advance by the trial court a lump sum out of the estate to enable them to make the contest is truly a novel proposition, and we are cited to no authority of any kind in support thereof. Upon the other hand this court, in Carter's Adm'r v. Carter, 12 S. W. 385, 11 Ky. Law Rep. 518, refused to approve such an allowance to an unsuccessful contestant, and in Taylor, etc., v. Minor, etc., 90 Ky. 544, 14 S. W. 544, 12 Ky. Law Rep. 479, denied to a successful contestant expenses other than the costs which ordinarily follow a judgment. From which it appears, as seems only reasonable, that a contestant of a will must take the chances of losing his costs and expenses if unsuccessful, and if successful can recover costs exactly and only as any other litigant. This being true, an allowance in advance, when it cannot be known how the contest will terminate or with any degree of certainty how or for what the money will be expended, certainly cannot be justified upon any theory of "costs" in the ordinary sense.

But, argue learned counsel, if contestants win, the whole estate is theirs, and even if they should lose, under the will and by the same authority as they were allowed \$4,200 each per year out of the income for ordinary necessary living expenses, they are entitled in addition, as a necessary part of the support to which they are entitled, a sum sufficient to enable them to defend what they upon reasonable grounds believe to be their property rights, so that whatever the outcome of this action or in whatever light the situation is viewed, the allowance is justified as a proper exercise of the judicial authority.

[2] Considering the proposition only upon the hypothesis that contestants may be unsuccessful, and, not denying the possible

soundness, as a general rule, that the chancellor, but hardly the court trying a common-law action, might, under many circumstances upon proper application, require trustees to pay to those entitled to support out of the trust funds, as part of a reasonable support, a sum needed to assert or defend property rights, or what reasonably seemed to be such, we are nevertheless firmly convinced such a principle would be wholly inapplicable where, as here, the purpose for which the funds are desired is for an attack upon the very existence of the trust itself, under which the allowance is claimed, because, among other reasons, as said in *Carter's Adm'r v. Carter*, supra, "if others than those to whom the testator has confided the control of his estate, or the law has imposed the duty of probating the will, are allowed to contest the validity of last wills and testaments at the expense of the estate, cases would often arise that are now unheard of," and litigation would be wonderfully encouraged.

[3] Although counsel attempt to show exceptional circumstances justifying the allowance here, these circumstances are but their reasons for believing their contest should succeed and afford no better ground for the allowance than could be urged in every will contest by those entitled to make it; and to sustain the contention here would establish a rule that would be applicable either to all such cases or to only such cases as the chancellor in his judgment thought ought to succeed, when the authority for determining this question is lodged with a jury on a common-law trial, either of which consequences would be a perversion of both the letter and spirit of the law that requires all litigants to take their chances on the outcome, and leaves them to their own resources and judgment to finance or refrain from litigation.

Wherefore the judgment is reversed, and the cause remanded, with directions to set aside the order complained of and for proceedings consistent herewith.

(183 Ky. 776)

**HARDY BUGGY CO. v. PADUCAH BANKING CO.**

(Court of Appeals of Kentucky. Feb. 25, 1919.  
Rehearing Denied April 17, 1919.)

**1. PRINCIPAL AND SURETY — 171—PAYMENT BY SURETY—RIGHT TO RECOVER FROM CREDITOR.**

If, after surety has paid debt, recovery is had by creditor from principal, surety may recover from creditor amount obtained from principal, or a proportionate part, if there were several sureties, but creditor is not entitled to overpayment either by sureties or by principal and sureties.

**2. PRINCIPAL AND SURETY — 171—GIVING OF SECURITY — RECOVERY OF SURPLUS ON CONVERSION.**

If security given by surety on conversion into money brings more than amount for which surety is liable, he can recover excess from creditor.

**3. BANKRUPTCY — 421(1) — DISCHARGE — RELEASE OF INDORSER.**

Company which indorsed notes was absolved from liability to indorsee bank by reason of its discharge in bankruptcy.

**4. PRINCIPAL AND SURETY — 171 — RIGHT OF INDORSER AGAINST INDORSEE.**

Company which sold and indorsed notes to bank was not entitled to recover from bank any part of sum which bank collected from makers of several notes after indorser company's bankruptcy; latter's right, if any it had, being to recoup amount it paid upon several notes which brought total amount paid upon them above amount due bank, if it did so do.

**5. PRINCIPAL AND SURETY — 171 — RIGHT OF INDORSER—AGREEMENT WITH INDORSEE.**

When company indorsed notes to bank, and went into bankruptcy, making a 20 per cent. composition, and agreed with bank that latter was to be fully reimbursed on account of indorser company's entire liability before bank was to pay company any excess realized from makers of notes, company was bound by its agreement, and is not entitled to be recouped against bank until latter has been fully indemnified.

Appeal from Circuit Court, McCracken County.

Action by the Hardy Buggy Company against the Paducah Banking Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Bradshaw & McDonald, of Paducah, for appellant.

Wheeler & Hughes, of Paducah, for appellee.

**SAMPSON, J.** The Hardy Buggy Company, a domestic corporation, was engaged in manufacturing vehicles in Paducah in 1914 and 1915. In selling its products it received, in many instances, negotiable paper from its customers, which it in turn indorsed and discounted with the Paducah Banking Company. All the notes were not discounted at one time, but only as the buggy company required funds to meet its pay roll or other emergencies, and the notes were sold and delivered to the bank from time to time over a period of many months. In March, 1915, the buggy company went into bankruptcy. Shortly thereafter it entered into a composition with its creditors upon a 20 per cent. basis, and on July 6, 1915, the 20 per cent. was duly distributed to all the creditors, including the Paducah Banking Company, to which the buggy company was

liable upon its indorsement, and upon one or more individual notes, for approximately \$5,000. At the time of the making of the composition and the payment of the 20 per cent. to the banking company, it was agreed between the bank and the buggy company that, in the event the bank should succeed in collecting the full face of the several notes which it had purchased from the buggy company, and which the buggy company had indorsed to it, or any amount greater than the total sum for which the buggy company was liable to the bank, the excess over and above said amount, the 20 per cent. included, was to be returned to the buggy company by the bank. Shortly after the composition, and in due course, the buggy company was discharged in bankruptcy, and therefore relieved of liability to the bank upon its indorsements of the several notes which it had discounted at that institution. From time to time the bank collected in full some of the notes discounted to it by the Buggy Company and payments upon other notes, until finally the amount collected by the bank, added to the 20 per cent. which the buggy company had paid it, exceeded the total liability of the buggy company to the bank, after paying all costs and expenses which the bank had undergone, and left a surplus to the credit of the buggy company. Thereupon the buggy company instituted this action against the bank to recover \$834.57, which it alleged was the total of the excess collected by the bank on the indebtedness of the buggy company to it.

By its answer the bank admitted that it had collected enough money on the several notes indorsed to it by the buggy company, plus the 20 per cent. paid by the trustee in bankruptcy, to extinguish the total liability of the buggy company to it, and leave a balance of \$76.04 to the credit of the buggy company after the payment of all costs and other expenses, and tendered said amount to the buggy company. The buggy company, however, refused to accept the \$76.04 in satisfaction of its claim, but insisted that it was in the same position as any other indorser, who pays part of a note, and the holder subsequently collects the full amount of the note from the maker, and therefore the holder must refund to the indorser (the buggy company) the amount paid by the indorser. It is the further contention of the buggy company that the several notes discounted at the bank were separate and distinct transactions and independent contracts, to be adjusted independently of each other, and that when the bank collected the note of A. in full, indorsed to it on March 1, 1915, the buggy company was entitled to a refund of 20 per cent. paid by it in the composition, because the bank had received upon that particular transaction 120 per cent.; whereas, it was entitled to receive only 100 per cent. and this notwithstanding the note

of B., discounted on March 5, 1915, had not been paid by the maker, and the bank had only received the 20 per cent. In support of this contention the buggy company argues that it was not liable to the bank upon any indorsement because of its discharge in bankruptcy, and therefore, since it was not liable on the indorsement of the note of B., which was not paid, the bank had no right to take the surplus amount paid on the note of A., and apply it to the extinguishment of the note of B., whereon the buggy company was originally liable as an indorser, but which liability had been extinguished by the discharge in bankruptcy.

[1,2] On the other hand, the bank contends that the discounting of the several notes by the buggy company must be treated as a single contract or transaction in the adjustment of these matters, because it proved its claim against the bankrupt buggy company as one sum, \$5,125.55, and that in making the composition it entered into a specific agreement with the buggy company whereby it was to have and receive the full amount of its indebtedness from the several notes discounted to it, plus the 20 per cent., before it was to be liable to the buggy company for any excess, and that the agreement was not with respect to each separate note, but as to the whole number and amount due. As a rule generally recognized, if, after the surety has paid the debt, a recovery is had by the creditor from the principal, the surety is entitled to recover from the creditor the amount obtained from the principal, and the creditor is not entitled to an overpayment, either by the sureties or by the principal and sureties. If security, given by a surety, having been converted into money, brings more than the amount for which the surety is liable, he can recover the excess. 32 Cyc. p. 236.

"Where the creditor, after payment by one surety of the amount for which the sureties were liable, recovered a dividend from the insolvent principal on the whole amount originally due from the principal, the surety who made the payment is entitled to recover a share of such dividend bearing the same proportion to the whole dividend as the sum paid by the surety bore to the sum proved for by the creditor." Gray v. Seckham, L. R. 7 Ch. 680.

[3-5] While the buggy company is absolved from liability to the bank upon its indorsement of each of the notes by reason of its discharge in bankruptcy, nevertheless it had no interest or property in the notes which it sold and transferred to the bank, and was not entitled to recover from the bank any part of the sum which the bank collected from the makers of the several notes. Its right, if it had any, was to recoup the amount it paid upon the several notes, which brought the total amount paid upon such notes above the amount due the bank, if it did so do. But when it entered

into the agreement with the bank, whereby the bank was to be fully reimbursed on account of the buggy company's entire liability to it before the bank was to pay to the buggy company the excess, it was bound by its agreement, and is not entitled to be recouped until the bank has been fully indemnified. As to the terms of the contract and agreement between the bank and the buggy company, the evidence is conflicting; but the chancellor found the facts against appellant, and there is sufficient evidence to justify the conclusion reached. But for this agreement the buggy company would be entitled to recover of the banking company the excess which the bank has collected upon the several notes, without relation to the deficit on other notes up to the amount of 20 per cent. paid by the buggy company. The chancellor having found the terms of the agreement as contended by appellee bank, and there being sufficient consideration to support it, we perceive no error in the rulings of the court, and the judgment is affirmed.

Judgment affirmed.

(183 Ky. 659)

### BIBB v. DANIELS.

(Court of Appeals of Kentucky. March 21, 1919.)

#### 1. PROPERTY ⚡12—TITLE TO LAND—HOW ACQUIRED.

The only way in which title to land may be acquired is by paper title from the commonwealth or by adverse possession.

#### 2. ADVERSE POSSESSION ⚡44—CONTINUOUS POSSESSION.

To acquire title by adverse possession, possession must not only be actual, but so continued as to furnish a cause of action every day during the whole period prescribed by the statute.

#### 3. ADVERSE POSSESSION ⚡24—EVIDENCE—SUFFICIENCY.

The occasional cutting of timber, or the feeding of hogs on the land, or the planting of a crop now and then, is not sufficient to show adverse possession.

#### 4. ADVERSE POSSESSION ⚡115(1)—QUESTION FOR COURT OR JURY.

While ordinarily the question of adverse possession is for the jury, yet where the facts are admitted, and ordinarily sensible men can draw but one reasonable conclusion, the question becomes one for the court.

#### 5. ADVERSE POSSESSION ⚡24—EVIDENCE—SUFFICIENCY.

That plaintiff and those through whom he claims made only occasional entries on the land for temporary purposes is insufficient to show title by adverse possession.

Appeal from Circuit Court, McClean County.

Suit by J. P. Daniels against Wm. E. Bibb. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

R. W. Slack, of Owensboro, and W. A. Taylor, of Calhoun, for appellant.

L. P. Tanner, of Owensboro, for appellee.

CLAY, C. Alleging that he was the owner and in possession of a certain described tract of land located in McClean county, and that the defendant, William E. Bibb, had entered thereon and cut and removed certain timber therefrom, and destroyed the fencing on the land, plaintiff, J. P. Daniels, brought this suit to recover damages in the sum of \$1,023.30. Defendant denied the title of plaintiff, and pleaded title by adverse possession, and by virtue of a patent issued to him by the commonwealth on March 31, 1914, and prior to the bringing of the action. On motion of plaintiff, the allegation respecting the patent was stricken from the answer. The jury found that plaintiff was the owner of the land in controversy and awarded him damages in the sum of \$75. The defendant appeals.

[1] The only way in which title to land may be acquired is by paper title from the commonwealth, or by adverse possession. *Hel-lard v. Hubbard*, 180 Ky. 304, 169 S. W. 727, Ann. Cas. 1916A, 605. Though plaintiff introduced several deeds, extending back over a period of many years, he did not attempt to prove a paper title from the commonwealth. On the contrary, his case was rested on adverse possession, and this was the only issue submitted to the jury. As bearing on this issue, he introduced a deed from the commissioner, dated January 9, 1907, and conveying a certain tract of land to him, Maurice Everly, and R. E. Stringer; also a deed from R. E. Stringer and E. C. Bryant to him, dated August 10, 1910, together with other deeds not necessary to be set out. On his direct examination he testified that he had been in the actual, adverse, and continuous possession of the land since 1907, but stated on cross-examination that he cut some timber off the land in 1907, that a man by the name of Cobb had raised two gardens and potato patches on it in the years 1910 and 1911, that a man by the name of Miller was then raising a crop on it, and that at certain times he had tenants on the land and a sawmill and machinery. R. E. Stringer testified that he and Allen Bryant bought the land in partnership and took possession of the land. In describing the character of his possession, he said:

"We cut the timber off, and used it whenever we wanted to. Nobody disputed it, and I was



on it every week. I had some hogs back there, and I would go back there and feed them."

[2, 3] The rule is that, to acquire title by adverse possession, the possession must not only be actual, but so continued as to furnish a cause of action every day during the whole period prescribed by the statute. *White v. McNabb*, 140 Ky. 828, 131 S. W. 1021. And the occasional cutting of timber, or the feeding of hogs on the land, or the planting of a crop now and then, is not sufficient to show adverse possession. *Courtney v. Ashcraft*, 105 S. W. 106, 31 Ky. Law Rep. 1334; *Hall v. Blanton*, 77 S. W. 1110, 25 Ky. Law Rep. 1400; *Muse v. Payne*, 144 Ky. 30, 137 S. W. 788; *Kelley v. Bicknell*, 147 Ky. 401, 144 S. W. 88; *Smith v. Chapman*, 160 Ky. 400, 169 S. W. 834.

[4, 5] While, ordinarily, the question of adverse possession is for the jury, yet where the facts are admitted, and ordinarily sensible men can draw but one reasonable conclusion therefrom, the question becomes one for the court. *H. F. Davis & Co. v. Sizemore et al.*, 182 Ky. 680, 207 S. W. 16; *Kentucky Coal Lands Co. v. Wilder*, 165 Ky. 293, 176 S. W. 1155. Here the evidence shows no continuous use or occupancy of the land. It merely shows that plaintiff and those through whom he claims made only occasional entries on the land for temporary purposes, and was not sufficient to establish title by adverse possession. It follows that defendant's motion for a peremptory instruction should have been sustained.

Judgment reversed, and cause remanded for a new trial, consistent with this opinion.

(183 Ky. 628)

# JOHNSON et al. v. BROUGHTON.

(Court of Appeals of Kentucky. March 18, 1919.)

## 1. FRAUDS, STATUTE OF §56(3) — SALE OF STANDING TIMBER—MEMORANDUM BY VENDOR.

Under Ky. St. § 1409, subsec. 13, no contract of sale of standing timber is enforceable, unless it or some memorandum thereof be in writing, signed by the person to be charged; that is, the vendor.

## 2. FRAUDS, STATUTE OF §56(3)—AGREEMENT AS TO STANDING TIMBER.

Agreement to purchase land or standing timber for another and then convey it to the other is within the statute of frauds.

## 3. FRAUDS, STATUTE OF §152(1)—PLEADING.

Defendant may obtain the benefit of the statute of frauds under a general denial of the contract, where plaintiff pleads an oral contract.

## 4. FRAUDS, STATUTE OF §129(12)—SALE OF TIMBER—PART PERFORMANCE.

The purchaser of standing timber under an oral contract is not liable to the vendor thereunder for the price, though he cut and removed the timber; this not being under such contract, but a subsequent contract with another.

## 5. APPEAL AND ERROR §1009(3)—REVIEW—FINDING OF CHANCELLOR.

Finding of chancellor will not be disturbed; the evidence being conflicting, and it being impossible, on a consideration of the whole case, to say with reasonable certainty that he erred in his conclusion.

## 6. LOGS AND LOGGING §3(5) — SALE OF STANDING TIMBER—REDUCTION OF PRICE—CONSIDERATION.

Under a contract supplemental to a contract of sale of standing timber, and reducing the price, *held*, the consideration for the reduction was not the payment of \$500, but the payment of that sum in advance, so that it was to be credited on the purchase price.

## 7. CONTRACTS §237(2) — CONSIDERATION—PAYMENT IN ADVANCE.

Under the rule that the doing of something that one is not legally bound to do is sufficient consideration, payment on purchase price in advance of time that it is due is sufficient consideration for contract reducing the price.

Appeal from Circuit Court, Bell County.

Action by Henry Broughton against B. Johnson & Son. Judgment for plaintiff for part of claim, and defendants appeal; plaintiff prosecuting a cross-appeal. Affirmed on cross-appeal, and on original appeal affirmed in part and reversed in part.

N. J. Weller, of Pineville, and Dishman, Tinsley & Dishman, of Barbourville, for appellants.

James M. Gilbert, of Pineville, for appellee.

CLAY, C. On December 17, 1910, Henry Broughton, by written contract, sold to B. Johnson & Son certain timber at the price of \$3.50 per thousand feet, mill measure. Of the purchase money, \$500 was paid in cash, and Johnson & Son were given five years within which to remove the timber. On December 18, 1911, the parties entered into another contract containing the following provision:

"Witnesseth, that for and in consideration of party of second part making a further advance to party of first part of the sum of (\$500.00) five hundred dollars, party of first part, does hereby agree to accept three dollars (\$3.00) per thousand feet mill measure, instead of three dollars and fifty cents (\$3.50) per thousand feet, as mentioned in contract dated December 17, 1910, and recorded in Bell County Instrument Book No. 1, page 34, December 24, 1910."

In settling with Broughton, Johnson & Son deducted the \$500 paid in advance from the purchase price of the timber. On December 17, 1910, Oliver Smith sold to Henry Broughton certain timber at the price of \$2.50 per thousand feet, and Broughton was given two years within which to remove the timber. This timber was sold to Johnson & Son at the price of \$3 per thousand feet, but was not removed within two years. Thereafter Johnson & Son purchased the timber from Smith himself.

This suit was brought by Broughton against Johnson & Son to recover as follows: (1) The \$500 paid under the supplemental contract of December 18, 1911, on the ground that it was paid solely for a reduction in the price of the timber and should not have been credited on the purchase price; (2) the sum of \$420, the difference between the price that he paid for the Ol Smith timber and the price which defendants agreed to pay; (3) the sum of \$600 damages to the timber, due to sap rot caused by defendants' permitting the timber to lie on the ground for several months before it was manufactured. On final hearing, plaintiff's claim under item 1 was rejected, but he was given judgment for \$400 under item 2, and for \$225 under item 3. From this judgment defendants appeal, and plaintiff prosecutes a cross-appeal.

It is first insisted by the defendants that the chancellor erred in adjudging plaintiff any recovery under item 2. Plaintiff pleaded in substance that subsequent to the execution of the contract of December 17, 1910, there was a verbal agreement entered into between the plaintiff and defendants' agent, by which it was agreed that plaintiff should buy, and he did buy, a boundary of timber from Ol Smith for the defendants, and the defendants and their agent agreed that they would take said timber so purchased from Smith and pay for it under the same terms set out in the contract of December 17, 1910; that pursuant to said verbal agreement he purchased said boundary of timber from Ol Smith and let the defendants have it, and that the defendants manufactured it into lumber; that under the terms of said contract \$2.50 on each thousand was to be paid to Smith, and, by agreement between plaintiff and defendants, plaintiff was to have for his services in purchasing said timber 50 cents per thousand; that the timber so purchased amounted to 840,000 feet; and that plaintiff was entitled to the sum of \$420, no part of which had been paid.

The defendants answered, and denied the making of the aforesaid agreement. Plaintiff testified that C. L. Taggart was the agent of defendants, with authority to purchase timber on their behalf. Taggart requested plaintiff to buy the Ol Smith timber, and drew the contract by which Smith sold the timber to plaintiff. This contract gave

plaintiff two years within which to remove the timber. The defendants proceeded immediately to cut the timber, but none of it was removed within the two years, but plaintiff frequently requested the defendants to remove it within that time. While testifying in rebuttal, plaintiff introduced a letter from Taggart, in which Taggart said:

"In accordance with conversation of yesterday, we will agree to go ahead and work out the timber on the Ol Smith and Britt Slusher tracts, under the same terms, price, and conditions as specified in contract covering your timber; that is, the tract we bought from you on the 17th inst."

It further appears that the two years in which the Ol Smith timber was to be removed expired before its removal, and Smith objected to its removal. Thereupon defendants bought the timber from Ol Smith and subsequently removed it. It is the contention of plaintiff that Johnson & Son owed him 50 cents for each 1,000 feet of lumber which they had the right to remove and did not remove. On the other hand, Johnson & Son contend that the above letter was the only binding contract into which they entered, and since it shows that the purchase of the timber was made on the same terms and conditions as those specified in the contract for the sale of Broughton's other timber, and since the latter contract provided for the removal of the timber within five years, they had the right to remove the timber in question at any time within five years. Of course, if there had been a binding contract for the purchase of the Ol Smith timber, and its resale to the defendants, its terms could not have been changed by the letter.

[1-4] However, under our statute and the rule in force in this state, no contract for the sale of standing timber is enforceable by action unless the contract or some memorandum thereof be in writing, signed by the person to be charged, or his duly authorized agent, and the person to be charged is the vendor. Subsection 13, § 1409, Kentucky Statutes; *Sears v. Ohler*, 144 Ky. 473, 139 S. W. 759; *Murray, City of, v. Crawford*, 138 Ky. 25, 127 S. W. 494, 28 L. R. A. (N. S.) 680; *Burris v. Stepp*, 162 Ky. 269, 172 S. W. 526. It is likewise well settled that an agreement to purchase land or standing timber for another, and then convey it to the promisee, is within the statute of frauds. *Day v. Amburgey*, 147 Ky. 123, 143 S. W. 1033; *Hocker v. Gentry*, 3 Metc. 463; *Raub v. Smith*, 61 Mich. 543, 28 N. W. 676, 1 Am. St. Rep. 619; 20 Cyc. 234. And where the plaintiff pleads an oral contract within the statute, the defendant may obtain the benefit of the statute under a general denial of the contract. *Hocker v. Gentry*, supra. Applying the above principles to the facts of this case, we find that plaintiff agreed to purchase the Ol

Smith timber and convey it to the defendants at an increased price.

This contract was in parol. He did purchase the timber, but never conveyed it to the defendants, or made a written contract to convey it. Plaintiff, being the vendor, was the party to be charged. Under these circumstances, the oral contract with the defendants was not enforceable. Of course, if defendants had cut and removed the timber under the contract, they would have been liable for the purchase price. However, they did not cut and remove the timber under that contract, but under a subsequent contract made with Smith. Under these circumstances, they incurred no liability to plaintiff, and it was error to adjudge any recovery against them.

[5] 2. On the question of damages due to sap rot, defendants contend that the evidence of those who knew shows that the damages allowed were far in excess of those actually sustained, while plaintiff asks that the allowance be increased. In reply to this contention it is sufficient to say that the case is one calling for the application of the rule that where the evidence on a question is conflicting, and upon a consideration of the whole case we cannot say with reasonable certainty that the chancellor erred in his conclusions, his finding will not be disturbed. *Burnett v. Miller*, 174 Ky. 91, 191 S. W. 659.

[6] 3. Plaintiff's chief objection on the cross-appeal is that the chancellor erred in denying him any recovery of the \$500 paid under the supplemental contract. On this question he claims that defendants were losing money on the original contract, and paid him the \$500 solely as a consideration for the reduction of the contract price. It appears, however, that on December 14, 1911, plaintiff wrote the defendants as follows:

"I am writing you in regard to the timber sold your agent about a year or more ago, and they were to go to work as soon as practicable and push same to completion, and it seems to me they ain't doing any good, and I need some money, as I am in the goods business, and I would like for you to press them up. I also offered Mr. May 50 cents off of each 1 M feet, and ain't heard from you. I know I was losing money, but I need ~~some~~ very bad; if this don't suit you, I would like for you to send me about \$500, and take it out of the timber, as I will, \$4,000 or \$5,000 worth."

On December 16, 1911, Johnson & Son sent to plaintiff the following reply:

"We have your favor of Dec. 14th, and have noted contents. In reply beg to say that you have misconstrued part of our contract. You will note, by referring to same, that we have five years in which to remove the timber. It also provides that you shall be paid by mill measure. Under the circumstances, however, we are willing to assist you in any way we can consistently, and we are therefore sending to our Mr. May a supplementary contract, with instructions that, when you sign same, he can pay you \$500 more on this timber. We trust this will be entirely satisfactory, and relieve you financially."

Thereupon the parties executed the supplemental contract of December 18, 1911, providing:

"That for and in consideration of party of second part making a further advance to party of the first part of the sum of \$500, party of first part does hereby agree to accept \$3 per thousand feet mill measure, instead of \$3.50 per thousand feet."

It will thus be seen that the consideration for the reduction in price of the timber was not the payment of \$500, but the payment of that sum in advance, and that this sum was to be credited on the purchase price of the timber.

[7] But it is suggested that, if this construction be given the contract, then the reduction of price was without consideration. The rule that the doing of something that the promisee is not legally bound to do is a sufficient consideration applies to an act done by him before he is legally bound to do it, as, for instance, the payment of a debt or interest before it is due. 6 R. C. L. § 68, p. 657; *Bell v. Pitman*, 143 Ky. 521, 136 S. W. 1026, 35 L. R. A. (N. S.) 820. Here the defendants had five years within which to cut and remove the timber, and until this was done further payments under the contract could not be insisted on. That being true, the \$500 paid under the supplemental contract was not then due. We therefore conclude that the payment of this amount in advance was a sufficient consideration for a reduction of the price of the timber.

On the cross-appeal the judgment is affirmed. On the original appeal, that portion of the judgment awarding damages for sap rot in the sum of \$225 is affirmed, and that portion of the judgment awarding plaintiff \$400 as commissions for the purchase of the Ol Smith timber is reversed, and cause remanded, with directions to enter judgment in conformity with this opinion.

(183 Ky. 685)

**A. R. HUMBLE STAVE & LUMBER CO. v. DUNBAR.**

(Court of Appeals of Kentucky. March 25, 1919.)

**TRESPASS —58—EXCESSIVE DAMAGES.**

In an action for trespass upon land, including removal of timber therefrom and making roads across the land, a verdict for plaintiff for \$1,250 held not so excessive as to warrant setting aside for passion or prejudice, where plaintiff's evidence showed \$1,600 damages, and defendant's \$450.

Appeal from Circuit Court, Russell County.

Action by Surrilda Dunbar, by her father as next friend, against the A. R. Humble Stave & Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lilburn Phelps and J. N. Meadows, both of Jamestown, for appellant.

T. Z. Morrow, of Jamestown, and Edwin P. Morrow, of Somerset, for appellee.

SAMPSON, J. Abner Perkins died testate, a resident of Russell county and the owner and in possession of a tract of about 325 acres of land, of which he willed 150 acres absolutely to his wife, Elizabeth Perkins, and the balance in remainder after the death of the widow to Lou Ettie Fox, who is the mother of appellee, Surrilda Dunbar. About 9 or 10 years before the commencement of this action the lands were divided between the widow and appellee, and a line established, cutting off 150 acres from the north end of the land for the widow, of which she took possession, and the remainder of the land was turned over to the possession of appellee, Dunbar, and her father, with whom she lived. The division line was well marked. Some time after the division of the land, the widow sold her 150 acres to one Sidney Holt, who took possession of it as a home and farm. A short time before the bringing of this action Holt sold the white oak and black oak timber on his tract of land to the appellant Humble Stave & Lumber Company, a partnership of which A. R. Humble is the manager and principal owner. At the time Humble purchased the timber he was shown the division line between the tract willed to the widow and that devised to the mother of appellee, and Humble who happened to have a bucket of paint with him painted the division line, so as to definitely fix it and prevent a trespass by crossing the line in cutting the timber. Some days later Humble obtained the services of John Mitchell, a surveyor, to go on the lands with the avowed purpose of resurveying the tract and establishing a new line. To this appellee, through her father, objected. Mitchell was the same surveyor who had laid off the 150 acres to the

widow in the first instance and established the division line. In running it the last time, however, he marked a line several poles further south than the old line, thus taking into the widow's part some 18 or 20 acres more, and that much from the lands of appellee. This part of the land was covered with very fine timber, and Humble and his employes entered on this strip in controversy, and cut and removed 187 white oak trees and 39 black oak trees, and injured much young growing timber, and made roads over and across it, to the damage of appellee. To recover for these trespasses this action was instituted in the Russell circuit court by Surrilda Dunbar, by her father, as next friend, she being less than 21 years of age, against A. R. Humble Stave & Lumber Company.

On a trial of the facts before a jury, a verdict for \$1,250 for the timber and damages to the land was returned in favor of the appellee Surrilda Dunbar, and, judgment being accordingly entered, the Stave Company appeals.

The trespass is admitted, the second survey made by John Mitchell in which he laid off more land to Humble and Holt is confessedly erroneous, and the answer offers to pay the reasonable value of the timber taken, but denies that the land was injured by the roads made across it, or that the growing timber was injuriously affected by the removal of the other timber. The evidence for the appellee tends to establish the value of the timber and damage to the land at about \$1,600, while that for the appellant, Stave Company, fixes it at about \$450. The instructions of the court were very brief, but we think fairly submit the issues.

As the trespass was admitted, it was only a question of the value of the timber and the extent of the damage to the land. If there was sufficient evidence upon the part of the appellee to warrant the jury in finding for the plaintiff, and the issues were properly submitted to the jury, there is no available ground for complaint, unless the verdict is so excessive as to impress the mind that the verdict was given under the influence of passion or prejudice. This we do not think is true. Appellant admits that the verdict should have been at least \$400 or \$500, but if the timber, as it stood on the land, was of the value at which the witnesses testifying for appellee fixed it, then \$1,250 was none too much, when considered in connection with the damage to the growing timber and the land by reason of the roads.

Apparently from this record appellant willfully went upon the land and took the timber in controversy. In such case quite a different rule prevails from that in cases where the trespasser acts in good faith and with the honest belief that the timber taken is his

property; but we need not consider that question, because there is no cross-appeal.

Appellant insists that the timber was taken from about 9 or 10 acres of land, and that at the rate fixed by the jury the timber on the farm would bring about \$18,000; whereas, the value of the farm, as estimated by appellant, is only about \$5,000. All this may be true, and yet it is not conclusive of the controversy. This particular boundary of timber appears to have been of a superior quality and size. The timber on the balance of the farm may have been very different. The jury heard the facts, and concluded from the evidence that the timber taken by appellant and the damage done by roads, etc., amount to \$1,250, and we find no reason to disagree with the verdict.

Judgment affirmed.

(183 Ky. 688)

# BINGHAM v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 25, 1919.)

## 1. HOMICIDE $\S$ 340(4)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In a homicide case, where accused was convicted of voluntary manslaughter, error in giving an instruction on murder, if any, *held* harmless; it having been disregarded.

## 2. HOMICIDE $\S$ 30(1)—AIDERS AND ABETTERS—DEGREE OF GUILT.

An aider and abettor may be guilty of willful murder, while the principal may be guilty only of manslaughter, if the aider designed and procured the death to be brought about by the principal, although the principal may have acted in sudden heat of passion.

## 3. HOMICIDE $\S$ 305—MURDER—INSTRUCTIONS—AIDERS AND ABETTERS.

In a homicide prosecution against an aider and abettor, an instruction on the law of murder was proper, although the principal had been convicted of manslaughter only, since such conviction would not preclude defendant from having been guilty of murder.

## 4. HOMICIDE $\S$ 255(2), 263—MANSLAUGHTER—EVIDENCE—SUFFICIENCY.

In a prosecution against an aider and abettor of one previously convicted of manslaughter, evidence that defendant and his principal went to the house of deceased, who was their common enemy, to precipitate trouble, *held* to sustain a conviction of voluntary manslaughter, and, there being a conflict in the evidence, a peremptory instruction was properly refused.

## 5. HOMICIDE $\S$ 162—EVIDENCE—ADMISSIBILITY.

In a prosecution for manslaughter against an aider and abettor, who with his principal had designedly gone to deceased's home to precipitate trouble, evidence as to a meeting by agreement between defendant and his principal,

in a certain store immediately before the homicide, as to their actions there and as to what transpired when they reached deceased's home, *held* not inadmissible.

## Appeal from Circuit Court, Pike County.

E. S. Bingham was convicted of voluntary manslaughter, and appeals. Affirmed.

J. J. Moore and W. K. Steele, both of Pikeville, for appellant.

Charles H. Morris, Atty. Gen., and Beverly M. Vincent, Asst. Atty. Gen., for the Commonwealth.

SAMPSON, J. The grand jury of Pike county returned an indictment in February, 1918, accusing Mosco Belcher and E. S. Bingham of the willful murder of Nelson Matney. Shortly thereafter Bingham moved for a severance of trial, which was granted, and the commonwealth elected to try Belcher first. At the spring term, 1918, Belcher was put upon trial, and the jury returned a verdict finding him guilty of manslaughter, and fixing his punishment at confinement in the state penitentiary for 21 years. Judgment was entered thereon, from which Belcher appealed to this court, and that judgment was affirmed. *Belcher v. Commonwealth*, 181 Ky. 518, 205 S. W. 567. At the September term of court appellant, Bingham, was placed upon trial, and the jury returned a verdict finding him guilty of voluntary manslaughter and fixing his punishment at 14 years in the state penitentiary. Motion and grounds for new trial were filed and overruled, judgment entered, and appeal granted to Bingham.

Appellant asks a reversal upon two grounds only: (1) The court erred in its instructions to the jury, in that it submitted to the jury the question of the guilt of appellant of the crime of willful murder, whereas, appellant asserts it had been judicially determined in the *Belcher Case* that the principal, Belcher, was guilty only of voluntary manslaughter, and Bingham, being only an aider and abettor, could not therefore have been guilty of any crime greater than voluntary manslaughter, if anything. (2) The evidence was not sufficient to warrant the court in submitting the case to the jury, and the court should have sustained appellant's motion for a directed verdict in his favor at the conclusion of the evidence.

In the opinion in the *Belcher Case* the facts are admirably set forth, and we will but briefly recite them, so as to enable one to better understand the application of the principles of law which we conceive to control this case.

The homicide occurred on Sunday, December 16, 1917, at the home of the deceased in Pike county. Appellant, Bingham, and the deceased, Matney, were brothers-in-law, but

they had quarreled some years before, and were not friendly at the time of the killing, nor had they been for several years. Belcher had been paying attention to Jane Matney, the 19 year old daughter of the deceased, and Matney objected to this, and had threatened to run Belcher off if he came to his house again. This had been communicated to Belcher by Jane, and Belcher had not been to Matney's house for two months next before the killing. Both Belcher and Bingham were unfriendly to Matney, but Bingham and Belcher were intimate friends. On the afternoon of the Sunday on which Matney came to his death, Bingham and Belcher met by appointment on the road near Slone's store. They claim to have transacted some slight business between them. Thereafter they went to the store operated by Slone, where they met several other persons. The store was open, and they bought four or five bottles of "hot drops," which they mixed with cider and whisky and drank. They became more or less intoxicated, and were dancing in the store. Bingham and Belcher used expressions between themselves, indicating that they had some secret expedition on hand, the exact meaning of the words being unknown to the other persons in the store. Matney lived a short distance down the river from the store, and Bingham and Belcher spoke of their destination as being down the river. About dark Bingham and Belcher and another man left the store and started down the road. After going only a short distance a pistol shot was heard, which came from the three in the road, but appellant, Bingham, claims not to know who fired the shot, although he admits it was fired by one of his companions. The third man returned to the store, but Bingham and Belcher proceeded down the road. They contend that they had started to the home of Belcher to have supper; but when they reached the forks of the road they turned in the direction of the home of Matney, instead of towards Belcher's home. Each knew that he was not welcome at Matney's home, and that Matney did not like them and they did not like him. In approaching the home of Matney they passed the barn where Matney was milking his cow. Without stopping with him, they went immediately to the house; entering the front door, Belcher walked into the kitchen, where his sweetheart, Jane, was cooking supper. Bingham, according to Bert Matney, the 12 year old son of the deceased, stopped in the front room by the dresser, and said to Bert, "Your pa don't want me here, does he?" Very soon after Belcher reached the kitchen and began a conversation with Jane, Nelson Matney walked in and asked Belcher what business he had there, to which Belcher answered, "I have a little," whereupon Matney ordered Belcher to leave the house, and Belcher said he would go out when he got ready. Bingham was in the front room and within hear-

ing of Matney and Belcher at the time. Matney turned and came into the hall to get his shotgun, and Belcher, seeing this, went out at the kitchen door and around the house towards the front gate. About the same time Bingham left the front room, and went towards the front gate, where he met Belcher. Matney came around to the gate with a shotgun in his hands. He and Bingham began to quarrel and to call each other bad names. In the meanwhile Belcher had crossed the road, gaining the elevation beyond, and was some 130 to 150 feet away; while Bingham and Matney were cursing and quarreling, Bingham called Matney "a son of a bitch," whereupon Matney told Bingham not to call him that again, or dared him to call him that again. About this time Belcher fired two shots from a pistol at Matney, who was inside his yard fence. Bingham, who was standing just on the outside of the fence near the gate, continued to quarrel with Matney, and an instant later a third shot was fired by Belcher, which struck Matney's vitals, and he turned towards the house and fell across his gun, dead. Both Bingham and Belcher left the scene immediately, although there was no one there to take care of the dead man except his 19 year old daughter and 12 year old son. The daughter remained with the body while the little boy ran for help. Bingham and Belcher fled into Virginia, where they were afterwards arrested and returned to Kentucky for trial.

One witness testified that only a few days before the killing that Bingham had said that Matney was a hard man to get along with, that he had had a quarrel with him some 4 or 5 years before, and that if he had had a gun at that time he would have killed Matney, and that it was not yet too late. Another witness gave evidence that Bingham had recently attempted to borrow a pistol, and there were several witnesses who gave testimony to the effect that Bingham disliked, if he did not hate, Matney. Bingham had not been to the home of Matney for about 2 years, and then Matney was not at home. According to some of the witnesses they frequently met and passed without speaking. The theory of the commonwealth is that, after Belcher and Bingham met on the afternoon before the killing, they entered into an agreement or conspiracy, either expressly or tacitly, to intimidate and alarm their common enemy, Matney, and, after nerving themselves for the job by drinking a concoction of whisky, cider, and "hot drops," proceeded with the execution of their design.

Appellant's contention is that he was an innocent bystander, wholly unconnected with any plan or conspiracy to injure or bring about the death of Matney, and that he did not anticipate any trouble on his visit to the home of Matney; that the shots by Belcher were fired in sudden heat of passion, without previous design even on Belcher's part, and

that he (Bingham) had no opportunity to prevent Belcher from firing the shots.

(1) Instruction A, given by the court, defines the words "willful," "malice aforethought," "felonious," and "feloniously," as used in the instructions, and there is no objection to the form or substance of the definitions, but only that definitions of "murder" and "malice aforethought" were not relevant to the facts of this case, especially since Belcher, whom appellant asserts was the principal, if not the sole, perpetrator of the crime, had been judicially determined to be guilty only of voluntary manslaughter. Instruction B directed the jury to find the defendant guilty of willful murder, if it believed from the evidence beyond a reasonable doubt that the defendant Belcher willfully and feloniously shot and killed Matney at a time when it was not necessary in order to protect himself or Bingham from death or the infliction of some serious bodily harm, and that Bingham was then and there present and near enough to, and did, unlawfully, willfully, feloniously, and with malice aforethought aid, assist, abet, encourage, advise, counsel, or command Belcher to so shoot and kill Matney. The same instruction told the jury that if it believed from the evidence beyond a reasonable doubt that defendant Belcher shot and killed Matney in sudden heat of passion or sudden affray and without previous malice and that Bingham was present and near enough to, and did, unlawfully, willfully, and feloniously aid, assist, encourage, advise, counsel, or command Belcher to so shoot and kill Matney, the jury should find the defendant Bingham guilty of the crime of voluntary manslaughter, and fix his punishment at confinement in the penitentiary not less than 2 nor more than 21 years.

Appellant insists that, as he is not charged with firing the shot or striking the blow which killed Matney, he could therefore be only an aider and abettor in the crime, if anything, and, as Belcher had previously been tried and found guilty of voluntary manslaughter only, the aider and abettor could not be guilty of a greater crime, and, consequently the instruction directing the jury to find the appellant guilty of murder if it believed certain facts to exist was palpably erroneous.

[1] Had the jury found defendant guilty of murder, there might have been some basis for this contention if the facts had only justified a verdict of voluntary manslaughter, but, since the verdict is only for manslaughter, and not under the instruction on murder, appellant's insistence is without force because the error, if it had been such, was not prejudicial; the jury having disregarded the instruction upon murder.

[2] It is a well-settled principle that an aider and abettor may be guilty of willful murder, while the one who fires the shot or

strikes the blow which takes the life may be guilty only of manslaughter. If Bingham secretly designed to bring about the death of Matney, and in furtherance of his plan induced Belcher to accompany him to the Matney home on the occasion of the homicide, and thus provoked and brought about the difficulty, which he further fomented by remaining at Matney's gate and quarreling and abusing him until Belcher, who had run off some distance, was so encouraged and abetted that he began to fire at Matney, and Matney's death resulted directly from the designing aid and encouragement of Bingham, though Belcher acted in sudden heat of passion, Bingham would be guilty of willful murder, though Belcher was guilty only of voluntary manslaughter. *Parker v. Commonwealth*, 180 Ky. 102, 201 S. W. 475; *Mickey v. Commonwealth*, 9 Bush, 596; *Dorsey v. Commonwealth*, 17 S. W. 183, 13 Ky. Law Rep. 359; *Arnold v. Commonwealth*, 55 S. W. 894, 21 Ky. Law Rep. 1566. This is not a new principle, but was anciently stated as follows:

"If several persons are present at the death of a man, they may be guilty of different degrees of homicide, as one of murder and another of manslaughter; for if there be no malice in the party striking, and malice in the abettor, it will be murder in the latter, though only manslaughter in the former."

[3] We, therefore, conclude that the court properly instructed the jury upon the law of murder.

[4] (2) Equally without merit is the contention of appellant that the evidence does not sustain the verdict of the jury and judgment of the court. Of course, the evidence offered on behalf of appellant does not sustain the verdict, and if the jury had considered it entitled to credibility, no doubt the appellant would not have received so severe a punishment. The evidence for the commonwealth was sufficient to justify the jury in believing beyond a reasonable doubt that Bingham's heart rankled with hatred for Matney, and that he designedly went with his confederate, Belcher, to the home of their common enemy for the purpose of precipitating trouble. The jury was the trier of the facts. It had the right to reject the evidence of appellant and to accept that of the commonwealth as true. Had it accepted the evidence offered by appellant as true, it would have reached a different conclusion, and defendant no doubt would have been acquitted of the charge. There was a conflict in the evidence, and this was correctly submitted to the jury. The trial court therefore properly overruled the motion of appellant for a peremptory instruction.

[5] It is insisted by appellant that all the evidence concerning what took place between appellant and Belcher and other persons at Slone's store immediately before the killing, as well as what was said and done by Bing-

ham at the house of Matney before the difficulty, was incompetent upon this trial, and should have been excluded. No good reason can be advanced for such a ruling. It may be that Belcher escaped the just penalties of the law, but it does not follow that Bingham, who beyond question incited the difficulty and encouraged the firing of the shots, should profit by it. Counsel for appellant insists that he is a victim of circumstances—yes, circumstances which he fathered. The enmity which he bore his brother-in-law found friendly companionship in the hate of Belcher for Matney, and when these hostile spirits were incited and energized by the concoction of whisky, cider, and hot drops, both Belcher and Bingham who, when separate and not incited, secretly nursed their wrath, were emboldened to visit the home of Matney to insult and humiliate him if not to do him bodily harm. Whatever was their mission to the house of Matney, it cannot be doubted that it was unfriendly to him, and, while they may not have planned his death, they did purpose to defy his will, overcome his home discipline, and to humiliate him; and, if while in the execution of this unholy plan Matney was killed, appellant is in no position to complain that the original design was less than murder.

Some slight errors occurred upon the trial by the introduction of incompetent evidence of which appellant complains; but, after carefully examining the record with respect to each of the complaints, we are persuaded that his substantial rights were not prejudiced thereby.

The court is of opinion that the facts fully justify the conclusion of the jury, and, there appearing no error to the prejudice of the rights of appellant, the judgment is affirmed.

Judgment affirmed.

(183 Ky. 662)

#### ADKINS v. ADKINS et al.

(Court of Appeals of Kentucky. March 21, 1919.)

#### 1. INFANTS & 100—DEEDS—AVOIDANCE—AGE—EVIDENCE.

In an action after majority to avoid plaintiff's deed, alleged as made in infancy, the finding of the chancellor that plaintiff had reached majority before making the deed held not against the preponderance of the evidence.

#### 2. INFANTS & 29—DEEDS—AGE—ESTOPPEL.

Where plaintiff, seeking to avoid a deed as having been made before reaching his majority, represented to his defendant brother, who did not know his age, that he had then reached his majority and made such deed, plaintiff was estopped to plead infancy.

#### Appeal from Circuit Court, Pike County.

Suit by Orange Adkins against Whetsel Adkins and others. From judgment dismissing the petition, plaintiff appeals. Affirmed.

W. K. Steele, of Pikeville, for appellant.

Auxier, Harman & Francis, of Pikeville, for appellees Blair and McVay.

J. F. Butler, of Pikeville, for appellees Adkins.

J. S. Cline, of Pikeville, for appellee Benge.

THOMAS, J. The appellant, Orange Adkins, is one of seven heirs of Henry Eliza Adkins, who died intestate, a resident of Pike county, in 1895, according to the allegations of the petition, but according to the testimony he died in April, 1894. At the time of his death he owned a tract of land in that county containing about 65 acres.

On December 31, 1912, plaintiff executed to his brother Whetsel Adkins and wife, Angie Adkins, a deed to a one-seventh undivided interest in that tract which he inherited upon the death of his father. Afterward the mineral rights in the tract were sold by Whetsel Adkins and wife to others, and this suit was filed by plaintiff against his brother and wife and the ones to whom they had sold the minerals, seeking a cancellation of the deed which plaintiff had executed to his brother on March 31, 1912; also a cancellation of the deed to the minerals which his brother and wife had executed, upon the ground that at the time he executed his deed to the brother and wife he was an infant under 21 years of age. In addition, he charged that the deed was procured from him by threats, persuasion, and by his brother overreaching him. He furthermore alleged that the consideration was inadequate.

Answers filed by the defendants put in issue the grounds relied upon in the petition, and in addition pleaded an estoppel against plaintiff's right to the relief which he sought. The case was prepared and submitted, when the court dismissed the petition, and, complaining of that judgment, plaintiff prosecutes this appeal.

[1] It is conceded by all witnesses that plaintiff was born on the 29th of September, either in the year 1891 or 1892. There was no family Bible in which the record of the births of their children was kept by plaintiff's parents, but there was a record made upon a sheet of blank paper, which was preserved by being placed in a book and kept in a trunk. Some years before the execution of the deed in question, that paper, being much worn, was copied by a young lady in the neighborhood at the instance of plaintiff's mother, upon which occasion the origi-



nal record appears to have been destroyed. The young lady who made the copy is dead. Neither side introduced or offered to introduce the copy made by her, nor was there any objection to parol testimony concerning its contents or appearance.

The contract for the conveyance of plaintiff's one-seventh interest in the land was made about a year before the execution of his deed, at which time he was paid five-sevenths of the consideration and agreed to execute a deed when he became 21 years of age. The brother who purchased plaintiff's interest did not know his own age, or that of plaintiff; both of them relying upon the copied record in the possession of their mother. A short while before the deed was made, plaintiff informed his brother, the defendant, that he was then 21 years of age and was prepared to execute the deed, stating that the record in possession of his mother showed him to be of age. He and his brother examined the record, and found it to be true that he was born on the 29th of September, 1891. After that time the deed was executed and the balance of the consideration was paid. Plaintiff does not deny these facts, but now claims that the record had been changed by erasing the figure "2" in the date and substituting therefor the figure "1" so as to make it appear that he was born in the year 1891, when in truth he was born in the year 1892, as he insists the record originally showed.

Plaintiff, the sister, and his brother-in-law testified that according to their belief a change had been made in the copied record. The sister is not positive that such change had been made, but she and her husband intimate that, if it had been made, it was done by plaintiff, in order to facilitate the collection of the balance of the purchase price agreed to be paid for the land. This insinuation is not denied by the plaintiff. On the other hand, plaintiff's mother testified that he was born on September 29, 1891. She further testified that plaintiff was next to the youngest child; that her youngest is plaintiff's sister, Lora, who is 1 year, 11 months, and 20 days younger than plaintiff, making her birthday September 19, 1898; that the daughter Lora was 8 months old at the time of the death of her father.

A witness by the name of Leslie was introduced by defendants, and he testified that he made the coffin in which plaintiff's father was buried; that he made an entry of the date upon which he did that work in a book which he produced, and it showed that it occurred in April, 1894, but the day of the month had become so dim he could scarcely read it, but to the best of his recollection it was the 16th of April.

The facts as testified to by the mother concerning the age of her youngest child at the time of her husband's death, and the

difference between the age of that child and the age of plaintiff, are nowhere disputed by any witness. It is shown by defendant in his testimony that his and plaintiff's father executed a certain deed on October 6, 1893, and that he died in the spring following the execution of that deed, which would make his death occur in the spring of 1894. If the youngest child was 8 months old at that time, and she was 1 year, 11 months, and 20 days younger than plaintiff, it would necessarily follow that the year of plaintiff's birth was 1891; the month and day of the month upon which he was born not being disputed.

Both the mother and defendant deny that any change in the record containing the date of plaintiff's birth was ever made, and defendant says that at the time he accepted the deed and paid the balance of the purchase money he in good faith believed that plaintiff was at that time past 21 years of age, although there is testimony to the effect that he had stated that he did not believe plaintiff was 21 years of age at that time, which statement he denied. In addition, it appears that plaintiff is married; that he voted in general elections before he executed the deed, and otherwise acted in the community as though he were an adult. From the testimony, as we have briefly related it, the chancellor found that plaintiff was 21 years of age at the time he executed the deed in question, and therefore dismissed his petition, which judgment we think finds abundant support from the testimony. To say the least of it, in cases of this kind we are not authorized to reverse the finding of the chancellor, unless it be against the preponderance of the evidence. Even if there were a doubt in our minds as to the truth of the matter, it would be our duty to give weight to the finding of the chancellor, since his presumed acquaintance with the parties and knowledge of their surroundings would better qualify him to weigh the testimony and determine the facts than this court would be from a mere reading of the record.

[2] However, were we of a different opinion as to plaintiff's age at the time he executed the deed which he seeks to cancel, we think the facts are sufficient to estop him from insisting upon the fact of his infancy as a ground for canceling it. This court has uniformly adhered to the rule that the doctrine of estoppel operates against infants the same as against adults; that they are no more privileged to practice fraud upon innocent persons and reap the reward of their misrepresentations than is an adult; and where one deals with them under the bona fide belief that they are 21 years of age, and the infant so represents himself to be, he will be bound by his representations. *County Board of Education v. Hensley*, 147 Ky. 441, 144 S. W. 63, 42 L. R. A. (N. S.) 643; *Ingram*

v. Ison, 80 S. W. 787, 26 Ky. Law Rep. 48; Turner v. Stewart, 149 Ky. 15, 147 S. W. 772; Smith v. Cole, 148 Ky. 188, 146 S. W. 30.

In this case, as we have seen, plaintiff represented himself to be 21 years of age, claiming to have obtained that information from the copy of the record of his birth in the possession of his mother; he went with the defendant to examine that paper, and his representation was found to be true. He had the appearance of being 21 years of age, and had exercised the rights of citizenship allowed only to an adult. Because of such appearances and representations defendant was induced to part with the balance of the consideration agreed to be paid for the land, and plaintiff will not now be allowed, after having spent it and rendered himself unable to return it, to come into a court of equity and cancel his deed, although he was not 21 years of age at the time he executed it.

There is no testimony to support the charge of inadequacy of consideration; nor is there any to establish fraud or misconduct on the part of defendant in procuring the deed; and we conclude that the trial court was correct in dismissing the petition.

Wherefore the judgment is affirmed.

(38 Ky. 742)

#### OYEN v. WILLINGS.

(Court of Appeals of Kentucky. March 28, 1919.)

#### 1. MASTER AND SERVANT ⇨222(3)—ASSUMPTION OF RISK—DIRECTION TO WORK IN PARTICULAR WAY.

Where servant was directed by master or foreman to do particular work in manner in which he was performing it when injured, he did not assume risk, if danger was not so obvious that person of ordinary prudence would have declined to undertake work.

#### 2. MASTER AND SERVANT ⇨218(1)—ASSUMPTION OF RISK—CHOOSING DANGEROUS ALTERNATIVE.

Where servant working with a land dredge, when told by the foreman to get a plank to prop up the bank of the ditch to prevent its caving, chose to step over the moving belt of the dredge with his heavy load, instead of going another safer way, he assumed the risk of injury, and cannot recover therefor.

Appeal from Circuit Court, Daviess County.

Action by Raymond Willings against C. V. Oyen. From a judgment for plaintiff, defendant appeals. Reversed, with directions to grant a new trial.

W. T. Ellis, Floyd J. Laswell, and W. Foster Hayes, all of Owensboro, for appellant. Clements & Clements and Ben D. Ringo, all of Owensboro, for appellee.

THOMAS, J. The appellee and plaintiff below, Raymond Willings, was employed by appellant and defendant below, C. V. Oyen, as a member of the crew operating a dredge boat with which defendant was digging or enlarging a ditch in Daviess county, and while so engaged he sustained injuries to his leg and other parts of his body by which the leg between the knee and ankle was broken in one or two places and plaintiff was thereby rendered more or less a permanent cripple. He brought this suit against defendant seeking to recover damage for his injuries, alleging, in substance, that defendant failed to furnish him a safe place in which to do his work, and that he had been directed by the foreman in charge to do the specific work at which he was engaged when he received his injuries in the way and manner in which he was performing it, which he alleged was dangerous and known by defendant's foreman to be dangerous, but which danger he himself did not know or appreciate.

The answer denied the negligence relied on, and pleaded both contributory negligence and assumed risk, which, being denied, formed the issues, and upon trial the jury under instructions from the court returned a verdict in favor of plaintiff for the sum of \$2,000. Defendant's motion for a new trial having been overruled, he prosecutes this appeal, seeking a reversal of the judgment upon the two grounds that the court erred in overruling defendant's motion for a peremptory instruction in his favor, and, having failed to sustain the motion for the peremptory instruction, the court misinstructed the jury to defendant's prejudice.

It appears from the testimony that defendant was engaged in cleaning out an old ditch, or rather making it deeper. The machinery employed was what is known as a "dry land dredge," being a boat about 18 or 20 feet wide and some 30 or 35 feet long, resting upon axles at either end, which at the time were about 35 feet long with wheels on them; the dredge being astride the old ditch in which the work was being done. On the rear of the dredge was an engine, and near the front end was the machinery to which the derrick was attached, as well as the wire ropes and other appliances which operated it. Between the engine and the derrick machinery, there was a large belt or band running, with its lower ply about 12 inches from the floor of the dredge and its upper one by actual measurement 30 inches from the floor, although according to some of the witnesses who testified merely from observation the upper ply of the belt was something near 27 inches from the floor. The wheels supporting the dredge ran on rails which were laid upon plank at the edges of the banks of the old ditch.

On the morning in question, about 10

o'clock, the bank on the right side of the dredge was threatening to give way, and plaintiff and a fellow workman, whose duty it was to keep the track on that side in repair, were told by the foreman to procure some old plank with which to prop and hold the bank so that it would not give way. According to plaintiff's testimony, the foreman directed him to go on the other side of the ditch for the plank; but, according to the testimony of the foreman and other witnesses introduced by the defendant, no direction was given as to the place where the plank was to be obtained, there being evidence that there were planks suitable for the purpose on either side of the ditch. However this may be, the proof shows that the foreman directed the two to get two pieces of plank, and they went on the other side of the ditch, the plaintiff procuring two pieces, one 7 and the other 8 feet long, each being 2 inches thick, and about 10 inches wide, and started, with them on his shoulder, across the dredge, and undertook to step over the belt in the space between the engine and the machinery at the front end at a point where the top ply was between 27 and 30 inches from the floor. In doing so, with the load he had, his foot slipped, causing him to fall on the belt, it being in rapid motion, and received his injuries. His fellow workman who preceded him also stepped over the belt, but he was carrying only one small piece of plank about 3 feet long, and he got across without sustaining an accident.

Plaintiff had been at work on the dredge for four days. He was reared upon a farm, and had worked in a coal mine and at a sawmill. At the latter place his work was in connection with the saw rig, and this gave him some experience in the operation of machinery, including belts.

[1] It is insisted by plaintiff that the only practical way by which the dredge could be crossed from one side to the other was by stepping over the belt in the manner he did, while defendant's testimony shows that there was a way to cross the dredge at the rear of the engine and also in front of the crane, but to cross at the latter place it was necessary to step over a small wire rope about two feet from the floor and under another one about 6 feet from the floor, neither of which was being operated at the time, since the power from the engine was disconnected with the machinery operating the crane. Under these facts, it is seriously insisted by plaintiff's counsel that the direction from the foreman to procure the plank was tantamount to a specific direction for plaintiff to go on the other side of the ditch and cross over the belt in returning with the plank, and that this case comes within the rule of the cases of *Runians v. Keller & Brady Co.*, 141 Ky. 827, 133 S. W. 960, *L. & N. R. R. Co. v. Adams*, 148 Ky. 513, 147 S. W. 384, *Consoli-*

*dation Coal Co. v. Moore*, 166 Ky. 48, 178 S. W. 1136, *Wasloto & Black Mt. R. R. Co. v. Hall*, 167 Ky. 819, 181 S. W. 629, and many others of like character from this court; it being contended that the servant in obeying specific orders from the master is not chargeable with unrestricted assumed risk in such cases because the presumed superior knowledge of the master as to the safety of the place or the method of doing the work will excuse him if under the circumstances he should undertake it.

The theory upon which the servant is relieved of the defense of assumed risk in the cases referred to, and under the circumstances contended for by plaintiff, is well stated in the *Runians Case*, supra, wherein this court, quoting from *Sherman & Redfield on Negligence*, § 186, said:

"The servant's dependent and inferior position is to be taken into consideration; and if the master gives him positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not *obviously* so dangerous that no man of ordinary prudence would have obeyed."

Again, the court said:

"This court has always made a distinction where the master or, as in the case at bar, the vice principal, is present and gives directions to the servant to proceed with work which he knows to be dangerous. In such cases the master is liable, notwithstanding the fact that the servant is aware of the danger, unless the danger he is subject to in obeying the orders is so obvious that a person of ordinary prudence would not undertake it."

But for that restriction of the defense of assumed risk to apply for the benefit of the servant, two things must concur, viz., the servant must have been directed to do the particular work in the manner in which he was performing it, and the danger to which he is subjected in obeying the orders must not have been so obvious that a person of ordinary prudence would decline to undertake the work. Other cases announcing the same rule are *Hutchison v. Cobankus Mfg. Co.*, 112 S. W. 899, and *C. & O. Ry. Co. v. Shepherd*, 153 Ky. 350, 155 S. W. 735. The cases referred to and relied upon grow out of facts where the danger attendant upon performing the work in the manner directed by the master "is somewhat hazardous or dangerous although not obviously so, or the danger of continuing is not so apparent that a person of ordinary intelligence would not undertake it, and the servant is assured, in substance or effect, by the master who is present, that it is reasonably safe, or that there is no danger, or is directed by him to go on with the work." In such cases the servant is justified in accepting the assurance of the master, and will not be charged with assuming the risk if injury occurs.

As we have heretofore said, it is extremely doubtful whether there is any ground for the claim in this case that plaintiff at the time of his injury was performing his work under the direction of the foreman of the defendant; for it must be remembered that the foreman was not present with the servant while he was performing the work of going after the necessary planks. Neither did the foreman instruct him as to how he should get the plank from one side of the boat to the other, nor did he in any manner indicate to plaintiff that he should overload himself. On the contrary, plaintiff and his companion were told, according to the undisputed evidence, to get only two small planks. Moreover, the testimony preponderates to the effect that plaintiff could have crossed the boat at the rear of the engine, or, with slight inconvenience, could have crossed at the front end of the boat by stepping over the steel rope which was not then in motion, and passing under another in like condition about six feet from the floor. But, however this may be, the rule relieving the servant from the assumption of the risk in such cases, as we have seen, has no application where the danger attendant upon the work is so *obvious* that a person of ordinary prudence would not have undertaken it, although directed to do so by the master. *C. & O. R. R. Co. v. Shepherd*, Adm'r, *supra*; *Toler v. Swan-Day Lumber Co.*, 99 S. W. 625, 30 Ky. Law Rep. 810; *Hutchison v. Cohankus Mfg. Co.*, *supra*; *Kelly v. Barber Asphalt Co.*, 93 Ky. 363, 20 S. W. 271, 14 Ky. Law Rep. 356; *McCormick Harvester Co. v. Liler*, 66 S. W. 761, 23 Ky. Law Rep. 2154; *Davis v. C. & O. R. R. Co.*, 166 Ky. 490, 179 S. W. 422; and *White v. Louisville Gas & Electric Co.*, 166 Ky. 499, 179 S. W. 418.

In the *Toler* Case, the plaintiff was performing his work in the immediate presence and under the direction of defendant's manager and foreman. In that case defendant was engaged in the sawmill business, and a piece of timber caught in one of the saws. The foreman took hold of it and directed plaintiff to open some clamps. Back of the clamps was a circular saw in motion, and in attempting to do his work plaintiff came in contact with the saw and was injured. He testified that he knew of the presence of the saw and that it was running, and that if he came in contact with it he would be injured; but he furthermore said that he was unacquainted with the danger attending the operation of sawmills. The court in denying the liability of the master said:

"The accident was altogether due to appellant's failure to exercise ordinary care for his own safety, and falls well within the line of *Wilson v. Chess & Wymond Co.* [117 Ky. 567, 78 S. W. 453], 25 Ky. Law Rep. 1655, *Duncan v. Gernert Bros. & Co.* [87 S. W. 762], 27 Ky. Law Rep. 1039, and other like cases, holding that there can be no recovery by a servant for

injuries received from obvious danger, when neither the premises nor the machinery is unsafe nor out of repair."

In the *Hutchison* Case, plaintiff sustained his injuries by his hand coming in contact with a cylinder studded with sharp teeth. It was right in front of him, and he knew the liability of getting hurt if he came in contact with it. This court said:

"Besides, it is not sufficient for a party seeking damages merely to state that he is inexperienced, or that he did not know of the danger. There are some things which a man of maturity must know. He must understand and appreciate the everyday laws of nature. He must know, unless he be shown to be of weak mind, that fire will burn, boiling water will scald, that a knife will cut, and that a revolving cylinder, with sharp teeth, will injure the hand if it is permitted to come in contact with it."

The court then refers to and quotes from the cases of *Wilson v. Chess & Wymond Co.*, and *Kelly v. Barber Asphalt Co.*, *supra*.

In the last-named case, plaintiff was injured by his shirt being caught in a revolving shaft over which he was required to bend in drawing buckets through an opening, and the court said:

"It was revolving right before his eyes, which he was bound to see, and did see, while he was performing his duty. \* \* \* It also conclusively appears that the only prudence that was necessary to be exercised in reference to this piece of machinery was to keep off of it, and that the common instincts of safety should have suggested to him to do that; and the exercise of ordinary prudence would have enabled him to do that."

In the *White* Case, plaintiff sustained his injuries while removing a wooden horse from near the edge of a newly dug trench by stepping so close to the edge of the trench that the embankment gave way, causing him to fall in it. A demurrer was sustained to the petition, and on appeal this court, in affirming the judgment, said:

"There is nothing in the petition to indicate that there was any hidden or unseen danger at the point where appellant alleges he fell into the ditch; on the contrary, it is apparent from the petition that the situation there was open and obvious, and whatever danger there was could have been seen and appreciated by any person of ordinary intelligence."

Further along in the opinion, the court with approval, takes this excerpt from the case of *Wilson v. Chess & Wymond Co.*, *supra*:

"As said by this court in the case of *Wilson v. Chess & Wymond Co.*, 117 Ky. 567 [78 S. W. 453, 27 Ky. Law Rep. 1039]: 'The lowest order of intelligence of a rational man would have comprehended that boiling water would scald the flesh if it came in contact with it, and that ice was slippery. The conditions were openly visible to the laborer. He had only to use his eyes and his most common experience and his earliest

instincts to fully appreciate the danger of his position."

[2] It is true that in the Wilson Case the foreman was not present and directing how the work should be done. But if he had been, under the rule of the cases referred to, if the danger was so obvious that a person of ordinary prudence would have seen and appreciated it, the servant would have assumed the risk by continuing in the work. The dangerous nature of the circular saw in the Toler Case, the shaft in the Kelly Case, and the newly dug ditch in the White Case, was no more obviously so than the rapidly moving belt in this case. Nor was the method of performing the work in either of those cases any more dangerous than the attempt of plaintiff in this case to cross the moving belt with a heavy load of lumber. Suppose that, instead of the object attempted to be crossed being a smooth belt, it had been a band saw; the danger in that case would have been different only in degree and not in kind. The servant would have been no more likely to come in contact with the saw in attempting to step over it than he would to come in contact with the belt in undertaking the same task. In the one case his injuries might have been more severe, but none the more certain.

The case of *L. & N. R. R. Co. v. Adams*, supra, does not announce a different doctrine. In that case it is said that the master will be excused if, "under all the facts and circumstances, the servant knows and realizes the danger, and with this knowledge and realization voluntarily assumes it."

The plaintiff in this case ran no risk of being discharged if he did not attempt to cross the belt with his load. He could easily have brought the plank to the belt and passed it over to his companion on the other side, admitting that there was no other way by which the lumber could be transferred from one side of the boat to the other. But even if he had to choose between losing his job and incurring the hazard of almost certain injury, it was his duty to decline the undertaking and accept the consequences. Masters are not the insurers of the safety of their servants. They have a right to rely upon the principle of self-preservation actuating the servant in the performance of his work, and when the servant disregards that principle and blindly engages in an undertaking which is patent, obvious, and dangerous, he cannot excuse himself upon the ground that the master alone is to blame. All machinery in operation is more or less dangerous if one comes in contact with it, and when the danger is active, as is true with machinery in operation, and is patent and reasonably certain, the common instincts of personal security should warn even the ordinarily intelligent to desist from an undertaking which

would bring him in such dangerous contact. We think this case comes within the principle of the cases to which we have referred, and that the motion made by defendant for a peremptory instruction in his favor should have been sustained.

Wherefore the judgment is reversed, with directions to grant a new trial, and for proceedings consistent herewith.

(183 Ky. 815)

**BATES & ROGERS CONST. CO. et al. v. ALLEN.**

(Court of Appeals of Kentucky. March 28, 1919.)

**1. MASTER AND SERVANT §417(7) — WORKMEN'S COMPENSATION — REVIEW — FINDINGS OF BOARD.**

Findings of Workmen's Compensation Board upon disputed facts are not reviewable.

**2. MASTER AND SERVANT §417(3½) — WORKMEN'S COMPENSATION — FINDINGS OF BOARD — REVIEW.**

Finding of Workmen's Compensation Board upon undisputed facts is a finding of law, although it may be styled a finding of fact, by board, and is reviewable by Court of Appeals.

**3. MASTER AND SERVANT §418(6) — WORKMEN'S COMPENSATION PROCEEDINGS — REVIEW OF QUESTION OF LAW.**

In trial of a common-law case before a jury, where there is no dispute as to the facts, the question for decision is one of law for the court and not for the jury, and the same rule is applicable to compensation cases.

**4. MASTER AND SERVANT §417(3½) — WORKMEN'S COMPENSATION — FINDING OF BOARD — REVIEW.**

In view of Ky. St. Supp. 1918, § 4935, finding of Workmen's Compensation Board as to whether employé is entitled to compensation as a matter of law is reviewable by Court of Appeals.

**5. MASTER AND SERVANT §398 — WORKMEN'S COMPENSATION — NOTICE OF INJURY — NOTICE TO FOREMAN — "AGENT OR REPRESENTATIVE."**

Under Ky. St. Supp. 1918, § 4917, providing that injured employé's failure or delay in giving notice of injury shall not bar proceedings for compensation, if it be shown that employer, or his agent or representative, had knowledge of the injury, the knowledge of a foreman or boss in charge of a crew or gang of men held sufficient; such foreman or boss being an "agent or representative" within the statute.

**6. MASTER AND SERVANT §398 — WORKMEN'S COMPENSATION — NOTICE TO EMPLOYER — "KNOWLEDGE OF THE INJURY."**

Injured employé's statement to foreman that he had been hit in the eye was insufficient to give the foreman "knowledge of the injury," within Ky. St. Supp. 1918, § 4917, providing

that failure or delay in giving employer notice shall not bar injured employe's right to compensation, if it be shown that employer had knowledge of the injury.

**7. MASTER AND SERVANT §398—WORKMEN'S COMPENSATION—NOTICE OF INJURY—"NATURE AND EXTENT OF THE INJURY SUSTAINED."**

Notice to employer of "nature and extent of the injury sustained," under Ky. St. Supp. 1918, §§ 4914, 4915, need not give a full or exact description of the injury, in view of section 4917; notice giving employer such knowledge as will enable him to provide the necessary medical or other attention that the nature or extent of the injury demands being sufficient.

**8. MASTER AND SERVANT §398—WORKMEN'S COMPENSATION—NOTICE OF INJURY—ACTUAL NOTICE—KNOWLEDGE OF INJURY.**

Employer's actual knowledge of injury, to excuse, under Ky. St. Supp. 1918, § 4917, the want of notice or delay in giving the notice required by sections 4914, 4915, need be only such knowledge of the injury as to apprise employer of its nature and extent, so that he may protect himself by giving employe the necessary medical attention.

**9. MASTER AND SERVANT §398—WORKMEN'S COMPENSATION—NOTICE OF INJURY.**

Ky. St. Supp. 1918, § 4914, requiring notice to employer of employe's injury "as soon as practicable" after the happening thereof, to entitle employe to compensation, should be given a liberal construction, so as not to deprive meritorious claimant of compensation.

**10. MASTER AND SERVANT §398—WORKMEN'S COMPENSATION—FAILURE TO GIVE NOTICE—EFFECT.**

Under Ky. St. Supp. 1918, §§ 4914, 4915, 4917, compensation will not be denied on ground of failure to give, or delay in giving, employer notice of the injury, where such failure or delay is due to an honest mistake and did not prejudice the employer.

**11. MASTER AND SERVANT §398—WORKMEN'S COMPENSATION—NOTICE—"MISTAKE."**

Failure to give employer timely notice of injury, where caused by addressing notice to "Mayfield," instead of "Maysville," was occasioned by a "mistake," within Ky. St. Supp. 1918, § 4917, providing that delay or failure to give notice, where occasioned by mistake, shall not preclude recovery of compensation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mistake.]

**12. MASTER AND SERVANT §398—WORKMEN'S COMPENSATION—NOTICE.**

Where injury to employe's eye caused impairment of the eyesight at time of accident, and was not aggravated by failure to receive prompt medical attention, employe's failure to give employer notice required by Ky. St. Supp. 1918, § 4914, without delay, was not prejudicial to employer, and does not preclude recovery of compensation, where such delay was due to mistake, under section 4917.

**13. MASTER AND SERVANT §398—WORKMEN'S COMPENSATION—DELAY IN GIVING NOTICE.**

Where claim of injured employe to compensation is meritorious, and employer has not been prejudiced by employe's delay in giving notice of injury, required by Ky. St. Supp. 1918, §§ 4914, 4915, the want of mistake or reasonable cause, to preclude recovery of compensation under section 4917, should be very convincing.

**14. MASTER AND SERVANT §348—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.**

Workmen's Compensation Act, having been primarily intended for the protection and benefit of employes, should not be given such a strict or technical construction as to deprive a meritorious claimant of compensation to which he would have been entitled if he had prosecuted claim with diligence.

**Appeal from Circuit Court, Mason County.**

Proceeding by Henry Allen under Workmen's Compensation Act for compensation for injury, opposed by the Bates & Rogers Construction Company, employer. From judgment of circuit court awarding compensation, on appeal by employe from a finding of the Workmen's Compensation Board denying compensation, the employer and the Workmen's Compensation Board appeal. Judgment of circuit court affirmed.

Fred Forcht, of Louisville, and Stanley Reed, of Maysville, for appellants.

Chas. H. Morris, Atty. Gen., and D. M. Howerton, Asst. Atty. Gen., A. D. Cole, of Maysville, and Lawrence Leopold, of Louisville, for appellee.

CARROLL, C. J. This case, under the Workmen's Compensation Act (Laws 1916, c. 33), is brought here by the employer, Bates & Rogers Construction Company, from the Mason circuit court, to which an appeal was prosecuted from the decision of the Workmen's Compensation Board by the appellee, Henry Allen, who had been denied compensation by the board.

There is no dispute about the facts, which are substantially as follows: Henry Allen was in the employ of the appellant Bates & Rogers Construction Company at lock and dam No. 33 on the Ohio river near Maysville, Ky., during the month of November, 1916. He went from Louisville, Ky., where he obtained the employment through the agency of the state free employment office, to Maysville, and about four days after he commenced work for the construction company received the injury for which he claimed compensation.

He testified before the board on the hearing of his claim that the injury happened in this manner:

"Well, I was tearing up the dinky track, the one the little engine hauls on, hauls the cars, and

working on a kind of trestle; the men would take up the rail and carry it back, and where the angle iron holds them together they wouldn't come apart; there was a big, heavy fellow, called Cobb, and he was hitting on these pieces of iron that held the rail together with a sledge, to loosen them, so I could get them apart, and something flew up and hit me in the eye, and that's the way I got hurt."

Asked as to whom he told about it and what occurred afterwards, he testified as follows:

"A. At that time there was several men knew I got hit in the eye with something. I told the boss I got hit. Q. Who was the boss? A. Little short fellow, they called Tom—wore a straight hat like a cowboy. Q. Do you know what his last name was? A. No, sir; Tom is all I know. I was not there long enough to get acquainted. I was only there a little over a week. Q. Was Tom the man in charge of you? A. Yes, sir. Q. Representing Bates & Rogers Construction Company? A. He was their foreman. Q. How long did you continue to work after you received this blow in the eye? A. Well, I worked—that was in the morning, and I worked out that day, and I worked the next day, and the next morning I left; came back to Louisville. Q. The day after you were hurt, did your eye show any evidence of being hurt? A. Well, it pained me all the time. When it was first hurt, I just thought something was in there, and would work out, and quit hurting right away. I didn't have any idea it would terminate the way it did; but then it would feel all right for a while, and commence hurting again, and kept on, until it got inflamed, so I couldn't sleep. Q. Did you tell the foreman anything about it afterwards? A. Well, the foreman knew about it; knew when I got hurt; knew the last day I worked. Q. How did he know that? A. Well, I told him, when I first got hit, I was hit in the eye with something. Q. After you came to Louisville, what did you do? A. Well, I came home, and after I went and came home I couldn't work, and I went to the City Hospital. Q. How long were you in the hospital? A. I judge about 11 days. I went in on Monday, and came out the following Sunday week. Q. Mr. Allen, what was the condition of your eye before you were struck with whatever substance struck you? A. I had good eyesight. Q. How is your sight in the injured eye since that blow? A. Well, I haven't got any sight at all. I can close this eye and tell light; that's all I can see. I can't see anything. Q. Do you know whether that condition was brought about by this blow in your eye? A. Well, I never had anything the matter with my eye in my life until I got hit with that piece, whatever it was; never had any diseases in my eyes, or anything, or any complaint. Q. Now, after you were released from the hospital, what attempt, if any, did you make to notify Bates & Rogers Construction Company of your injury? A. Well, I wrote them, the best of my memory, about three letters. Q. And when was the first one that you wrote? A. Well, it was before Christmas, and then I wrote one around Christmas, and then I wrote another letter, I think a couple of weeks after Christmas, and it came back. I wrote to the wrong place. I had it

Mayfield, instead of Maysville, and then I went to Bob Lucas, and he wrote a letter, and kept a couple of letters for me. Q. There is an envelope; read how that is addressed. A. Well, that is Mayfield, Ky.; that's the way I wrote. Q. That is a stamped envelope. A. Yes, sir. Q. It has across the face the figure of a hand, 'Returned to the writer unclaimed.' Will you file that as part of your deposition? A. Yes, sir. 'Law Offices Robt. H. Lucas, 316-317 Louisville Trust Building. Louisville, Ky., January 30, 1917. Bates & Rogers Construction Co., Mayfield, Ky.—Gentlemen: I have been employed by Mr. Henry Allen of this city to represent him in a claim against you growing out of an injury which he received while in your employ on lock and dam No. 33 on or about November 1, 1916. While engaged in his work he was struck in the eye with a piece of steel, which caused him to lose the sight of his eye. Dr. Wolfe, in the Atherton Building, this city, has been attending him. Kindly investigate this matter and inform us whether or not we may expect a settlement and oblige. Yours very truly [Signed] Robert H. Lucas.' Q. What time in the morning was it you got hurt? A. Must have been around 10 o'clock, 9 or 10 o'clock. Q. And you continued to work all that day? A. Until 3 that evening. Q. And went to work the next morning? A. Yes, sir; and worked until 3 the next evening. Q. How many doctors did Bates & Rogers Construction Company have at their camp? A. If they had any, I never saw them. Q. Did you ask for a doctor? A. I never heard anybody say anything about any doctor; I never heard of any doctors. Q. Did you ask any of the bosses for a doctor, or for any medicine for your eye? A. No, sir; I asked one fellow where there was a hospital, and he said they had a place at Maysville where they taken men who was sick and hurt. Q. You say there was a man named Tom there, who was your boss? A. Yes, sir; Tom. Q. Did he pay you off? A. I don't know—they called it a job and jump job—you can get your money any time. Q. Did you go to the office to get your pay? A. No, sir; you had to go to the commissary. Q. You did that, did you? A. Yes, sir. Q. Did you say anything to the commissary about getting hurt—about quitting because you were hurt? A. No, sir. Q. Or the man at the office? A. No, sir. Q. Did you tell the man at the commissary, or the man where you got your money, why you were quitting? A. No, sir; never told anybody but the foreman. Q. That is this man 'Tom,' you don't know his last name? A. No, sir; that's all I know him by—Tom. \* \* \* Q. When you read that notice, you knew you were working under the Workmen's Compensation Act? A. I knew I was working under the compensation all the time; I knew that. Q. You say you wrote three letters to Bates & Rogers at Mayfield, Ky.? A. Yes, sir. Q. How did you happen to write it Mayfield, when you knew their plant was located at Maysville? A. I was taking Mayfield for Maysville all the time; that's the way I made the mistake. I thought it was Mayfield, instead of Maysville. Q. What did you say in your letters to the Bates & Rogers Construction Company? A. Well, that has been a long time. I don't know whether I can think exactly, or not, what I wrote now. I don't hardly think I could. Q. Well, about

what you said? A. Well, I know this; I told them I was hurt there by being hit there with something in the eye, and I lost my sight out of one eye, and I know I asked them if they couldn't help me a little. Q. Was that the tenor of what you said in all three of the letters? A. Yes, sir; just about the same. Q. Were these letters returned to you? A. Yes, sir. Q. What became of them? A. Well, in fact, I never paid any mind to them; I couldn't say. Q. When did you first find out that you had made a mistake between Mayfield and Maysville? A. Well, I never found that out until I was talking to Mr. Leopold. Q. Did Mr. Lucas tell you? A. No; Mr. Lucas never did know. Mr. Lucas didn't know; he thought it was the same I did."

John Reed, who was a laborer with Allen, testified as follows:

"Q. Were you up there with Henry Allen, the plaintiff in this case? A. I worked with him there; yes, sir. Q. Were you housed in the same bunkhouse with Henry Allen? A. Yes, sir. Q. Did you have occasion to observe him before the time he complained of an accident? A. Yes. Q. What was the apparent condition of his eye, his left eye, at that time? A. I didn't see anything wrong with it. Q. Was there any evidence of redness or inflammation? A. No. Q. Or being bloodshot or anything? A. No. Q. When was the first time you saw anything the matter with his eye, his left eye? A. Well, it was one evening that, after our shift was out, he complained of his eye, and same night he was up and complained with it. Q. You didn't see the accident? A. No; I didn't see it. Q. Well, now, did this eye apparently give him much or little trouble when you first saw it? A. Well, he complained of it; I couldn't say as to what pain he suffered or what seriousness happened to his eye, but he complained of it; that's all I know. Q. Do you know whether he was able to sleep that night or did he— A. Well, he was up at one time, on one night, there in the shanty we stayed in. I don't know what pain he suffered with his eye. It seemed to be inflamed. Q. Do you remember why he was not sleeping? A. Well, he complained of his eye is what he told me. Q. Said his eye hurt so he was unable to sleep; is that what he said? A. Yes; said his eye hurt."

Dr. C. T. Wolfe, who was a member of the medical staff of the Louisville City Hospital, testified that Allen was admitted to the hospital in the latter part of November on account of an injury to his eye that had the appearance of having been made by a foreign body or a blow; that Allen told him that the injury to his eye was caused by a piece of metal that flew from a sledge or a piece of iron that was being struck with it by a co-laborer; that the eyesight was practically destroyed by the injury. He further testified as follows:

"Q. What was the condition of the eyeball? A. He had a lacerated wound, if I remember rightly, near the outer edge of what we call the cornea—that is the clear part of the eye. The tissues were torn and lacerated, and it

looked as though— I am sure something did strike him in the eye. Q. Did the symptoms you found correspond with the history of the case as given to you? A. Well, the history that he gave me was— Do you want me to tell you what he told me? Q. Yes. A. Told me he was working with metal, and that he or one of his fellow workmen were using a sledge, and in his opinion a piece of the metal flew up, as a result of the blow of the sledge, and struck him in the eye. That's all I asked him; didn't care to know any more about it. Q. What is the present vision of the eye, do you know? A. He has perception to light—reduced merely to telling when the electric light is on. Q. Do you think unquestionably this cataract of this particular man is due to that injury? A. He had a lacerated wound, and in what we call the danger zone, and it was of such character as made me believe that the cataract—formation of the cataract—was directly due to the blow. Q. That is your opinion now? A. That is my opinion; yes, sir."

This was all the evidence heard by the Compensation Board, and it made the following findings of fact:

"(1) The alleged accident to the plaintiff is proven to have occurred on the 18th or 19th of November, 1916, and the first notice of accident and injury which defendant received was mailed March 5, 1917. This notice was not given as soon as practicable and was not a compliance with section 33.

"(2) The plaintiff failed to show the alleged 'Tom' to be an agent or representative of defendant.

"(3) The plaintiff failed to show that 'Tom,' or the defendant, had knowledge of the alleged injury.

"(4) Plaintiff's failure or delay in giving proper notice was not occasioned by mistake or other reasonable cause.

"(5) When plaintiff was alleged to have written his letters was too late under the circumstances to give the notice under the act."

On these findings of fact the board found as a matter of law that Allen was not entitled to compensation and dismissed his claim.

As the case turns on the sufficiency of the notice to the employer of the injury, it will be necessary to refer to pertinent sections of the Workmen's Compensation Law. It is provided in section 4914 of volume 3, Kentucky Statutes, that—

"No proceedings under this act for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and unless a claim for compensation with respect to such injury shall have been made within one year after the date of the accident."

Section 4915 provides that—

"Such notice and such claim shall be in writing, and the notice shall contain the name and address of the employé and shall state in ordinary language the time, place of occurrence, nature and cause of the accident, with names of



witnesses, the nature and extent of the injury sustained and the work or employment in which the employé was at the time engaged."

And in section 4917 it is provided that—

"Such notice shall not be held invalid or insufficient by reason of any inaccuracy in complying with section 4915 hereof unless it be shown that the employer was in fact misled to his injury thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this act if it be shown that the employer, his agent or representative, had knowledge of the injury or that such delay or failure to give notice was occasioned by mistake or other reasonable cause."

In section 4935 provision is made for a review of the findings of the Compensation Board by an appeal to the circuit court, but this power of review is limited to determining whether or not—

"1. The board acted without or in excess of its powers. 2. The order, decision or award was procured by fraud. 3. The order, decision or award is not in conformity to the provisions of this act. 4. If findings of fact are in issue, whether such findings of fact support the order, decision or award."

At the very outset we are met with the contention of counsel for Bates & Rogers Construction Company that the findings of the Workmen's Compensation Board on the questions of fact are supported by sufficient evidence to sustain them, and of course, if this contention is sound, we are not at liberty to go back of the findings of fact made by the board for the purpose of determining their correctness. It would further necessarily follow from this that the ruling of the board that Allen was not entitled to compensation should be sustained, because in its findings of fact the board held that the evidence did not show that "Tom" was the representative of the Bates & Rogers Construction Company, and besides did not have the "knowledge of the injury" required by the statute, and that the delay of Allen in giving the statutory notice was not occasioned by "mistake or other reasonable cause."

[1, 2] We think, however, counsel misconceives the effect of the findings of fact made by the Compensation Board. The rule relied on by counsel as to the effect of the findings of fact by the board only applies when there is a disputed issue of fact, and on the disputed facts the board makes a finding. If there is no issue of fact, or if the facts are undisputed, the question on the facts becomes one of law, and the finding of the board is a finding of law, and not of fact, although it may be styled a finding of fact by the board.

[3] It is a familiar principle in our practice that when, in the trial of a common-law case before a jury, there is no dispute

as to the facts, the question for decision is one of law, to be made by the court, and not by the jury, and we think the same rule should be applied in compensation cases. *Hochspeier v. Industrial Board*, 278 Ill. 523, 116 N. E. 121, L. R. A. 1918F, 227.

[4] The question, therefore, being one of law, and not of fact, we do not find in the Compensation Act anything that precludes us from inquiring into the correctness of a finding of law made by the board. We think the right of the court to review it is authorized by that clause in section 4935 of the statute giving to the court authority to determine whether or not "(3) the order, decision or award is not in conformity to the provisions of this act." If Allen, on the undisputed facts, was entitled to compensation, then the decision of the board was not in conformity with the provisions of the act, and so if the board, where there is no dispute as to the facts, should allow compensation, the court could review its finding of law.

On the record it is conceded that there are only two questions in the case that need to be considered. One is whether the Bates & Rogers Construction Company had knowledge of the injury, and the other, if it did not, whether the failure or delay in giving the notice required by the statute was occasioned by "mistake or other reasonable cause."

The statute in section 4914 provides, as we have seen, that—

"No proceeding under this act for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof."

It further provides in section 4915 that "such claim shall be in writing." And it is contended upon the one side that the notice required by these provisions of the statute was not given, while on the other it is insisted that the rights of Allen were saved by section 4917, providing in part that—

"Want of notice or delay in giving notice shall not be a bar to proceedings under this act if it be shown that the employer, his agent or representative, had knowledge of the injury."

It being conceded that the employer, Bates & Rogers Construction Company, did not have personal knowledge of the injury, the first question we may take up is: Did its agent or representative have knowledge of the injury?

[5] We think the evidence is sufficient to show that "Tom" was, within the meaning of the statute, the agent or representative of the Bates & Rogers Construction Company; there being no contradiction upon this point of the evidence of Allen, who says that "Tom" was the man in charge of him, representing the Bates & Rogers Construction Company as their foreman; and a "fore-

man" or "boss" in charge of a crew or gang of men is an agent or representative of the employer, and his knowledge of the injury has the same effect as if the employer in person had knowledge of it. *Fell's Case*, 226 Mass. 380, 115 N. E. 430; *In re Simmons* (1918) 117 Me. 175, 103 Atl. 68; *Hornbrook-Price Co. v. Stewart* (Ind. App. 1918) 118 N. E. 315; *Joliet Motor Co. v. Industrial Board*, 280 Ill. 148, 117 N. E. 423; *R. F. Conway Co. v. Industrial Board*, 282 Ill. 313, 118 N. E. 705; *State ex rel. v. Pennington County*, 132 Minn. 251, 156 N. W. 278; *In re Bloom*, 222 Mass. 434, 111 N. E. 45; *Pellet v. Industrial Commission*, 162 Wis. 596, 156 N. W. 956, Ann. Cas. 1917D, 884; *Parker Washington Co. v. Industrial Board*, 274 Ill. 498, 113 N. E. 976; *In re Murphy and In re American Mutual Liability Ins. Co.*, 226 Mass. 60, 115 N. E. 40.

[6] But we do not think that "Tom," the foreman, had the "knowledge of the injury" that is required by the statute. According to the evidence of Allen, he merely told the boss, who was present at the time of the accident, that "I got hit." "Well, I told him, when I first got hit, I was hit in the eye with something." Knowledge by the foreman or employer that an accident has happened, or knowledge that an employé has been hit with something as a result of the accident, is not "knowledge of the injury." An employé might meet with an accident, he might get hit with something, and the employer or his agent or representative might have actual knowledge of the fact that an accident had happened, and that an employé got hit with something as a result thereof; but this would not convey to him the knowledge of the injury contemplated by the statute.

[7] The purpose of the statute was that knowledge of the injury by the employer or his agent or representative should dispense with the necessity for giving the written notice required when the employer or his agent or representative did not have personal knowledge of the injury. If the written notice is given, the statute provides that it shall state the "nature and extent of the injury sustained," although this does not mean that the full or exact nature or extent of the injury shall be brought to the knowledge of the employer, his agent or representative, but only that he should have such knowledge of its nature and extent as would enable him to take such steps as might be deemed prudent or advisable to provide the necessary medical or other attention that the nature or extent of the injury seemed to demand. We say this because it is provided in section 4917 that the written notice shall not be held invalid or insufficient by reason of any inaccuracy, unless it be shown that the employer was in fact misled to his injury thereby.

[8] We therefore think that the actual notice that may take the place of a written notice should be sufficient to convey to the employer the same knowledge of the injury that would be required if a written notice was given. Looking at the matter from this standpoint, our opinion is that mere knowledge on the part of the employer that his employé has been hit with something, or that an accident of some kind has happened, is not "knowledge of the injury," within the meaning of the law. An employé might get hit and not sustain any injury, or he might get hit and sustain an injury so trifling as that no medical or other attention would be needed, or he might get hit and receive such an injury as that attention and treatment would be required. The notice is intended for the protection of the employer as well as the benefit of the employé, and it must be of such fullness and sufficiency as to apprise the employer of its nature and extent, so that he may for his own protection, as well as the benefit of the employé, do whatever seems necessary under the circumstances to save himself as well as he can from further loss or cost on account of the injury.

In *Bushnell v. Industrial Board of Illinois*, 276 Ill. 262, 114 N. E. 496, it appears from the opinion that an employé was engaged in tearing up a floor. He was using a pick, one end of which he stuck under the floor, and the floor was raised and torn up by putting his foot on the other end of the pick and giving the handle a pull. In some manner the pick slipped, and he twisted his leg, sustaining an injury. The injury was apparently slight at first. No formal notice of the accident was given. Two conversations with the foreman were relied upon as dispensing with formal notice. On the following day the foreman noticed the employé limping, and asked as to what was the matter. The employé replied that he had hurt his leg in tearing up the floor. Some days later the foreman again noticed that the employé was limping, and again asked him as to what was the trouble. On this occasion the employé stated that he had a "game leg." It was not claimed that in either of the conversations it was intimated that the injury was serious, or that the foreman had any knowledge of the facts or circumstances of such injury, other than that obtained from these conversations, and the court said:

"We think it is both the spirit and intention of the act that the employer shall have notice, either by formal notice or knowledge of such facts and circumstances of the accident, as will apprise him that his employé has sustained injuries of such a character as to entitle him to compensation under the act, and that he may reasonably expect that such claim will be made. \* \* \* The mere fact that Stewart [the injured employé] told the foreman, in response to

the question as to what caused him to limp, that he had wrenched his leg in attempting to tear up the floor, without making any claim for compensation for such injury, or suffering any interruption of his work, was not sufficient notice of the facts and circumstances of the accident to entitle him to compensation under the provisions of section 24 of that act, without the giving of any other notice."

The remaining question is: Did Allen give to his employer notice of the accident and injury within the time and manner required by the statute, or, if not, was his delay or failure to give the notice occasioned by mistake or other reasonable cause?

It will be observed that the statute, in section 4914, provides that "no proceeding under this act for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof," and limits the time in which the notice may be given to one year after the date of the accident; and in section 4915 there is specified what the notice shall contain; and further it is provided in section 4917 that the notice shall not be invalid or insufficient because of a failure to describe, as required by section 4915, the time, place, nature, and cause of the accident, and the nature and extent of the injury, unless it be shown "that the employer was in fact misled to his injury thereby," and further provided that the giving of the notice will be excused if the delay or failure to give it was "occasioned by mistake or other reasonable cause."

Looking, now, to the facts, it is not contended that the letters written by Allen or the letter written by Robert H. Lucas did not sufficiently comply with the statutory requirement as to written notice, but insisted, first, that Allen did not give the notice "as soon as practicable" after the injury; and, second, that his conduct in addressing the letters to Mayfield, Ky., in place of Maysville, Ky., was not "occasioned by mistake or other reasonable cause."

Allen received the injury for which he asked compensation in the latter part of November, 1916, and his first letter informing his employer of the accident and injury was written before Christmas, 1916, the second about Christmas, and the third a few weeks after Christmas, while the letter of Lucas was written on January 30, 1917. Not receiving any answer to either of these letters, because they had been sent to the wrong address, Allen placed the matter in the hands of Mr. Leopold, who gave the Bates & Rogers Construction Company, on March 5, 1917, a sufficient notice, and in June, 1917, the matter was heard and disposed of by the board.

Allen, of course, knew the nature of his injury a few days after it was received, and how it happened, and was fully advised of the extent of it when he left the hospital in

December, and within a few days after leaving the hospital he attempted to give to his employer the notice required by the statute, but in place of sending this notice to Maysville, where his employer was located, he sent it to Mayfield. That Allen did attempt in good faith to give the notice was clearly established by the undisputed facts. Upon failing to receive an answer to his first letter, he sent another, and, not getting an answer to this, wrote yet another, to which he received no answer and then put the matter in the hands of his attorney, Lucas, who also attempted in good faith to give the notice.

[9] The words "as soon as practicable" should be given a liberal construction, so as not to defeat, without just cause, the compensation to which a meritorious claimant is entitled, and when a claimant, acting in good faith, attempts to give the notice very shortly after he learns the nature and extent of his injury, and within the year, he should not be denied compensation, unless it appears that the employer "was in fact misled to his injury" by the failure to receive earlier notice, and there is no fact or circumstance in this record conducing to show that the delay in giving the notice prejudiced in any manner the rights of the Bates & Rogers Construction Company.

Where a notice is not given "as soon as practicable," but the failure to give it "as soon as practicable" is caused by "mistake or other reasonable cause," this excuses the failure to give the notice "as soon as practicable," and therefore, in considering the question whether a notice was given "as soon as practicable," and an excuse is offered for this failure, it becomes important to inquire into the sufficiency of the excuse, so that it may be determined whether or not the failure to give the notice "as soon as practicable" was occasioned by "mistake or other reasonable cause," and also whether the employer was prejudiced by the delay.

[10] Where the employer is not prejudiced by the failure to give the notice at as early a date as it might have been or should have been given, and where the failure to give it sooner was occasioned by an honest mistake on the part of the employé, we do not think a fair consideration of the statute warrants the rejection of the employé's claim for compensation solely on account of the delay in giving notice. It is only important that the employer should have notice of the injury as soon as practicable, in order that he may have opportunity to investigate the cause of the injury, as well as the nature and extent of it, and take such action as he may think advisable to protect his interest; and if it was made to appear that the employer's rights were prejudiced by the failure to give the notice at an earlier date than it was given, it would require stronger evidence to support the excuse for the failure or delay in giving it than should be required when the

delay did not occasion any injury to the employer, or in any manner prejudice his interest.

But in this case there is, as we have said, no suggestion that the employer was prejudiced by the delay in giving the notice, or that the injury to Allen's eye was aggravated by neglect or failure to receive proper medical attention. Dr. Wolfe testifies that the injury to his eye was of such a nature that the impairment of his eyesight was brought about immediately upon its happening.

[11, 12] Under the circumstances of this case we are of the opinion that the delay in giving the notice sooner was caused by mistake within the meaning of the statute, and that a fair construction of the act did not warrant the rejection by the board of Allen's claim for compensation upon the ground of his delay in giving the notice.

[13] The right to defeat it is rested entirely upon the legal ground that notice was not given as required by the statute; and where the claim is meritorious, and the employer has not been prejudiced by the delay, the want of mistake or reasonable cause that would be sufficient to excuse the giving of the notice sooner should be very convincing, to authorize the rejection of the claim.

[14] The law was primarily intended for the protection and benefit of employes, and its beneficent purpose should not be defeated by a strict or technical construction that would deprive the employe of the compensation to which he would clearly be entitled without contest if he had prosecuted his claim with diligence. Illustrative cases on the disposition of the court to support this view are *Donahue v. Sherman's Sons Co.*, 39 R. I. 373, 98 Atl. 109, L. R. A. 1917A, 78, *Schmidt v. O. K. Baking Co.*, 90 Conn. 217, 96 Atl. 983; *Pellett v. Industrial Commission*, 162 Wis. 596, 158 N. W. 956, Ann. Cas. 1917D, 884; *Frankfort General Insurance Co. v. Milwaukee*, 164 Wis. 77, 159 N. W. 581; *Bloom's Case*, 222 Mass. 484, 111 N. E. 45; *Knoll v. Salina*, 98 Kan. 428, 157 Pac. 1167; *A. Breslauer Co. v. Industrial Commission*, 167 Wis. 202, 167 N. W. 256; *Smith v. Solvay Process Co.*, 100 Kan. 40, 163 Pac. 645.

Wherefore the judgment of the circuit court is affirmed.

(183 Ky. 699)

EMPIRE COAL MINING CO. et al. v. EMPIRE COAL CO.

(Court of Appeals of Kentucky. March 28, 1919.)

1. MINES AND MINERALS ¶59—CANCELLATION OF COAL MINE LEASE—SUFFICIENCY OF EVIDENCE.

In lessee company's suit to recover possession of coal mines, under its lease, defense being that lease had been canceled, evidence held to

show no effective cancellation, but at most a conditional cancellation never carried out.

2. ESTOPPEL ¶93(5) — ESTOPPEL IN PAIS AGAINST LESSEE — IMPROVEMENTS UNDER CLAIM OF RIGHT.

A lessee who stands by and sees another purchase land and enter upon it under claim of right, and permits him to make expenditures or improvements under circumstances calling for notice or protest, cannot afterwards assert his own title against such person.

3. ESTOPPEL ¶98(8) — ESTOPPEL IN PAIS AGAINST LESSEE—IMPROVEMENTS BY PURCHASERS—KNOWLEDGE.

Where purchasers of coal mines had actual and constructive knowledge of a subsisting lease to a company, and knew company was asserting its claim prior to time they made improvements, lessee company is not estopped to claim under its lease on any ground it permitted purchasers to make valuable improvements without asserting claim.

4. CORPORATIONS ¶404(1) — AUTHORITY OF VICE PRESIDENT AND MANAGER—DISPOSITION OF ASSETS.

Ordinarily, the vice president and general manager of a corporation is without authority to sell or dispose of all its assets.

5. CORPORATIONS ¶410 — AUTHORITY OF VICE PRESIDENT—SALES—TERMS.

The actual authority of the vice president and general manager of a company leasing coal mines to sell the lease, the company's sole asset, for cash, did not carry with it authority to sell for anything less than cash.

6. PRINCIPAL AND AGENT ¶116(1), 147(2)—SECRET INSTRUCTIONS—INQUIRY AS TO REAL AUTHORITY.

Where agent is acting within scope of apparent authority, secret instructions are not binding on person with whom he deals, but where transaction was not within his apparent authority, persons dealing with him were put on inquiry as to his real authority.

7. CORPORATIONS ¶422(5) — REPRESENTATION BY VICE PRESIDENT—ESTOPPEL.

Company leasing coal mines, lease being its sole asset, held not estopped, as against purchasers of property, to claim under lease because its vice president and general manager, vested with authority to sell lease for cash alone, represented to purchasers of property from others that title was perfect.

Appeal from Circuit Court, Christian County.

Suit by the Empire Coal Company against the Empire Coal Mining Company and others. From the judgment, defendants appeal. Affirmed.

Caldwell & Greer, of Madisonville, Edmunds & Stites and Thos. N. Greer, both of Hopkinsville, and Laffoon & Waddill, of Madisonville, for appellants.

Trimble & Bell and Breathitt, Allensworth & Breathitt, all of Hopkinsville, for appeal.

CLAY, C. The Empire Coal & Coke Company was the owner of 1,200 acres of coal mining lands in Christian county. In March, 1911, it leased the property to the Empire Coal Company for a period of 10 years, and the lease was recorded in the county court clerk's office of Christian county. The Empire Coal Company was a corporation organized by Tom and A. V. Rutland, who were brothers and owned all of the stock except one share. Tom was the president, and A. V.; the vice president and general manager. In July, 1915, C. N. Bryan, who resided in Nashville, Tenn., arranged with the officers of the Empire Coal & Coke Company to purchase the property for \$15,000, to be paid in cash upon delivery of the deed. Bryan arranged with A. V. Rutland to assist him in making the sale of the property, with the understanding that they were to share in the profits. Bryan traded the property to H. Cohen for a stock of furniture in Nashville. At this time Bryan had no title. Subsequently, Cohen, for reasons not necessary to state, refused to consummate the trade, and the sale was abandoned. Thereupon Bryan endeavored to find another purchaser, and with that end in view approached a lawyer by the name of G. Bibb Jacobs. Through Jacobs' efforts, J. D. Hutton, a Tennessee banker, became interested. Jacobs and Hutton then went to Empire to look at the property. They spent the night with A. V. Rutland. After supper, Neal Rutland, a brother of A. V. Rutland, says that he told Hutton and Jacobs that they were operating the mine under a 10-year lease. He is corroborated by Mrs. A. V. Rutland. Hutton denies that this statement was made, but admits that he may be mistaken. Jacobs does not deny that the conversation took place. Thereafter further negotiations took place, between Hutton and Jacobs on the one hand and Bryan on the other, by which Hutton was to purchase a half interest in the property for \$12,500 in cash, or its equivalent, and \$25,000 of the preferred stock of the First Amortization Mortgage & Bond Company, and Jacobs was to purchase the other half. However, Jacobs had an understanding with Bryan, by which he was not to pay his full half of the purchase price. Of this sum, the Empire Coal & Coke Company was to receive \$15,000 in cash, and the Empire Coal Company, the lessee, \$12,500 in cash. Bryan prepared a deed from himself, conveying the property to Hutton and Jacobs. The consideration expressed in the deed was \$5,000 cash and two notes for \$5,000 each, due, respectively, in six and nine months, with a lien on the property to secure their payment, and other valuable considerations. When this deed was prepared,

Bryan was unable to go from Nashville to Shelbyville, the home of Hutton, and sent A. V. Rutland there for the purpose of closing the deal. At the same time, Bryan told Rutland to deliver the deed upon the delivery to him of the following money and securities, a list of which was indorsed on an envelope which Rutland carried with him: Cash in a check, \$5,000; notes, \$10,000; Hutton's preferred stock, \$25,000; Jacobs' common stock, \$17,500—a total of \$57,500. This memorandum was shown to Hutton, and upon the delivery of the deed the items contained in the memorandum were delivered to Rutland. Hutton and Jacobs say that prior to closing the trade they inquired of Rutland as to the condition of the title, and he replied that there was not a flaw in the title. At the same time, Hutton and Jacobs employed A. V. Rutland as their general manager to run the mines, and agreed to pay him a salary of \$300 a month, with house rent and fuel free. A. V. Rutland then returned to Nashville and delivered the consideration to Bryan. Bryan then had no title to the property, but collected the check and discounted the two notes and paid the Empire Coal & Coke Company for the property. Thereupon the Empire Coal & Coke Company executed to Bryan a deed subject to the lease in favor of the Empire Company. The latter deed, together, with the deed from Bryan to Hutton and Jacobs, was taken to Christian county and recorded. Hutton and Jacobs then took charge of the mine, and A. V. Rutland proceeded to manage it until the following April, when he resigned. After taking possession, Hutton and Jacobs spent several thousand dollars in buying new equipment for the mine. After the sale, Bryan wanted to pay Tom Rutland in securities, but the latter refused to receive them. Subsequently Bryan sold some of the Amortization stock and paid to the Empire Company \$3,500, and assigned to it a lien note for \$1,000. Subsequently Hutton and Jacobs organized two corporations, known as the Empire Coal Mining Company and the Empire Coal & Land Company.

This suit was brought by the Empire Coal Company against the Empire Coal Mining Company, the Empire Coal & Land Company, Hutton, Jacobs, and Bryan, for the purpose of recovering possession of the coal mines. Subsequently the case was transferred to the equity side of the docket, and plaintiff amended his petition and asked the recovery of whatever sum might be found due it under its lease, and that it be awarded a lien on the property to secure its payment. On final hearing, the chancellor gave judgment against Bryan for \$8,000. He further held that A. V. Rutland, who owned one-half of the stock of the Empire Coal Company, had so conducted himself that he was estopped from receiving any benefit from

the Empire mines, or any judgment against the defendants, but that Tom Rutland, who owned the other half of the stock, was not estopped, and decreed that the Empire Coal Company was entitled to recover, for the use and benefit of Tom Rutland, the sum of \$4,000, which was adjudged a lien on the property. From this judgment, the defendants appeal.

[1] It is first insisted that the court erred in not holding that the lease, under which the Empire Coal Company claimed, was canceled and annulled, and that the Empire Coal Company was looking to Bryan for whatever part of the purchase money remained unpaid. With this contention we cannot agree. Fairly considered, the evidence shows that the cancellation of the lease was made for the sole purpose of carrying out the sale to Cohen and was not intended to be effective unless that trade was consummated. In making the purchase, Hutton and Jacobs did not know of, or rely upon the cancellation of the lease. Hence, when the sale was abandoned, the condition on which the cancellation was to take effect never occurred. The parties were restored to their former position, and the rights of the Empire Coal Company were in no wise affected.

Nor is there any merit in the contention that the Empire Coal Company had abandoned its rights under the lease, or that the lease was of no value. It had a valid, subsisting lease, and was endeavoring at all times to get the sum of \$12,500 therefor. Hutton and Jacobs were willing to pay at least \$57,500 in cash and securities for the fee to the property. The chief value of the property consisted in the right to mine the coal. That being true, it cannot be said that the lease, which conferred this right, was worthless.

[2, 3] But it is insisted that the Empire Coal Company is estopped from claiming under its lease because it stood by and permitted Hutton and Jacobs to make valuable improvements on the property without asserting its claim. Of course one who stands by and sees another purchase land or enter upon it under a claim of right, and permits such other to make expenditures or improvements under such circumstances as would call for notice or protest, cannot afterwards assert his own title against such person. 10 R. C. L. § 97, p. 782. But a careful consideration of the record convinces us that the facts of this case do not bring it within the foregoing rule. Here, Hutton and Jacobs had both actual and constructive knowledge of the lease, and it is equally clear that they knew that the Empire Coal Company

was asserting its claim prior to the time the improvements were made.

[4-7] Another ground of estoppel relied on is the fact that A. V. Rutland, the vice president and general manager of the Empire Coal Company, represented that the title to the property was perfect. With respect to this contention, our conclusions may be stated as follows: A. V. Rutland went to Shelbyville as the agent or representative of Bryan for the purpose of delivering the deed and receiving the consideration. It is not clear that Jacobs and Hutton then knew that he was the vice president and general manager of the Empire Coal Company, or relied upon his authority to make representations on behalf of that company. But, if we go further and assume that they relied upon his statements because they knew that he was the vice president and general manager of the Empire Coal Company, it remains to determine whether the facts are sufficient to work an estoppel. The leasehold was practically all the property the Empire Coal Company owned. Ordinarily, the vice president and general manager of a corporation is without authority to sell and dispose of all its assets. Hence such an act is not within the apparent scope of his authority. *Elk Valley Coal Co. v. Thompson*, 150 Ky. 614, 150 S. W. 817. The only actual authority A. V. Rutland had was to sell the lease for cash, and this authority did not carry with it authority to sell for anything less than cash. *White Plains Coal Co. v. Teague*, 163 Ky. 110, 173 S. W. 360. Of course, where an agent is acting within the scope of his apparent authority, secret instructions are not binding on the person with whom he deals, but where the transaction, as here, was not within the apparent authority of the agent, Hutton and Jacobs were put on inquiry as to his real authority. 21 R. C. L. § 84, p. 855. Had they pursued this inquiry, they would have learned Rutland's actual instructions, and are therefore bound by them. Having authority to transfer the lease only for cash, and Hutton and Jacobs being charged with knowledge of this limitation, it was certainly not within the power of Rutland to accomplish by indirection what he could not accomplish directly. Under the circumstances, we conclude that it was not within the scope of Rutland's apparent authority, as the vice president and general manager of the Empire Coal Company, to represent that the title to the property covered by the lease was perfect, and thereby estop that company from asserting its claim under the lease.

Judgment affirmed.

(183 Ky. 531)

**TURNER, DAY & WOOLWORTH HANDLE CO. v. ALLEN.**(Court of Appeals of Kentucky. Jan. 28, 1919.  
Rehearing Denied March 11, 1919.)**1. MASTER AND SERVANT ⇨235(7) — ACTION FOR INJURIES—CONTRIBUTORY NEGLIGENCE.**

In action by servant for injuries sustained while operating a lathe turning timber, cut into proper length, called billets, into handles for tools, ground of recovery being negligent furnishing of billet which contained a knot, *held*, that it was plaintiff's duty to inspect billets for knots, and reject such as he thought dangerous to put into the lathe.

**2. MASTER AND SERVANT ⇨206, 217(1), 219 (1)—ORDINARY RISKS AND PERILS—ASSUMPTION.**

A servant assumes all the ordinary and usual risks and perils, which are incident to the employment, and all risks arising from a known or obvious danger in performing the services.

**3. MASTER AND SERVANT ⇨101, 102(2)—NEGLECT OF MASTER—HOW DETERMINED.**

The master is not an insurer of the safety of servant, and negligence as between him and the servant must be measured by the character and danger of the business engaged in.

**4. MASTER AND SERVANT ⇨219(15)—HAZARDOUS EMPLOYMENT—ASSUMPTION OF RISK.**

That the work in which a servant is employed is hazardous does not relieve him of assumption of risks which are obvious and incidental to the work.

**5. MASTER AND SERVANT ⇨217(13) — RISKS INCIDENT TO WORK—ASSUMPTION.**

In action for injuries sustained by plaintiff servant while operating a lathe turning timber, cut into proper length, called billets, into handles for tools, alleged ground of negligence being negligent furnishing of billet which contained a knot, *held*, that risk was one of the incidents of work of operating the lathe and well known to plaintiff, so that he assumed the risk.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by John W. Allen against the Turner, Day & Woolworth Handle Company. Verdict and judgment for plaintiff, motion for new trial overruled, and defendant appeals. Reversed and remanded.

Fred Forcht and Chas. W. Morris, both of Louisville, for appellant.

Elmer C. Underwood, of Louisville, for appellee.

**HURT, J.** The appellee, John W. Allen, was an employé of the appellant, Turner, Day & Woolworth Handle Company, which was a corporation and engaged in the business of making wooden handles for hatchets, hammers, axes, and other tools. The process of making the handles was as follows:

The timber was received by the appellant in logs, and was then cut by a saw into billets, of the proper length and dimensions, for the making of the kind of handles desired, and the sawyer would endeavor to so cut the timber as to not include in a billet any knot or defect in the timber which would obviously render it unfit to be worked into a handle on account of its poor quality. The billets were all thrown together by the persons engaged in the sawing, and, when handles of a certain class were desired, two employés would go through the billets, and select the billets suitable for making the handles of the class desired. These employés were called "graders," and the service performed by them was denominated "grading" the billets. The appellant manufactured several classes of handles, which were distinguished from each other by the quality of the timber out of which each class was made. One or more classes were made out of billets which were free from knots, as well as other defects, while there were other classes of handles which were made out of billets containing knots, and another class was made exclusively of billets which had knots in them. A large open knot rendered the billet a "cull," and unfit for making a handle, on account of the poor quality of the timber, and the graders, as well as the lathe men, were directed to reject them; but the billets containing knots other than open ones were worked into handles. After the billets were graded, they were carried to the lathes to be turned into handles. The lathes had circular saws, about 10 inches in diameter, and clamps for securing the billet for the operation of the saw. The appellee had been in the employment of the appellant for eight years, and five years of that time he had charge of the operation of a lathe, and hence was an experienced man in the operation of a lathe in making handles of all kinds, and was well acquainted with the manner of doing the work of that kind at appellant's establishment, and of all the dangers and risks incident to that character of work. It seems that in the work of operating the lathe the appellee performed all the duties attached to it. He adjusted the billets to the machine, and took the billets from where they were placed for the purpose of being operated upon, and placed them in the machine.

On the 10th day of December, 1915 he claims that, while operating the lathe, he placed in it a hickory billet, about 14 inches in length, and 3 inches in width, and the same in thickness, and there was in the billet a knot, about the size of a dime, which penetrated the wood from one side to the other, about 4 inches from the end of the billet, which was intended to be sawed into the "eye" of the handle. When the saw

came in contact with the knot, the billet was broken at the knot, and the larger portion was thrown out with great force, and struck him upon the side, just above the right hip. He claims that this occurred on Saturday afternoon, and rendered him unable to continue the work further on that evening, and gave him great pain, but that he returned to work on the following Monday, and thereafter continued to work at the lathe, but not all the time, until about the middle of the following April or May, when he was no longer able to do that kind of work, and quit and secured a less onerous character of employment. He never at any time made any report or complaint to the appellant of his injury. He claims that the force of the blow upon his side caused injury to him internally, and resulted in the creation of an abscess within his body at that point, but of which there is no visible evidence. He instituted this action in October, 1916, and upon a trial recovered a verdict and judgment for the sum of \$700. The appellant's motion for a new trial was overruled, and it has appealed, and assigns, as prejudicial errors of the trial court, that it overruled its motion for a directed verdict in its favor at the conclusion of the evidence offered by appellee, and at the conclusion of all the testimony, and misinstructed and refused to properly instruct the jury.

The claim by appellee for damages is asserted upon the grounds that the appellant negligently furnished him a billet, to be turned into a handle, which contained a knot, and the attempt to make a handle from it was dangerous on account of the knot in it, and that appellant knew, or by the exercise of ordinary care should have known, of the dangerous character of the billet, and that he did not know of its unsafe and dangerous character when he placed it in the lathe. The appellant traversed the averments in the petition, and interposed pleas of contributory negligence and assumed risk.

(a) The appellee, after testifying that he had worked for appellant in the operation of a lathe and engaged in turning handles for five years before he received the alleged injury, further testified that he did not see and did not know that the billet which injured him contained a knot, when he placed it in the lathe; that such a knot in a billet rendered it dangerous to be put in the lathe; that when he began to work at a lathe, and to turn handles, the foreman said to him, in substance, that if he saw a knot in a lathe to throw it aside; that, however, he had frequently put billets in the lathe which contained knots, and did so when the knot was not so large in size as the one complained of; that frequently billets, on account of containing knots, were thrown out by the lathe, in the same way the one complained of was thrown out; that this had occurred,

sometimes once a day, and sometimes more often; that on these occasions the billets had struck him on the hands, arms, and other portions of his body, but at the time he suffered the injury was the first time a billet had been thrown out by reason of a knot, and struck him at the point where the one complained of struck him; that oftentimes the knots in the billets did not cause them to fly out of the machine, but they worked through all right, but the knots in other billets would cause them to fly out. He does not testify that the billets, upon which he was working at the time of his injury, were to be turned into the class of handles which were to be free of knots, and in fact declined to make such statement; and he does not testify that it was the duty of the graders to make an inspection of the billets, for the purpose of rejecting those which contained knots, but his testimony shows that the billets with knots in them were turned in the lathe with his knowledge, and that in his work he did so frequently, and had been oftentimes struck by billets, which the knots caused to fly out of the machine.

[1] Hence, considering all of his testimony together, the only conclusion which can be arrived at is that he knew that there was no inspection made of the billets for the purpose of finding and rejecting all of those with knots in them; that the billets contained knots when they were brought to the lathe and placed in it; that the business in which he was engaged was in part to turn billets with knots in them; and that, if a prudent man, he must reasonably expect that the billets, or some of them, would contain knots, and under such circumstances, if the full meaning is given to his statement, that he had been directed, five years before, to reject the billets in which he should see knots, and, considering the statement to be true, it would appear that it was made his duty to inspect the billets for knots, and to reject such as he thought would be dangerous to put in the lathe, as he testifies that he did put into the lathe the billets which contained knots as large as a lead pencil, as he did not regard such knots as dangerous. The other evidence offered by him as to the duties of the graders was not contradictory of the evidence given by himself, and proved that it was not their duty to reject billets on account of the knots in them, unless the knots were so large as to render the billet unfit for the making of a handle of any class, and such as the sawyer should have cut out. The evidence offered by the appellant upon the subject of the graders' duty agrees with that offered by appellee, to the effect that it was the duty of the graders to reject the billets which contained large, open knots, only, and therefore unfit to be made into a handle of any class.



[2] (b) It may be conceded that it is the primary duty of the employer to exercise reasonable care to furnish his servant with a reasonably safe place in which to work, reasonably safe tools, machinery, and appliances with which to do the work, and reasonably sound and safe materials to be worked. This principle is well established, and in regard to its soundness there is now no dispute, but as a part of the law regulating the rights of master and servant is the principle that while a servant, in accepting an employment, does not assume any extraordinary and unusual risks, he does assume all the ordinary and usual risks and perils which are incident to the employment, and all risks of which he has knowledge, which attend such an employment, and any risk incident to the employment, which arises from a known or obvious danger in performing the service.

[3, 4] The master is not an insurer of the safety of the servant, and the negligence, as between him and the servant, must be measured by the character and danger of the business engaged in. The fact that the work in which the servant is employed is hazardous does not relieve him from the assumption of the risks, which are obvious or incidental to the work, as the servant has a right to accept and engage in a hazardous employment, if he desires to do so. *Nicholas v. Abadie*, 124 S. W. 325; *Young v. Norfolk & Western Ry. Co.*, 171 Ky. 517, 188 S. W. 621; *L. & N. R. R. Co. v. Foley*, 94 Ky. 224, 21 S. W. 866, 15 Ky. Law Rep. 17; *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 386, 13 Sup. Ct. 914, 37 L. Ed. 772; *Buey's Adm'r v. Chess & Wymond*, 84 S. W. 563, 27 Ky. Law Rep. 198; *Flaig v. Andrews Steel Co.*, 141 Ky. 391, 132 S. W. 1015; *Goss v. Kentucky Refining Co.*, 137 Ky. 404, 125 S. W. 106; *Wilson v. Chess & Wymond Co.*, 117 Ky. 567, 78 S. W. 453, 25 Ky. Law Rep. 1655; *C. & O. Ry. Co. v. McDowell*, 24 S. W. 607, 16 Ky. Law Rep. 1; *Ky. Freestone Co. v. McGee*, 118 Ky. 306, 80 S. W. 1113, 25 Ky. Law Rep. 221; *Louisville Ry. Co. v. Bocock*, 107 Ky. 223, 51 S. W. 580, 53 S. W. 262, 21 Ky. Law Rep. 383, 896; *Ashland Coal & Iron Co. v. Wallace*, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207, 19 Ky. Law Rep. 849; *Greer v. Louisville Ry. Co.*, 94 Ky. 169, 21 S. W. 649, 14 Ky. Law Rep. 876, 42 Am. St. Rep. 345; *Louisville Ry. Co. v. Milliken*, 51 S. W. 796, 21 Ky. Law Rep. 489; *Ohio Valley Ry. Co. v. McKinley*, 33 S. W. 186, 17 Ky. Law Rep. 1028. Hence the master does not insure the servant against the results of injury, which arises from a danger inherent in the work in which the servant is engaged, and which is known to the servant and obvious to him.

[5] The risk which the appellee in the instant case underwent from a billet with a knot in it being thrown out by the lathe

seems to have been one of the incidents of the work of operating the lathe and well known to the appellee. The turning of handles out of billets containing knots was the business which appellee undertook to perform, as well as the business of turning them out of billets which did not contain knots. Billets were cast out by the machine for various reasons, besides that of having knots in them. The appellee, therefore, failed to show a case which entitled him to submission to the jury, and the court should have sustained the motion for a directed verdict in favor of the appellant.

The judgment is therefore reversed, and cause remanded for proceedings consistent with this opinion.

(183 Ky. 730)

### STEWART v. WISCONSIN STEEL CO.

(Court of Appeals of Kentucky. March 28, 1919.)

#### 1. BENEFICIAL ASSOCIATIONS §18(3)—EMPLOYER'S INDUSTRIAL DEPARTMENT—WRITTEN CLAIM FOR BENEFITS.

Telegrams and letters from mother of deceased employé and her attorney to employer, held not such a demand for settlement as was contemplated by the provisions of the employer's industrial accident department, requiring written claim for benefits within three months after the employé's death.

#### 2. BENEFICIAL ASSOCIATIONS §18(3)—EMPLOYER'S ACCIDENT DEPARTMENT—RULE REQUIRING RELEASE.

Though under rules of Employer's Industrial Accident Department proper written notice of claim for death benefit was given, under rule that no person should receive any benefit without giving release of claims against employer arising out of death, where such release was not given, by amending administrator's petition, until more than 16 months after accident, administrator could not recover the benefit.

#### 3. MASTER AND SERVANT §100(2) — EMPLOYER'S INDUSTRIAL ACCIDENT DEPARTMENT—ACCEPTANCE OF OFFER BY EMPLOYÉ.

Benefits of Employer's Industrial Accident Department were a gratuity on its part, and employer's offer to pay specified death benefits did not become contract until its terms were accepted and complied with by employé, and, after his death, by his personal representative, and, until representative gave company notice of acceptance or election to take under department, he was privileged to prosecute suit for damages against employer.

#### 4. BENEFICIAL ASSOCIATIONS §18(2)—BENEFITS—RIGHT TO RECOVER—INJURY WHILE DISOBEYING RULE.

Administrator of deceased servant who was not injured in performance of his duties, but while disobeying a rule enacted for his safety, and that of co-workers, held not entitled to re-

cover death benefit from Employer's Industrial Accident Department.

**5. BENEFICIAL ASSOCIATIONS §18(2)—BENEFITS—COMPLIANCE WITH CONDITIONS.**

When employer voluntarily offered its employé benefits of Employer's Industrial Accident Department paying death benefits, it was privileged to attach such conditions as it desired, and there was no binding contract between employé and employer until requirements of plan had been complied with.

Appeal from Circuit Court, Harlan County.

Action by Zeb A. Stewart, administrator of William Blanks, deceased, against the Wisconsin Steel Company. From judgment for defendant, plaintiff appeals. Affirmed.

Zeb A. Stewart, of Harlan, for appellant.  
Sampson & Sampson, of Middlesboro, for appellee.

QUIN, J. William Blanks, a boy about 17 years of age, was employed December 1, 1915, by appellee to work in its mines at Benham, Ky.; on the 6th of December, after he had quit work for the evening and had started towards the outside of the mine, he was killed by an explosion; he was found, in an unconscious condition, with his body across the track; he was placed upon a stretcher, but expired in a few minutes, and before reaching the outside of the mine.

The appellee company maintained what is called an "Industrial Accident Department," which appears to be a plan or system adopted to provide compensation for its injured employés. This was before the passage of the Workmen's Compensation Act, approved March 23, 1916 (Acts 1916, c. 33).

In the present suit the appellant, as administrator of the estate of William Blanks, is not seeking damages on account of the negligence of the appellee, but is seeking to recover the amount claimed to be due decedent's estate under the terms and conditions of the Industrial Accident Department, which for brevity will be hereafter referred to as the I. A. D.

After sustaining a demurrer to the petition as amended, a second amendment was filed, and in the issues thus joined a trial was had, and at the conclusion of appellant's evidence there was a directed verdict for the company, from which judgment an appeal has been prosecuted. Appellant contends his decedent was entitled to the benefits of the I. A. D. as a part of his contract of employment; the contention of appellee being that under the plan of the I. A. D. no premiums or other payments were made by the employés, and it was optional with them whether they would take the benefits of the plan or elect to prosecute their claims for damages, and no benefits accrued to any employé until after disability, nor, in the event of death, to their

estate until the disabled employé or his executor or administrator filed a written election to accept the benefits of the I. A. D., and waive any and all right or claim to damages. To the better understanding of the questions involved we will advert to such of the provisions of the I. A. D. as appear to be pertinent to this appeal.

Section 1 thus defines membership:

"Employés of the above-named companies, who are employed in the works, twine and lumber mills and mines, are entitled to the benefits of this plan, except those employed in the states where the company pays, or may decide to pay, compensation for industrial accidents in accordance with the provisions of Workmen's Compensation Laws."

Section 2 describes the purpose of the plan as the—

"prompt, definite, and adequate compensation for injuries resulting from accidents occurring to them while engaged in the performance of their duties; and also to provide compensation to the widow, child, children, and relatives, who may be dependent upon any employé whose death results from such accident."

Section 14, under death benefits, are these provisions:

"All death benefits shall be paid to the administrator or executor of the deceased employé, in trust for his widow, children, or other relatives, who were dependent.

"No death benefits shall be paid unless death results within fifty-two weeks from the date of the accident, nor unless a written claim therefor shall be filed by the executor or administrator of the deceased employé with the board of management within three months after the employé's death."

Under section 17, defining disability, are these provisions:

"No benefits shall be paid unless the injury or death is caused, directly or solely, by an accident arising out of and in the course of the employment. \* \* \* Benefits shall not be paid for any injury or death resulting from or caused, directly or indirectly, wholly or in part, by the intoxication or partial intoxication of the employé (page 13 of booklet), or by his failure to use the safety appliances provided by the company, or by his gross or willful misconduct."

Section 20 is as follows:

"The acceptance of any of the benefits herein provided shall operate as an election to take said benefit, and such further benefits, if any, as may become due under these rules, in full satisfaction and release of all claims against the company and all other companies associated in this department, arising out of the injury or death for which such benefits are paid. No person shall receive any benefit without first giving a written instrument evidencing such election and release. The company, upon requiring and receiving any such release, shall become obligated to pay all further benefits, if any, which may become due under these rules

on account of the injury or death in question.

"No death benefits shall be due or payable unless such release shall have been duly executed by all persons who might legally assert any claim growing out of the death of the employé. The commencing of any legal action whatsoever against any of the companies associated in this department on account of such injury, by the employé, or, in the event of his death, by his executor, administrator, or personal representatives, shall be a bar to the recovery of any and all benefits herein provided; but in such event the employé shall be entitled to have refunded to him any contributions paid since the receipt by him of disability benefits, and no more.

"The benefits of this plan are offered upon the express condition that all the rules and regulations herein contained shall be faithfully and strictly obeyed by the employés, and a complete compliance with each and all such rules and regulations shall be and is a condition precedent to the right to receive any benefits whatsoever."

There is also in evidence a copy of the rules for the government and operation of the company's mines, approved by the chief inspector of mines, section 35 of said rules being as follows:

"The practice of carrying explosives and caps in the same package, or of storing them together, is absolutely prohibited. Explosives and tools must not be placed in or upon any empty or loaded cars."

To be entitled to the benefits of the I. A. D., employés must comply with the terms and conditions thereof, as well as the rules and regulations in regard to the operation of the mine, as set forth in rule No. 35.

Decedent left no widow or children. His mother was living in Mississippi, where she and her husband owned a farm of about 80 acres, she having married her second husband after the death of decedent's father, about 15 years ago. The company telegraphed his mother on the 7th, notifying her of her son's death, and asking what disposition to make of the body, and on the 8th they telegraphed and wrote her that it would be impossible to send her the body because the express company required embalming and shipment in a hermetically sealed casket, but these requirements could not be met, because there was no undertaker at Benham. In response to a letter from decedent's mother the company, on February 15, 1916, explained to her how her son was killed, stating that the company was not responsible for the accident. It appears from this letter that the son had a stick of coalite powder and some dynamite caps in his possession, and in some way the caps were discharged, exploding the dynamite or powder, thus causing his death.

The company again wrote the mother on the 22d of February. Responsive letters from the mother were tendered, but, while the proper foundation was not laid for their

introduction, they are not of sufficient materiality to change the conclusion we have reached.

March 23, 1916, the company received from an attorney at Enterprise, Miss., the home of the mother, a letter stating he had been employed to represent the mother in a claim for damages against the company, and offering to take \$5,000 in settlement of the claim. The company answered on the 25th, denying responsibility. On the same day, to wit, March 25th, the above-mentioned attorney wrote stating he was authorized to represent the mother, and asked for copy of the rules of the I. A. D.

There is another letter from the attorney under date of March 31st, still urging settlement. On the 25th of July, appellant, Zeb A. Stewart, was appointed administrator of decedent's estate, and on the same day notified the company of his appointment, and asked if the company would be willing to settle his claim on behalf of the estate. Failing to effect a settlement, he filed the present action, August 10th.

[1] It was not until after a demurrer had been sustained to the petition and amended petition that appellant on April 19, 1917, filed a second amended petition, in which for the first time he alleged that a written claim or demand had been made upon the company for the payment of benefits under the I. A. D., claiming that a demand had been made by the mother, the attorney for the mother, and by the administrator, and also alleging that he elected to sue for benefits under the I. A. D., and released any claim which the estate might have to recover against the company for damages for the death of his decedent. No written demand for benefits under the I. A. D. was made on the company unless it be found in the telegrams and letters herein, above referred to, and we do not think that in any one of these is there such a demand as is contemplated by the provisions of the I. A. D. It will be noticed that under section 14 no benefits will be paid to persons other than the administrator or executor of the estate of a deceased employé in trust for the widow, children, or dependent relatives, nor will any benefits be paid "unless a written claim therefor be filed by the executor or administrator of the deceased employé with the board of management within three months after the employé's death." This was not done. As a matter of fact the administrator was not appointed for more than seven months after the accident to his decedent.

[2] Furthermore, under section 20, "no person shall receive any benefit without first giving a written instrument evidencing an election to release all claims against the company arising out of the death." This was not done until April 19, 1917, when the second amended petition was filed, and which was more than 16 months after the accident.

Even though proper notice had been given, we do not think appellant was entitled to recover.

Under section 20 the benefits of the plan are offered upon the express condition that all the rules and regulations shall be faithfully and strictly obeyed by the employes, "and a complete compliance with each and all such rules and regulations shall be and is a condition precedent to the right to receive any benefits whatsoever."

Rule 35 expressly and absolutely prohibits the practice of carrying explosives and caps in the same package, or storing them together. The death of decedent, according to the evidence, was due to a violation of this rule. When decedent was employed by the company he was given a copy of the I. A. D., and told to study it, and these rules were explained to him by the assistant mine foreman.

In addition to rule 35, the mine foreman testifies there was another rule that a man must carry the explosives, consisting of coalite powder and caps, separately, and the men were requested to wrap all caps in separate pieces of paper, and not to carry any two caps together. The witness said he read this rule to decedent. The promulgation of this rule was due to the fact that powder and caps are liable to explode when wrapped together, and wrapping them separately makes them safe. The witness further testified that, in his opinion, decedent was an experienced miner.

[3, 4] The benefits of the I. A. D. were in reality a gratuity on the part of the company—a proposal to pay benefits under certain specified conditions, the consideration to be received by the company being the release from all claims for damages—and it was purely optional with the employé whether he accepted their benefits and conditions or not. It did not become a contract until its terms were accepted and complied with by the employé. Neither the employé nor the company is bound by any provision of the I. A. D. until the employé, or the representative of his estate, in the event of death, gives to the company a written acceptance or notice of their election to take under the I. A. D., and until this acceptance is given and election made the employé is privileged to prosecute his suit for damages against the company for any injuries received. In our judgment, appellant has not shown himself entitled to the relief sought. The terms and conditions of the I. A. D. were not met. There was in fact no contract. Within the meaning of the plan no written claim was made in three months, nor was there an election within that time evidencing an intention or desire to accept the benefits of the I. A. D., and to release the employer from all claims for damages. Decedent was not injured in the performance of his duties; on the contrary, he was disobey-

ing a rule enacted for the safety of himself and co-workers, a violation or breach of which was fraught with so much danger.

Counsel has cited a number of cases in support of his contentions, but none of them involves a plan similar to the I. A. D. In each of the authorities relied upon it will be found the employé signed an application for membership or paid periodical sums or dues, thus entitling him to the benefits claimed, such as is instanced by the payment of a premium on a policy of insurance.

The contract sued on in each of the above cases will be found merely an obligation of the company to take charge of the fund raised by voluntary contribution, to administer it at its own expense, and to guarantee that it shall be sufficient to furnish the specified relief. Such contract is not one of insurance, but has only the elements of a labor contract. Cooley on Insurance, p. 22. For example, reliance is placed on *Donald v. Chicago, B. & Q. R. Co.*, 93 Iowa, 284, 61 N. W. 971, 33 L. R. A. 492. In this case the fund was obtained by a monthly assessment of its members, an amount being deducted for their salary, and the insured in this case agreed to be bound by the regulations of the relief department. And so in *Petty v. Brunswick & W. Ry. Co.*, 109 Ga. 666, 35 S. E. 82, to entitle an employé to participate in any of the forms of relief afforded by the department, he was required to execute a prescribed form of application. Stipulated benefits were payable only upon compliance with the express condition that—

"there be first filed with the superintendent and chief surgeon of the relief and hospital department releases satisfactory to him, releasing each and all of the several companies constituting the Plant System from all claims for damages by reason of such injury or death, signed by all persons who might bring suit for such damages, or those legally competent to release for them."

In the other case of *Eckman v. Chicago, B. & Q. R. Co.*, 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750, the same department is involved here as in the *Donald Case*, supra, and from which opinion we quote as follows:

"Each member contributes monthly a specified sum according to the class to which he belongs, which is deducted from his wages, and placed to the credit of the relief fund. All employes of the company who pass a satisfactory medical examination are eligible for membership. \* \* \*

"The regulations also provide a form of application, which was used by the appellant, in which the appellant agreed to be bound by the regulations of the relief department; \* \* \* that this application, on approval by the superintendent of the relief department, shall make him a member of the relief fund and constitute a contract between him and the company. \* \* \* It also appoints the beneficiaries in case of death, and contains the following agreement: 'I also agree that in consideration of the amounts paid and to be paid by said

company for the maintenance of said relief department, and of the guaranty by said company of the payment of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against said company and all other companies associated therewith in the administration of their relief departments, for damages arising from or growing out of said injury."

None of these cases involved a plan or contract similar to the I. A. D. The one very distinguishing feature between them being that in the latter no premiums or dues were paid by the employé; nor was an application ever signed by William Blanks; nor, as before stated, did he comply with the express terms and conditions of the plan.

The case nearest in point that we have been able to find is that of *McNevin v. Solvay Process Co.*, 32 App. Div. 610, 53 N. Y. Supp. 98, affirmed in 167 N. Y. 530, 60 N. E. 1115. The fund in this case was credited voluntarily by the company, and was a pure gift on its part. The question under consideration in that court being when a sum is credited to an employé on the book furnished by the company the employé had a vested right in the sum so credited, or whether under the terms by which the fund is established the employé acquires no vested right until the gift is completed by actual payment to the employé, and on this point the court says:

"It must be conceded at the outset that a person or a corporation proposing to give a sum for the benefit of any person or any set of persons has the right to fix the terms of his bounty, and provide under what circumstances the gift shall become vested and absolute. Under the regulations established, it seems to me that none of the employés have a vested interest in any part of this fund, even though credited upon their pass books, until the gift is completed by actual payment. \* \* \* In this case the defendant's trustees decided, after a hearing of the plaintiff, that the plaintiff was not, when the action was begun, entitled to payment of any portion of the fund credited to him, and it seems to me that under the terms of the gift this decision is final, unless, within the discretion of the defendant's trustees, it shall be modified in the future. In case it shall be held that this plaintiff had a vested right in the fund credited to his account, it would necessarily follow that it might be reached by his creditors through proceedings supplementary to execution, and thus the very object of creating the fund would be destroyed. \* \* \*

"The plaintiff subscribed his name to the regulations, and promised to faithfully perform his work with a true loyalty to the interests of the company, and that during his term of service, and after leaving the defendant's employment, he would not use his knowledge of the company's business or processes to its injury or disadvantage."

The text of this case is quoted with approval in 26 Cyc. 1049, as follows:

"Where the fund is contributed entirely by the employer, any rules which he makes regulating the disposition thereof are binding on the employé, so that he has no rights therein except as provided for by such rules."

See, also, *Geddes v. Lehigh Coal & Nav. Co.*, 39 Pa. Super. Ct. 417.

[8] In our judgment this is the rule that should be applied here. When the company offered its employés the benefits of the I. A. D. it was privileged to attach such conditions to the payment of the benefits as it desired, and there was no contract between the employé and the employer until the requirements of the plan had been complied with. We do not think the appellant has shown himself entitled to any of the relief sought in his pleadings. Decedent having left neither wife nor children, the only other person who could claim the benefits of the I. A. D. is a dependent relative. It is very doubtful if the mother has shown herself within the clause of "dependent relatives," but it will be unnecessary to discuss this phase of the case because of the conclusion we have reached on the other points involved.

Wherefore the judgment of the lower court is affirmed.

(183 Ky. 714)

#### MARTIN v. CITY OF LEXINGTON.

(Court of Appeals of Kentucky. March 28, 1919.)

#### 1. MUNICIPAL CORPORATIONS §978(3)—DELINQUENT TAXES—COLLECTION—REMEDIES GIVEN FOR RECOVERY OF DEBT.

Ky. St. § 3187, subsec. (a), empowering cities of the second class to enforce collection of taxes more than 30 days overdue "by all remedies given for the recovery of debt in any court of this commonwealth otherwise competent for that purpose," held to authorize personal judgment against party owing tax when due.

#### 2. CORPORATIONS §237—PURCHASE OF ENTIRE STOCK—COMMINGLING OF ASSETS—LIABILITY FOR CORPORATE DEBTS.

One who purchases the entire capital stock of a corporation, and commingles its assets with his own property of a like nature, and converts such assets to his own use, leaving nothing to the corporation with which to pay its debts, is personally liable for the corporate taxes.

#### 3. CORPORATIONS §225—CONVERSION OF ASSETS—LIABILITY OF STOCKHOLDERS.

Stockholders, who divide up and convert to their own use corporate assets, without paying the debts of the corporation, must respond personally to the creditors of the corporation to the extent of the value of the converted assets.

#### 4. MUNICIPAL CORPORATIONS §978(3)—TAXATION—CORPORATE PROPERTY—PERSONAL LIABILITY OF SOLE OWNER.

In view of Ky. St. § 3187, subsec. (a), where purchaser of all of the capital stock of a corpo-

ration commingles the corporate assets with his similar personal property, leaving nothing wherewith to pay corporate indebtedness, a personal judgment can be recovered against him for taxes assessed prior to purchase of the stock, more than 30 days overdue.

Appeal from Circuit Court, Fayette County.

Action by the City of Lexington against E. L. Martin and others. Personal judgment against the named defendant, and he appeals. Affirmed.

Richard C. Stoll and Wm. H. Townsend, both of Lexington, for appellant.

James G. Denny and J. Embury Allen, both of Lexington, for appellee.

CLARKE, J. [1] On September 1, 1914, Curry, Brown & Snyder, a corporation engaged in the wholesale grocery business, assessed for taxation by the city of Lexington for 1915 personal property of the value of \$60,300, and the taxes thereon were due, one half June 1, 1915, and the remaining half on December 1, 1915. By subsection (a), § 3187, Ky. Statutes, cities of the second class, to which Lexington belongs, are given the power to enforce the collection of taxes remaining unpaid for 30 days after becoming due "by all remedies given for the recovery of debt in any court of this commonwealth otherwise competent for that purpose," and may consequently by statutory authority recover personal judgment against the party owing same when due. On February 8, 1915, all the owners of the capital stock in this corporation sold, transferred, and delivered to E. L. Martin their shares of stock, for which he settled with them individually at its par value, as is conclusively established by the evidence, although Martin attempts to construe the transaction to have been the purchase by him of the assets, rather than the capital stock, of the corporation, admitting, however, that he assumed and paid all of the corporate debts except this and one other, and that he paid for the business the par value of the capital stock, the certificates for which later came into his possession. After this transaction Martin took charge of the business and commingled with its stock of merchandise his own previously owned merchandise of the same kind.

In June, 1916, the city instituted this action against the corporation, Curry, Brown & Snyder, its stockholders, and Martin to recover these taxes long since past due and unpaid, with interest and penalties. The trial resulted in a personal judgment against Martin for the amount due, with a lien upon so much of the property still owned by Martin, and formerly owned by the corporation, as could be identified as the same as that as-

essed. Martin has appealed only from the personal judgment against him.

[2, 3] Since Martin purchased and became the owner of all of the capital stock of the corporation, and thereafter commingled its assets with other like property of his own and converted same to his own use, leaving nothing to the corporation with which to pay its debts, there can be no doubt of his personal liability for the corporate indebtedness, because of the thoroughly established and correct principle of law that stockholders, who divide up and convert to their own use corporate assets without paying its debts, must respond personally to creditors to the extent of the value of the corporate assets thus wrongfully received by them, and there is no question but that Martin received all of the assets of the corporation and largely in excess of the amount of this indebtedness. Some of the cases from this court so holding are *Gratz v. Redd*, 4 B. Mon. 178, *Grant v. Southern Contract Co.*, 104 Ky. 781, 47 S. W. 1091, 20 Ky. Law Rep. 960, and *Martin v. Com.*, 181 Ky. 212, 204 S. W. 84.

[4] The statute, supra, applicable to cities of the second class, and expressly empowering them to enforce payment of taxes by "all remedies," and therefore by ordinary processes for personal judgment, obviates in this case the only question that gave the court any serious trouble in *Martin v. Com.*, supra, where such authority for a personal judgment was lacking.

Wherefore the judgment is affirmed.

(183 Ky. 756)

#### OLAY'S COMMITTEE v. WASHINGTON et ux.

(Court of Appeals of Kentucky. March 28, 1919.)

#### 1. APPEAL AND ERROR $\S$ 164—RIGHT TO APPEAL — ACCEPTANCE OF BENEFIT UNDER JUDGMENT.

Enforcement of judgment, which is for part only of demand, by express provision of Civ. Code Prac. § 757, as amended by Acts 1888, c. 669, not depriving plaintiff of right to appeal, where judgment on plaintiff's motion for writ of possession for two houses, bought by him under execution, adjudged defendant a homestead exemption of \$1,000, and gave plaintiff option to surrender the first in lieu of paying \$1,000, and take the second, or take the first at once, and on payment of \$1,000 take the second, he by taking the second did not lose right to appeal, especially where his notice of intention to avail himself of the option distinctly rested the act on the requirement of the judgment.

#### 2. HOMESTEAD $\S$ 164—ABANDONMENT.

Homestead right in a house, left with the intention of returning thereto, was abandoned when before return the owner bought a second

house for a home, and returned to the first house temporarily, till a dilatory tenant moved from the second house.

### 3. HOMESTEAD ~~6-56~~—TRANSFER OF RIGHT TO OTHER PROPERTY.

Homestead right in a house, which the owner abandoned by buying a second house for a home, and moving there, was not transferred to the second house, bought prior to creation of a debt, and so under Ky. St. § 1702, not exempt from sale for satisfaction thereof; the second house not having been bought with proceeds of the first house.

Appeal from Circuit Court, Bourbon County.

Action by H. C. Howard, as committee of George Clay, against Alfred Washington and wife. Plaintiff obtained personal judgment, purchased property at sale on execution thereon, and appeals from judgment on motion for writ of possession so far as it imposed conditions. Reversed and remanded.

Emmett M. Dickson, of Paris, for appellant.

Talbot & Whitley and Harmon Stitt, all of Paris, for appellees.

SEYTTLE, J. The appellant, H. C. Howard, as committee of George Clay, a person of unsound mind, in an action brought in the Bourbon circuit court, recovered of the appellees, Alfred Washington and Sara Washington, husband and wife, a personal judgment for \$5,000. An execution was issued on the judgment, and levied upon two lots as the property of the appellee Sara Washington, both situated in the city of Paris, one of them on Thomas avenue and the other on Hanson street; the first containing a one-story and the second a two-story frame dwelling house. Preliminary to their sale under the execution the lots were duly appraised, the value of each being placed by the appraisers at \$900. When sold under the execution both lots were purchased by the appellant, the Thomas avenue lot at \$1,000, and the Hanson street lot at \$1,200. As each lot brought more than two-thirds of its appraised value, the sheriff, by deed made shortly after the execution sale, conveyed the lots to appellant in his fiduciary capacity, and the latter, in order to obtain possession of them, applied to the Bourbon circuit court for a writ of habere facias possessionem, of which appellees were given due notice.

By written notice given appellant and the sheriff, on or before the sale of the lots under the execution, and also by her answer to appellant's motion for the writ of possession, the appellee Sara Washington claimed a homestead in one or the other of the lots, alleging that she was a bona fide housekeeper with a family, consisting of herself and hus-

band; that she had acquired by its purchase by her for that purpose and her occupancy of the Thomas avenue lot a right of homestead therein long before the creation of the debt for which appellant obtained judgment against her, which right of homestead, notwithstanding her removal from the Thomas avenue lot to the Hanson street lot and occupancy of the latter lot at the time of the institution of the appellant's action against her, she had not abandoned or lost, or that, if lost in the Thomas avenue lot, such right of homestead had been transferred to, and existed in, the Hanson street lot. The affirmative matter of the answer was controverted by reply.

On the hearing of the motion for the writ of possession, the circuit court rendered the following judgment:

"The court declines to sustain the motion of the defendant Sarah Washington, filed herein November 13, 1916, supported by her affidavit, filed herein on the same date, in reference to the introduction of further proof, and overrules said motion, to which the defendant Sarah Washington excepts, and the court, being advised, is of the opinion, and so adjudges, that the defendant Sarah Washington acquired a homestead right in the following real estate, to wit:

"Also that other certain property in Paris, Bourbon county, Kentucky, known as lot No. 1, Higgins' subdivision, being 50 feet on McCann (or Thomas) avenue, and 118 feet, more or less, on Williams street, and is bounded on the south by lot No. 3, on the east by the Prewitt property, and is the same property conveyed by John W. Childers by the master commissioner of the Bourbon circuit court to the Economy Building & Loan Association of Paris, Kentucky, and by it conveyed to Sarah Washington by deed recorded in Deed Book 83, page 144, in the Bourbon county clerk's office.

"And that said homestead right was so acquired long before the creation of the liability sued on herein and represented by the judgment herein, and that the plaintiff cannot look to both pieces of real estate herein, freed from all homestead rights, to satisfy his judgment, as plaintiff has undertaken to do. The court is further of the opinion and adjudges that the defendant Sarah Washington, in moving into the improvements on the other parcel of real estate sold herein, took with her a homestead exemption so acquired, to the extent of the value of the above-described real estate in which she first acquired a homestead right; and it appearing to the court from this record that the above-described property, in which she first acquired a homestead right, was sold for \$1,000, and there being no other proof of its value, it is adjudged that the defendant Sarah Washington, in moving into the improvements on the other property now occupied by her described below, and which, as it appears from the record, was sold for \$1,200, took with her a homestead exemption to the extent of \$1,000.

"It is accordingly adjudged that the plaintiff is entitled to a writ of possession of both parcels of real estate sold herein, but the plaintiff is required to pay to her, or her attorneys, Tal-

bot & Whitley and Harmon Stitt, the value of her homestead right, to wit, \$1,000, before the writ of possession shall issue as to the last parcel, known as the Jones property, in which defendant resides, and described as follows:

"A certain house and lot of ground situated in Paris, Bourbon county, Kentucky, on Hanson street, fronting on Hanson street 100 feet, more or less, and extending back to Gano street 290 feet, more or less, and adjoining the property of R. H. Maddox, Lettie Masterson, Thomas Samuels, Ben Hawkins, and Ed Hutsell, being the same property conveyed by Martha Jones by deed of date September 15, 1913, of record in the office of the clerk of the Bourbon county court, in Deed Book 100, page 180.

"Comes defendant, and consents and offers to permit the plaintiff to surrender to the defendant said real estate first described above, in which defendant is adjudged to have first acquired a homestead right before the creation of the liability, herein, in lieu of plaintiff paying the defendant the \$1,000 aforesaid, and in that event the plaintiff may have a writ of possession for the last tract without the payment of the \$1,000 aforesaid. If the plaintiff declines this offer, plaintiff may have writ of possession of the first parcel above described at once, and a writ of possession of the second parcel, in which defendant resides, upon payment of the homestead exemption of \$1,000, as aforesaid. But if the plaintiff accepts the above offer the plaintiff will release and surrender to defendant the first described tract, and may have a writ of possession at once for the second described tract.

"To all of which the plaintiff objects and excepts, and prays an appeal to the Court of Appeals, which is granted."

Appellant filed motion and grounds for a new trial of his motion for the writ of possession for the lots, but the motion was overruled. From this ruling and the judgment previously entered he prosecutes this appeal.

[1] Appellees, after due notice thereof to appellant, have entered in this court a motion to dismiss the appeal on the ground set forth in a verified answer filed in support of the motion, which is that appellant, by his exercise of the option given him by the judgment of the circuit court to accept the appellee Sara Washington's offer to surrender to him the Hanson street property upon his surrendering to her as a homestead the Thomas avenue property, followed by his surrender to her of the possession of the Thomas avenue property and her surrender to him of the possession of the Hanson street property, was such an acceptance of a benefit conferred by the judgment as estops him to complain of its provisions or ask its reversal; hence the act should be held to constitute an abandonment of his appeal.

We are unable to find any merit in this contention. Civ. Code, § 757, provides:

"If it appear from the record that an appeal was improperly granted, or that the appellant's rights to prosecute it further has ceased, the appellee may, upon stating the grounds in writing, move the court to dismiss the appeal. \* \* \*"

By an act passed in 1888 (Laws 1888, c. 669) this section was amended by adding to it these further provisions:

"But when a party recovers judgment for only part of the demand or property he sues for, the enforcement of such judgment shall not prevent him from prosecuting an appeal therefrom as to so much of the demand or property sued for that he did not recover."

In numerous cases involving the construction or application of this section, we have held that accepting satisfaction of a judgment where the party only recovers part of what he sued for does not prevent him from appealing. *Combs v. Bates*, 147 Ky. 849, 145 S. W. 759; *O'Connor v. Henderson Bridge Co.*, 95 Ky. 633, 27 S. W. 251, 983, 16 Ky. Law Rep. 244; *Nashville, C. & St. L. Ry. Co. v. Bean's Ex'r*, 128 Ky. 758, 109 S. W. 323, 33 Ky. Law Rep. 114, 129 Am. St. Rep. 333.

The fact that the party appealing has availed himself of whatever benefit the judgment complained of allows him does not, as argued by appellee's counsel, destroy his right to prosecute the appeal from so much of the judgment as refuses him in part the recovery or relief sought. It is only where he has compromised and settled the demand sued for or matter in controversy with the appellee in satisfaction of the judgment, or so as to free the parties of its coercive provisions, or where, pending the appeal, conditions have arisen that would make the judgment on appeal of no effect, that the right to prosecute it will cease. *Whittle v. Rawleigh Medical Co.*, 177 Ky. 1, 197 S. W. 470; *Ohio River Contract Co. v. Pennybaker*, 168 Ky. 78, 181 S. W. 946; *Madden v. Madden*, 169 Ky. 367, 183 S. W. 931, L. R. A. 1916E, 892; *Haggin v. Montague*, 125 Ky. 507, 101 S. W. 893, 31 Ky. Law Rep. 123.

Here the appellant by the judgment appealed from recovered but a part of the property for which he sued, and that he obtained only by exercising an option imposed by the judgment, the exercise of which compelled him by its terms to surrender to the appellee Sara Washington the remainder of the property. In fact the judgment gave him two options—the one mentioned, of which he availed himself, and the other giving him the right to take both pieces of property by first paying appellee \$1,000 in lieu of a homestead, the result of the taking of either option being alike coercive upon appellee. If, instead of availing himself of the option he exercised, appellant had taken the other, and paid Sara Washington the \$1,000, in order to obtain both pieces of property, could it be contended that his act in so doing would have deprived him of the right of appeal from the judgment? Manifestly such would not have been its legal effect, and no logical reason can be assigned in support of



the contention that his exercise of the option of which he availed himself should be given the legal effect claimed for it by appellees.

It is also manifest that if the judgment should be reversed, with direction to the circuit court to require delivery to appellant of the lot which, as the result of his exercise of the option, was surrendered to appellee, that court upon the return of the case would have such jurisdiction of the parties and control of the property as would enable it to compel delivery of the possession of the latter to appellant in obedience to the mandate of the appellate court. On the other hand if the judgment should be affirmed the appellees, who have no cross-appeal, would be left in the situation in which the judgment placed them, and would continue in possession of the property they now hold. So it is clear that there has been no change in the condition of the property or situation of the parties, arising from appellant's exercise of the option accorded him by the judgment of the circuit court, that can have the effect to bar his right to further prosecute the appeal.

In addition to what has been said, we find that the written notice of his intention to avail himself of the option in question, given by appellant to appellees, distinctly rests the act upon the requirement of the judgment, and contains no intimation of its being intended as a compromise or settlement of his claim to the lot surrendered to appellee, or as an abandonment of his right to prosecute his appeal, which was granted by the judgment containing the option. It follows from the conclusions we have expressed that appellant's right to prosecute this appeal has not ceased; therefore the motion of appellees to dismiss the appeal is overruled.

It yet remains to be determined whether the appellee Sara Washington had a right of homestead in either of the lots at the time of the levy of the appellant's execution upon them or when they were sold thereunder. And to the decision of this question we will now proceed. No doctrine is better settled in this jurisdiction than that the debtor, in order to be entitled to a homestead exemption in property of which he is the owner, seized for his debt, must be a bona fide housekeeper with a family, and in possession of the real estate when levied on by the attaching or execution creditor, claiming it as his homestead; or, if not in possession, his absence from it must be temporary, and with the intention to return to and occupy it as a homestead. Moreover, he must have acquired the property prior to the creation of the debt or demand to satisfy which it is sought to be subjected to sale. Ky. St. § 1702; *Nichols v. Sennitt*, 78 Ky. 630; *Hensley v. Hensley's Adm'r*, 92 Ky. 164, 17 S. W. 333, 13 Ky. Law Rep. 426; *Holder's Adm'r v. Holder*, 120 Ky. 802, 87 S. W. 1100, 27

Ky. Law Rep. 1171; *Carter Fisher & Co. v. Goodman*, 11 Bush, 228; *Brown & Co. v. Martin*, 4 Bush, 50; *Caldwell, etc., v. Truesdell*, 13 S. W. 101, 11 Ky. Law Rep. 726. If the homestead is once acquired, the length of the time of absence from it is not so material, but it must be temporary in the sense that it begins and continues with a fixed purpose on the part of the claimant of the homestead to return to the property and occupy it as a homestead. *Mattingly v. Berry*, 94 Ky. 544, 23 S. W. 215, 15 Ky. Law Rep. 288; *Burch v. Atchison, etc.*, 82 Ky. 585; *Curran v. Culf Adm'r*, 15 S. W. 657, 13 Ky. Law Rep. 84; *Nethercutt v. Herron, etc.*, 8 S. W. 13, 10 Ky. Law Rep. 247.

[2] We think it sufficiently appears from the evidence furnished by the record that the appellee Sara Washington, by her purchase of, and removal to, the Thomas avenue lot in 1900, and continued occupancy of same for the two years succeeding the purchase, did acquire a homestead in that property. For she testified that she purchased it with that purpose, and for the two years occupied it as a homestead, and this testimony is not contradicted by any other witness. She and her husband, at the end of their two years' occupancy of the Thomas avenue property, went back to the service and home of their employer, George Clay, with whom they had previously lived, and after remaining with him until 1913 returned to the Thomas avenue property. Notwithstanding their stay of 10 or 11 years at Clay's, in view of the testimony of the appellee Sara Washington that she left the Thomas avenue property with the fixed purpose to return thereto when her employment by Clay had ceased, we would not be inclined to hold that this long absence from the Thomas avenue property necessarily constituted an abandonment of that property as a homestead; for such absence, as long as it was, cannot be said to be necessarily inconsistent with a fixed purpose on appellee's part to return to her own property as a permanent place of residence when her employment by Clay should cease.

But whatever purpose she may once have entertained respecting her return to the Thomas avenue property as a permanent place of residence, her acts and conduct before leaving the Clay home, and following her return to the Thomas avenue property, make it reasonably plain that such purpose had been abandoned before her return thereto. For in giving her testimony she frankly admitted that her purchase of the Hanson street house and lot was made shortly before her removal from Clay's; that the purchase was made by his advice and with a part of \$5,000 given her by him; and that the \$5,000 thus given her by Clay is the same money for which the appellant, as his committee, recovered against her the judg-

ment compelling the sale of her two lots under the execution.

She further admitted that her object in buying the Hanson street lot with its two-story dwelling house was to make of it a home for herself and paralytic husband; that upon leaving the Clay place they would have moved directly to the Hanson street property but for the fact that a tenant then in possession of it had not removed from it as anticipated, for which reason she and her husband temporarily removed to the Thomas avenue property, taking with them a part of their household effects, having previously caused the remainder to be hauled to and left at the Hanson street house. It also appears from Sara Washington's testimony that she and her husband, following their removal thereto, remained in the Thomas avenue property about one month, and until the Hanson street property was vacated by the dilatory tenant, and then removed to the Hanson street property, where they were residing when sued by appellant, and continuously resided, until their surrender of the property to appellant, when he surrendered to them the Thomas avenue property under the option given him by the judgment of the circuit court.

The evidence referred to clearly establishes the following facts, viz.: (1) That whatever homestead right the appellee Sara Washington once had in the Thomas avenue lot had been abandoned by and lost to her before the levy of appellant's execution and sale of the property thereunder; (2) that when she removed from the Thomas avenue lot to the Hanson street lot it was with a fixed purpose to abandon the first property as a homestead and make a permanent home of the second, which purpose, as admitted both by her answer and testimony, actuated her purchase of the latter property before she left Clay's and was consummated by her subsequent removal to and occupancy of it; (3) that she had no right of homestead in the Hanson street lot at the time of the levy of the execution, because the debt for which the lot was sold was created before the lot or any right of homestead therein had been acquired by her.

[3] While in every case involving a claim to homestead the question of abandonment, if raised, must be determined by the facts established in evidence in the particular case, in the case before us there is no doubt of the appellee Sara Washington's abandonment of her right of homestead in the Thomas avenue property, because the abandonment is admitted by her. It is her claim, however, that her homestead in that lot was by some unaccountable means transferred to the Hanson street lot, or, if not so transferred, it reattached to the Thomas avenue lot. According to our interpretation of the statute the homestead of the debtor cannot, by his or her own

volition, be thus shifted from one piece of property to another. The right of exemption depends upon the actual purpose and intention of the debtor to use and enjoy the property sought to be exempted as a home for himself and family, and the right does not exist where the residence of the debtor is permanently located elsewhere than on the property in which the homestead is claimed. Our view of the law on this question is well stated in 13 Bulling Case Law, 546:

"It is clearly a perversion of the spirit and purpose of the homestead exemption to allow a double immunity against the claims of creditors. Hence it is a rule of universal application that a person cannot lawfully hold two exemptions at the same time; nor can he have two homesteads either of which at his election would be exempt. \* \* \* In as much as one person cannot hold two homesteads at the same time, the removal from one homestead elsewhere is conclusive proof of abandonment of the former homestead."

To which we would add, provided the removal from the one homestead elsewhere is made with a fixed purpose on the part of the debtor to abandon as a homestead the property from which he removed and permanently make his home on the property to which he removes; and such is the state of case here presented.

The circuit court by the judgment appealed from seems to have sustained appellee's contention that the homestead in the Thomas avenue property was not abandoned by Sara Washington, but to the extent of \$1,000 its value was merely transferred by her to the Hanson street property, thereby giving her a right of election, which the law does not permit. A debtor may sell his exempt homestead, and invest the proceeds in other real estate, which, if claimed by him and occupied by himself and family as a homestead, cannot be subjected to the payment of his debts. But the case here presented does not rest upon any such state of facts. The Hanson street lot was not purchased with the proceeds of any other homestead, and, though avowedly purchased as and for a homestead, was paid for with money otherwise acquired. Its purchase for such purpose, and appellees' removal to it as a permanent home, necessarily operated as an abandonment of their homestead in the Thomas avenue property, without having the effect of exempting to them a homestead in the Hanson street property, as it was acquired after the creation of the debt for which it was sold under the execution. Furthermore appellees' abandonment of their homestead right in the Thomas avenue property rendered it as much subject to the execution debt as was the other property.

The errors shown by the judgment were not cured by the options it gave appellant, as the effect of his availing himself of either option could but cause the loss to him of a part of the debt sued for.

For the reasons indicated the judgment is reversed and cause remanded for such further proceedings as may be consistent with the opinion.

The whole court sitting.

(183 Ky. 705)

**BALLARD et al. v. SMITH.**

(Court of Appeals of Kentucky. March 28, 1919.)

**1. PARENT AND CHILD ⇐7(1)—EMPLOYMENT OF MINOR CHILD—INJURY—RIGHT OF PARENT.**

To enable parent to recover from employer of minor child injured in employment for loss of services and medical expenses, employer must have known, or, in exercise of ordinary care, been chargeable with knowledge, of infancy of child, employment must have been made without knowledge or consent of parent, and child must have been employed for and put at dangerous work, at least to such extent injury would likely result.

**2. PARENT AND CHILD ⇐7(10)—ENGAGEMENT OF MINOR EMPLOYE—UNSAFE WORK.**

Employer is not liable to parent of a minor employe engaged to do and put at safe work, but injured in quitting safe work of its own accord, and engaging for time being in hazardous work, contrary to directions, knowledge, or consent of employer.

**3. PARENT AND CHILD ⇐7(14)—ACTION BY PARENT—INSTRUCTION.**

In parent's action for injuries to minor daughter while feeding mangle in a laundry, where evidence was conflicting as to whether girl when injured was working at mangle with knowledge or consent of employers or their foreman, trial court should not have based parent's right to recover on fact that his daughter was engaged in dangerous work, but should have qualified instruction to submit question whether work was being performed with knowledge or consent of employers or foreman.

Appeal from Circuit Court, Bell County.

Action by Alex. Smith against J. J. Ballard and another. From judgment for plaintiff, defendants appeal. Reversed, with directions.

D. B. Logan, A. W. Babbage, and Jas. M. Gilbert, all of Pineville, for appellants.

J. M. Robison and J. D. Tuggle, both of Barbourville, for appellee.

THOMAS, J. Appellants and defendants below, J. J. Ballard and A. B. Leibig, owned and operated a laundry in Pineville, Ky. On June 22, 1913, they employed Laura Smith, an infant about 17 years and 8 months old, and put her at certain kinds of safe work in their laundry. She continued to work there

until July 22d, just one month from the time she began, on which day, at the hour of beginning work in the morning, she commenced to feed a machine known as a "mangle." Within a few minutes thereafter her hand was caught in the rollers of the mangle and three of her fingers severely mashed and her hand otherwise injured and bruised, the bones in the three fingers being crushed so that according to the testimony she is probably a permanent cripple. This suit was filed by her father, the appellee and plaintiff, Alex. Smith, against defendants, to recover damages for the loss and deprivation of the services of his infant daughter until she shall arrive at the age of 21 years, and "for medical service, medicine, and nursing and caring for his said child, because of said injury," which he has expended and which will be necessary to expend in the future, aggregating in all the sum of \$1,000, for which amount he asked judgment.

The petition alleged that plaintiff's daughter was under 21 years of age, which fact defendants knew, and with that knowledge employed her without plaintiff's knowledge or consent and set her to work at a hazardous employment in operating a mangle, which is a dangerous piece of machinery and requires in its operation special knowledge, skill, and experience, which plaintiff's daughter did not possess, and which fact was known by defendants at the time.

The answer denied the averments of the petition and pleaded contributory negligence on the part of the daughter, as well as assumed risk by her, and in another paragraph alleged that she was employed in the laundry to iron shirts with an ordinary smoothing iron, not connected with any machinery dangerous or otherwise, and that she was put at that work and instructed and directed to do no other character of work in the laundry on penalty of being discharged; that at the time she was injured she of her own accord undertook to feed the mangle without the knowledge, direction, or consent of defendants or their foreman in charge and was so injured while thus engaged. Counter pleadings formed the issue, and upon trial under instructions from the court the jury returned a verdict in favor of plaintiff for the sum of \$600, upon which judgment was rendered, and, complaining of it, defendants prosecute this appeal.

The chief grounds urged for a reversal are that the court erred in giving to the jury instruction No. 1, and in failing to instruct the jury as requested by defendants. The criticized instruction which the court gave is:

"If you believe from the evidence in this case that the defendants, J. J. Ballard or A. B. Leibig, or any person acting for them, employed Laura Smith, a daughter of the plaintiff, Alex.

Smith, to work in the laundry mentioned in the evidence, without the consent of the plaintiff, Alex. Smith, and that she was under 21 years of age, and that the defendants, or those acting for them, who employed the said Laura Smith, knew or by the exercise of ordinary care could have known that she was under 21 years of age, and that she was injured in the hand, and that the work at which she was engaged in said laundry at the time of the injury, if she was injured, was dangerous or hazardous, then you ought to find for the plaintiff, Alex. Smith."

The chief objection to the instruction is that it makes the defendants liable if the work at which the daughter "was engaged" at the time she received her injury was dangerous or hazardous, and did not make the liability of the defendants to plaintiff depend upon the dangerous or hazardous character of the work which the daughter was employed to do, or at which she was engaged under the directions, express or implied, of the defendants.

[1] The law seems to be that, to enable a parent in cases of this kind to recover of the master for injuries to his infant child, three things must concur: (a) The employer must have known, or by the exercise of ordinary care could have known, of the infancy of the child; (b) the employment must have been made without the knowledge or consent of the parent; and (c) the infant must have been employed to do and put at dangerous and hazardous work, at least to such an extent as that injury would likely result. The general rule upon this subject is thus stated in 29 Cyc. 1643:

"If the child is injured in the course of a dangerous service, the employer is liable; but the mere fact that a child was injured while in the employ of a person by whom he has been employed without the knowledge of the parent does not render the employer liable in an action by the parent for the loss of the services of the child, where the employment was not hazardous and the injury was not due to the employer's negligence."

This court seems to have adopted the rule of the text in the cases of *L. & N. R. R. Co. v. Willis*, 83 Ky. 57, 4 Am. St. Rep. 124; *Union News Co. v. Morrow*, 46 S. W. 6, 20 Ky. Law Rep. 302; *I. C. R. R. Co. v. Henon*, 68 S. W. 456, 24 Ky. Law Rep. 298; and *Hendrickson v. L. & N. R. R. Co.*, 137 Ky. 562, 126 S. W. 117.

In the *Willis Case*, according to the opinion, the defendant without the consent or knowledge of the parent "employed and permitted the son to render service for it in the hazardous capacity of brakeman." It was contended by defendant that it had not employed the son because the conductor, with whose knowledge and consent he was performing the service as brakeman, had no authority to permit him to do so as to bind the defendant. This contention was rejected

by the court and the liability of the defendant upheld upon the ground that—

"If one engages the servant of another in an obviously dangerous business, he renders himself responsible for any injury the servant may sustain while so engaged, and which can rationally be attributed to the undertaking; and this is so, even if the injury results immediately from the neglect or unskillfulness of the servant, owing to the fact that the person, by so illegally interfering, assumes all the risk incident to the service."

In the *Morrow Case*, the infant was employed to sell papers, magazines, and periodicals upon the train while making trips. The instruction, in submitting to the jury the facts upon which defendant's liability depended, said:

"If you believe from the evidence \* \* \* that such employment of said Samuel S. Morrow [the infant] was dangerous and hazardous for a boy of his age and experience, and that the said defendant had notice and knowledge, or should have known, that such employment was dangerous and hazardous," etc., then the jury should find for the plaintiff.

That instruction was approved by this court.

In the *Henon Case*, the infant was employed by the defendant railroad company to work in a gravel pit, but on the day he was injured he was taken out of the pit and was put to work on a gravel train. While so engaged, he was caused through a bump or jar of the train to fall from a ladder and sustain injuries, to recover for which his father brought the suit, seeking judgment in his own right as parent. The court referred with approval to the *Willis Case* and to the case of *N. N. & M. V. R. R. Co. v. Carroll*, 31 S. W. 182, 17 Ky. Law Rep. 374, and then said:

"The circuit court followed the rule laid down in these cases. He instructed the jury that if the son was employed without the knowledge or consent of the father, and was under 21 years of age, and this fact was known to the defendant's agents in charge of him prior to his injury, and he was required to perform dangerous or hazardous work, and while thus engaged was thus injured, they should find for the father a fair compensation for the loss of the services of his son during his minority and for trouble and expense in taking care of him."

In the *Hendrickson Case*, the infant was employed in the capacity of brakeman, and, in holding defendant liable to the parent in a suit like this, the court, *inter alia*, said:

"The service of brakeman is peculiarly hazardous. The knowledge on the part of the conductor that the son was on the train and rendering service as brakeman was the knowledge of the defendant. The defendant could not with knowledge of the father's rights thus expose the son knowingly to the dangers of such a hazardous business without his consent."

[2] These cases also appear to hold that the dangerous character of the work at which the infant is placed or exposed need not be inherently so. It is sufficient if injury is likely to happen although it could have been prevented by cautious and prudent action on the part of the infant servant. It is not altogether made clear by these and other authorities just why it is essential to the right of the parent to recover that the employment should be dangerous or hazardous, since it would appear that the basis of the action is the deprivation of the parent of the services of his child without his consent. It may be that the rule was founded upon the idea that to otherwise hold would prevent in all cases the employment of infants howsoever safe and free from danger the employment might be. But, whatever the reason for the distinction, it now seems to be too firmly fixed in the law to call it in question. Following the rule as thus laid down, the master in such cases would not be liable to the parent if he employed the child and engaged it to do and put it at work which in itself was safe and in the performance of which it was not injured, and necessarily would the employer not be liable if the child of its own accord quit the safe work which the master assigned it to do and engaged for the time being in a hazardous work contrary to the directions, knowledge, or consent of the master.

[3] In this case the evidence is conflicting as to whether Laura Smith at the time she received her injuries was working at the mangle with the knowledge or consent of defendants or their foreman in charge. Her testimony and that of some of her witnesses would seem to indicate that it was known to defendants and their foreman that she would upon occasions engage in feeding the mangle, while it is contended by defendants in their testimony and that of their witnesses that she was expressly forbidden to work at feeding the mangle under all circumstances. With this contradiction in the testimony, we think the court should not have based plaintiff's right to recover upon the fact that his daughter was at the time engaged in a dangerous and hazardous work, but that the instruction should have been so qualified as to submit to the jury whether such work was being performed with the knowledge or consent of the defendants or of their foreman in charge.

The instructions which were refused, and of which complaint is made, attempted to submit this phase of the case; but, with instruction No. 1 modified as indicated, the entire law governing the rights of the parties will be presented. This may be done by inserting therein, immediately following the words "dangerous or hazardous," these words:

"And defendants or their foreman in charge placed her at such work, or knew that she was so engaged and without objection thereto or protesting against it suffered her to remain at it."

The instruction will then conform to the law as laid down by the cases, *supra*.

Wherefore, for the error indicated, the judgment is reversed, with directions to grant a new trial, and for proceedings consistent herewith.

(183 Ky. 608)

DONAHUE v. LOUISVILLE, H. & ST. L. RY. CO.

(Court of Appeals of Kentucky. March 18, 1919.)

1. MASTER AND SERVANT ⇐219(5)—ASSUMPTION OF RISK—SIMPLE TOOL RULE.

Where an experienced railroad trackman, on two occasions while working with a chisel and clawbar, was injured by flying slivers, he assumed the risk, as the tools were simple and their defects readily observable, and he could not recover under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665).

2. NEGLIGENCE ⇐97—CONTRIBUTORY NEGLIGENCE—COMPARATIVE NEGLIGENCE RULE.

Where an experienced railroad trackman engaged in interstate commerce was injured by slivers flying from a defective chisel and clawbar, which he had selected, he assumed the risk of injury, and his acts did not amount to contributory negligence within the comparative negligence rule of the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665).

3. MASTER AND SERVANT ⇐204(1)—ASSUMPTION OF RISK—DEFECTIVE TOOLS.

In case of an injury to a servant engaged in interstate commerce, resulting from the use of defective tools, not coming within the federal Safety Appliance Acts (U. S. Comp. St. §§ 8605-8623), assumed risk may be interposed as a defense.

4. MASTER AND SERVANT ⇐205(2)—INJURY TO SERVANT—ASSUMPTION OF RISK—SIMPLE TOOLS—PRESENCE OF FOREMAN.

Where a railroad workman engaged in interstate commerce was holding and using a defective clawbar, when a sliver flew therefrom and struck his eye, the fact that the work was under the direction of the foreman did not prevent assumption of risk, as the tool used was simple, and the injury resulted from his own use of it.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Jerry Donahue against the Louisville, Henderson & St. Louis Railway Company. From a directed verdict for the defendant, plaintiff appeals. Judgment affirmed.

Elmer C. Underwood, of Louisville, for appellant.

Helm & Helm, of Louisville, for appellee.

**SAMPSON, J.** The Louisville, Henderson & St. Louis Railway Company operates an interstate railroad, and was at the times complained of and is now engaged in interstate commerce. Appellant Jerry Donahue was employed by said railway company as one of a crew of trackmen engaged in maintaining the tracks in the Louisville yards of said company. On September 21, 1916, appellant Donahue and a colored man named Logsdon were directed by the foreman of the gang to take a spike maul and a chisel T-rail cutter, and go to a certain pile of T-rails in the yards of the company and there cut an ordinary steel railroad rail into two parts. This work was accomplished by placing the chisel on the steel rail at the point where it was marked to be cut, and then by striking the chisel with the maul. The colored man held the chisel on the rail, while appellant Donahue struck the top of the chisel with the spike maul. The chisel was an old one, that had been long in use, and the top or head of it had been battered and "mushroomed" by heavy strokes from the spike maul. The spike maul likewise was old and battered. In the course of the work a silver or steel splinter flew from the head of the chisel and struck appellant Donahue in the left eye, inflicting a more or less painful injury, and impairing the sight of the eye in part. From this injury Donahue lost only a few days' work.

About a month later Donahue, with his gang, were engaged in repairing a switch in one of the yards. The foreman directed Donahue to take the clawbar, a steel bar about four or five feet long, with a claw on one end so arranged as to pull spikes from cross-ties, and place the claw thereof over the head of a steel spike, which had been driven into the bolt hole of the rail and splice, in order to drift the rail into position, and hold the bar in such position as to allow a fellow workman to strike the heel thereof with the spike maul, and thus drive the spike from the hole in the steel rail. While appellant Donahue was thus holding the clawbar and the fellow workman was striking the heel as aforesaid, a silver or steel flew from the heel of the clawbar and struck appellant in the right eye, destroying the sight thereof. On the 18th day of January, 1917, Donahue instituted this action in the Jefferson circuit court under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 9657-9665]), in two paragraphs, seeking to recover of appellee, railway company, damage for each of said injuries.

After a general demurrer to the petition had been overruled, and other preliminary

motions passed upon, defendant filed an answer traversing the allegations of the petition, and in a second paragraph averred that plaintiff Donahue was guilty of such contributory negligence as would bar his right of recovery. By the third paragraph the answer alleged that plaintiff Donahue—

"in entering and remaining in the service of the defendant assumed certain risks and dangers incident to his work, and by his contract of service with the defendant he assumed all the ordinary risks and dangers incident to his employment, among which was the risk of injury set up in the petition."

The affirmative allegations of the answer were controverted by reply. The case came on for trial before a jury, and at the conclusion of plaintiff's evidence counsel for defendant company moved the court to peremptorily instruct the jury to find and return a verdict for it, which motion was sustained by the court, and plaintiff's action dismissed, and of this he complains upon this appeal.

The railroad company is an interstate common carrier, and was engaged in interstate commerce at the time of the two injuries of which Donahue complains, and Donahue is admitted to have been in its employ at each of said times, and it may be conceded was engaged in interstate commerce. Appellee company insists that the clawbar, chisel, and spike maul employed by appellant Donahue and his fellow workman, at the times of which he complains of injury, are common tools, governed by what is generally known as the "simple tool" rule, and that the master did not owe to Donahue the duty of inspecting the tools for defects, but that such duty rested upon Donahue as the workman having the tools in charge. To this contention appellant Donahue responds by conceding the tools employed to come within the rule stated, but asserts the most that could be said against appellant is that he was guilty of contributory negligence in continuing to use the tools which he knew to be in a defective condition, and that by the federal act, under which this suit is prosecuted, contributory negligence is not a bar, but may be pleaded in mitigation of damages only, and the trial court erred to appellant's prejudice in sustaining the motion for peremptory instruction. Appellee company does not accede to this insistence, and attempts to avoid it by saying that the act of appellant Donahue in continuing to use the tools after he knew of their defective condition is not properly classified as contributory negligence, but was an assumption of risk on his part, the tools not being within the federal Appliance Act, which is conclusive of his right to recover.

Appellant Donahue admits that he was thoroughly acquainted with the tools with which he was working at the time of the

two accidents. He had been engaged as a trackman for about 15 years, 9 years of which had been spent in the yards of the appellee company, where the injuries occurred. During that 9 years he had used many different chisels similar to the one employed at the time of the first accident. The clawbar with which he was working at the time of the second accident, he testifies, had been on the job, and he had been using it, for 9 years. He admits that he knew of its battered condition, that he had seen it hammered in the same manner with the spike maul before the occasion in question, and that the heel of the claw was battered and bruised so as to be quite visible. A photograph of the clawbar and the heel thereof is made a part of the evidence. Donahue also admits that there were some 12 or 13 chisels in the tool box at the time he and his collaborer selected the maul and chisel with which to do the cutting on September 21st, and that all of said chisels were about alike; the top or head of each was spread and battered by long use. The defective condition of the tools was open and obvious; the defects were as apparent to Donahue as to any one, and the nature of the tools was so simple and uninvolved as to be understood by any one with ordinary vision and mentality. Donahue had a better opportunity to see and know the condition of the tools with which he worked than did the foreman or master.

[1] Under facts similar to those in this case, this court has repeatedly held that the simple tool rule, which exempts the master from liability where the instrument or tool which is the cause of the injury is of so simple a nature and character that a person accustomed to its use cannot fail to appreciate the risks of danger incident thereto, is applicable. In the case of *Ohio Valley Railway Co. v. Copley*, 150 Ky. 38, 166 S. W. 625, it was held that, where one was injured through a defect in a chisel similar to the one in the case at bar, the master was not liable to the injured servant because the tool in question was of a "simple nature, easily understood, and in which defects can be readily observed by such servant."

The simple tool rule was first recognized by this court in the case of *Stirling Coal & Coke Co. v. Fork*, 141 Ky. 41, 131 S. W. 1080, 40 L. R. A. (N. S.) 837, where a laborer, who was working with a common shovel, sustained injuries from a defect in the handle, and was denied recovery. A case very similar to the one at bar is *Hoskins v. L. & N. R. R. Co.*, reported in 167 Ky. 665, 181 S. W. 352, where it was held that a clawbar and spike maul, similar to the ones in question in the case under consideration, were simple or common tools which any one of ordinary intelligence may safely use without instruction or assistance, and the duty of inspection as to such tools rests upon the laborer using

them and not upon the master. To the same effect are the following Kentucky cases: *C. N. O. & T. P. Ry. Co. v. Guinn*, 163 Ky. 157, 173 S. W. 357; *Ohio Valley Ry. Co. v. Copley*, *supra*.

The simple tool doctrine has been acknowledged and applied in most, if not all, of the states of the Union. Some of the more recent cases are the following: *Arnold v. Doniphan Lbr. Co.*, 130 Ark. 486, 198 S. W. 117; *Wrought Iron Range Co. v. Zeitz* (Colo.) 170 Pac. 181; *Nosal v. International Harvester Co.*, 187 Ill. App. 411; *Morrison v. People's Gas, Light & Coke Co.*, 191 Ill. App. 335; *Wiggins v. Standard Oil Co.*, 141 La. 532, 75 South. 232; *Cooney v. Portland Terminal Co.*, 112 Me. 329, 92 Atl. 178; *Kromer v. Minneapolis, St. Paul & S. R. R. Co.*, 139 Minn. 424, 166 N. W. 1072; *Southern Ry. Co. v. Hensley*, 138 Tenn. 403, 198 S. W. 252; *Southern Ry. Co. v. Buford*, 120 Va. 157, 90 S. E. 616; *Panhandle, etc., Ry. Co. v. Fitts* (Tex.) 188 S. W. 523; *Haile v. Schaff* (Mo. App.) 190 S. W. 56; *Ft. Smith, etc., Ry. Co. v. Holcombe* (Okla.) 158 Pac. 633, L. R. A. 1916F, 1237.

In the case of *Western Railway Co. v. Buford*, *supra*, the facts are almost identical with those surrounding the first injury of which Donahue complains, except stronger for him, in that the injured workman was not using the hammer or chisel in cutting the rail, but was holding the rail when the sliver of steel from the chisel struck and injured him. He was denied a recovery.

[2] There is a distinction recognized by all the courts between assumed risk and contributory negligence, but this distinction fades when pursued to the point where the danger to the servant becomes open and obvious, for there he may in some cases be said to be guilty of contributory negligence if he proceeds with the work, or in other instances to have assumed the risks of danger. The distinction, however, is important in cases tried under the federal Employers' Liability Act, as is admirably set forth in the case of *C. & O. Ry. Co. v. De Atley*, 159 Ky. 687, 167 S. W. 933, which was appealed to the Supreme Court of the United States, and, while reversed, the principle is recognized and discussed. See *C. & O. V. De Atley*, 241 U. S. 310, 38 Sup. Ct. 564, 60 L. Ed. 1016; *L. & N. R. R. Co. v. Patrick*, 167 Ky. 118, 130 S. W. 55; *Rase v. Minneapolis, etc., Ry. Co.*, 107 Minn. 280, 120 N. W. 360, 21 L. R. A. (N. S.) 138; *Wiley v. O. N. & T. P. Ry. Co.*, 161 Ky. 305, 170 S. W. 652; *Lexington Railway Co. v. Cropper*, 142 Ky. 39, 133 S. W. 968.

Appellant asserts that the employment by Donahue of the defective chisel, spike maul, and clawbar amounts to contributory negligence only on his part, and not to an assumption of risk; but this is not borne out by the authorities. In the case of *L. & N. Ry. Co. v. Patrick*, *supra*, it was expressly

held that in an action to recover for injury received while working as a section hand by slivers or spawls flying from the spike maul used by another section hand and furnished by the company, the injured servant was not entitled to damages if he knew of the defective condition of the spike maul and the danger of flying slivers therefrom, and continued to work in close proximity to the defective instrumentality, without obtaining from the defendant or its foreman an assurance that the defect would be remedied or the danger removed, for the reason that his continuance at such work was an assumption of the risk thereby entailed. That was a case under the federal Employers' Liability Act, and it was held that the negligence of the company in supplying a defective spike maul did not amount to a violation of the federal statute enacted for the safety of the employé, commonly called the "Safety Appliance Act."

[3] In cases like this, where the defective instrumentality does not come within the federal Safety Appliance Act for the safety of employées, assumed risk may be interposed as a defense, but not so where the instrumentality complained of comes within the provisions of that act. In other words, the defense of assumed risk was abrogated by the federal act of 1908, where the injury resulted in whole or in part through a defective instrumentality employed by the company in violation of the federal Safety Appliance Act; but where the instrumentality was a simple or common tool, which was not embraced within said act, assumed risk is allowed as a defense. *Seaboard Air Line v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; *Southern Ry. Co. v. Gadd*, 233 U. S. 572, 34 Sup. Ct. 696, 58 L. Ed. 1099; *Glenn v. C., N. O. & T. P. Ry. Co.*, 157 Ky. 453, 163 S. W. 461; *Enos' Adm'r v. Kentucky Distilleries & Warehouse*, 163 Ky. 558, 174 S. W. 14; *Nashville, C. & St. L. R. Co. v. Henry*, 158 Ky. 88, 164 S. W. 310.

[4] To avoid the application of the simple tool rule as above stated, appellant Donahue asserts that the work which he was doing at the time of his second injury was directly under the eye, direction, and supervision of the foreman; but he admits that the injury which came to him on September 21st was not so received. He relies upon the opinion in the case of *C., N. O. & T. P. Ry. Co. v. Guinn*, 163 Ky. 157, 173 S. W. 357, where an employé, injured by flying slivers of steel was allowed to recover, notwithstanding the simple tool rule, because the work was being done by the foreman and the injured servant; the foreman doing the striking which caused the sliver to fly. There the injured laborer was inexperienced, and did not know the dangers from the

defective and battered hammer or anvil. In the case at bar Donahue admits that he was thoroughly acquainted with the fact that slivers would fly from a battered chisel, clawbar or spike maul, and with the further fact that the tools with which he worked were obviously defective. In the *Guinn* Case the master was handling the tool from which the sliver flew and injured Guinn, and the opinion in that case is rested upon the principle that a servant will not be barred of recovery where the injury results from a defective simple tool in the hands of another, but only in cases where the injury results from his own use or employment of the simple tool. In this case Donahue was holding and using the defective instrumentality from which the sliver flew and struck his right eye in October, and the exceptions to the rule do not, therefore, apply.

It follows, therefore, that as Donahue was injured through the employment of defective tools, which were not within the prohibition of the federal Safety Appliance Act, and knew of the defective condition of the tools at the time and before his injury, his continuance to use them was an assumption of the risk of danger incident to the employment of such defective tools, and the railroad company had a right to rely upon his assumption of risk as a defense, and the trial court properly sustained its motion for a directed verdict at the conclusion of the evidence of plaintiff, which evidence clearly establishes the facts which bring appellant within the rule above announced.

Judgment affirmed.

(183 Ky. 625)

YOUNG et al. v. CUMBERLAND COUNTY EDUCATIONAL SOC.

(Court of Appeals of Kentucky. March 18, 1919.)

# 1. APPEAL AND ERROR ¶878(1)—REVIEW—MATTERS REVIEWABLE.

On appeal by two defendants from judgment for a third defendant on its counterclaim, where neither third defendant nor plaintiff cross-appealed, that part of the judgment which rejected plaintiff's claim and another claim of third defendant cannot be reviewed.

# 2. DAMAGES ¶123—BUILDING CONTRACTS—BREACH OF CONTRACT.

Owner's measure of damages upon contractor's failure to construct building according to contract is the difference between the value of the building as constructed and its value if it had been constructed according to the contract, but where contractor willfully varies from contract by using materials different from those contracted for and wholly unsuitable for the purpose, the true measure of damages is the ac-



tual cost of reconstructing building according to contract.

### 3. DAMAGES $\S$ 123—BUILDING CONTRACTS—DEFECTS IN BUILDING.

Where soft and unsuitable brick were used in the outside walls instead of hard brick, as required by the contract, the measure of owner's damages is the cost of removing defective brick and putting hard brick in their stead.

### 4. CONTRACTS $\S$ 322(4)—BUILDING CONTRACT—SUFFICIENCY OF EVIDENCE—VALUE OF BUILDING.

In contractor's action for balance due on contract and for extras, where owner counterclaimed for damages, evidence held insufficient to sustain finding that building was utterly worthless as contended by owner.

### 5. APPEAL AND ERROR $\S$ 1177(6)—DISPOSITION—REMAND.

In building contractor's action for balance on contract in which owner counterclaimed for faulty construction, where judgment was rendered on theory that building was worthless, but evidence did not support such theory, but showed that defective conditions could have been remedied, the court on appeal, where there was no evidence as to cost of correcting defects, will not direct final judgment, but will remand case for introduction of evidence on such question.

Appeal from Circuit Court, Cumberland County.

Action by Charles Grayer against the Cumberland County Educational Society, R. Young, and C. R. Payne, in which defendant first named interposed counterclaim, and in which the two defendants last named filed joint answer, counterclaim, and cross-petition. From judgment rendered, defendants R. Young and C. R. Payne appeal. Reversed and remanded with directions.

Prescott Sandidge, of Burkesville, for appellants.

W. E. Miller, Charles Grayer, C. R. Hicks, and J. O. Ewing, all of Burkesville, for appellee.

CLAY, C. The Cumberland County Educational Society, a corporation, was organized for the purpose of purchasing a site and erecting buildings thereon to be leased and used as an educational institution. To that end, it purchased eight acres of land in the town of Burkesville and entered into contracts with Charles Grayer to construct a school building for the sum of \$7,500, and with R. Young to build two frame dormitory buildings for the sum of \$5,940. After the execution of these contracts R. Young and C. R. Payne entered into a partnership for the erection of the two dormitory buildings, and later on, Young, Payne, and Grayer entered into a partnership for the construction of all the buildings. The grounds and buildings

were leased to Payne. Upon the completion of the buildings, Payne moved to and proceeded to conduct the school for two or three years.

Grayer brought this suit against the Cumberland County Educational Society, R. Young, and C. R. Payne, and sought a mechanic's lien for the sum of \$4,949, the balance due under the contract, and for the further sum of \$922.02, the amount due for extras. He charged that Young and Payne were in collusion with the Cumberland County Educational Society to prevent him from recovering what was due him, and that they would not unite as plaintiffs. Young and Payne filed a joint answer, counterclaim, and cross-petition, denying collusion and asserting their claim and lien for certain balances due. The Cumberland County Educational Society filed an answer and counterclaim, denying the right of Grayer, Young, and Payne to recover, and pleading that it was damaged in a large sum because the brick building was practically worthless. Later on it filed an amended answer charging a conspiracy between Young, Payne, and Grayer to cheat and defraud it out of its money, and asked damages on this account in the sum of \$10,125.18. During the progress of the action Grayer abandoned his original suit and asserted a claim against Young and Payne for 217 days' service at \$2 per day. On final hearing the chancellor held that the brick school building was worthless, that there was due Grayer, Young, and Payne, under the contracts, the sum of \$2,276.07, and also the sum of \$702.92 for extras, and rendered judgment on the Educational Society's counterclaim against Grayer, Young, and Payne for the sum of \$7,500, less the sum of \$2,928.99. The Society's claim for damages of \$10,125.18 on the ground of fraud was rejected, as was also Grayer's claim against Young and Payne. Young and Payne appeal.

[1] No cross-appeal has been prosecuted either by the Educational Society or Grayer; hence that part of the judgment rejecting the Society's claim for fraud and Grayer's labor claim against Young and Payne cannot be reviewed.

Besides other defects which could have been easily remedied, it was shown that a large number of the facing brick were soft instead of hard, and when exposed to the weather disintegrated and ran over the outside wall. Three or four of the directors of the Educational Society testified that, in their opinion, the brick building was worthless. None of them, however, had ever had any experience as contractors or builders, and were unable to state whether or not the defective brick could have been removed and good brick substituted. Charles Grayer also stated that the building was in such condition that no one would want to take it. On

the other hand, an experienced contractor, in answer to the hypothetical question whether the defective brick could have been removed and hard brick substituted, replied that this could be done at an expense of about \$30 per thousand for hard brick.

[2-5] The brick building was accepted and used for the purpose for which it was constructed. Ordinarily, in a case like this, the measure of damages is the difference between the value of the building as constructed and what its value would have been if it had been constructed according to the contract. *Hartford Mill Co. v. Hartford Tobacco Warehouse Co.*, 121 S. W. 477; *Culbertson v. Ashland Cement Co.*, 144 Ky. 614, 139 S. W. 792; *Cunningham v. Fischer*, 48 S. W. 993; *Short v. Moore*, 48 S. W. 211. However, where the contractor willfully varies from the contract by using materials not only different from those contracted for, but wholly unsuitable for the purpose, the true measure of damages is the actual cost of reconstructing the building according to the contract (*Morgan v. Gamble*, 230 Pa. St. 165, 79 Atl. 410); and it seems to us that this is the measure of damages applicable to the peculiar facts of this case, since it appears that soft and unsuitable brick were used in the outside walls instead of hard brick, as required by the contract. The judgment below was based on the finding that the building was worthless. Manifestly, if the defective conditions could have been remedied, the building was not worthless. None of the witnesses for the Society were able to say this could not be done. On the other hand, an experienced builder gave it as his opinion that the defective brick could have been removed and hard brick put in their stead at a reasonable expense. In our opinion, the evidence was not sufficient to sustain the chancellor's finding that the building was utterly worthless. In view, however, of the fact that the case was not fully developed with respect to the cost of remedying the defective conditions, the ends of justice require that the parties be given an opportunity to introduce further evidence on the question, and no final judgment will be directed.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

(183 Ky. 656)

LISLE'S ADM'R et al. v. LISLE et al.

(Court of Appeals of Kentucky. March 21, 1919.)

1. EXECUTORS AND ADMINISTRATORS §353—  
COERCIVE SALE OF LANDS—APPRAISEMENT.

The statute requiring an appraisal applies to all coercive sales for the payment of debts, but does not apply to sales of land made under Civ. Code Prac. § 490, for a division of the proceeds.

2. EXECUTORS AND ADMINISTRATORS §353—  
COERCIVE SALE OF LANDS—APPRAISEMENT.

Where the sale is coercive, the mere fact that the parties consent, or other joint owners come in and request a sale of the land as a whole, does not change its coercive character, so as to make appraisal unnecessary.

3. EXECUTORS AND ADMINISTRATORS §353—  
"COERCIVE SALE" OF LANDS—APPRAISEMENT  
—NECESSITY.

In suit for sale of intestate's farm on the ground of indivisibility, as authorized by Civ. Code Prac. § 490, as amended by Acts 1916, c. 119, *held*, where primary purpose was sale of whole farm, the fact that settlement of estate and payment of debts were also asked did not make sale coercive.

Appeal from Circuit Court; Clark County.

Suit by Carrie A. Lisle and by the People's State Bank & Trust Company, administrators of E. C. Lisle, deceased, and guardian of Elizabeth Buckner Lisle, against Elizabeth Buckner Lisle and certain creditors of deceased for the sale of deceased's farm. From judgment confirming sale, the purchasers, M. C. Clay and another, appeal. Affirmed.

John A. Judy, of Mt. Sterling, for appellants.

Pendleton & Bush and Benton & Davis, all of Winchester, for appellees.

H. T. Lisle, of Winchester, guardian ad litem.

CLAY, C. E. C. Lisle died intestate and a resident of Clark county in the year of 1917. He was survived by his widow, Carrie A. Lisle, and one child, Elizabeth Buckner Lisle. The People's State Bank & Trust Company duly qualified as administrator of the decedent, and as the guardian of the infant, Elizabeth Buckner Lisle. At the time of his death, the decedent owned a farm of about 300 acres in Clark county and considerable personal property. After applying the personal property to the payment of his debts, there remained unpaid an indebtedness amounting to about \$11,000.

This suit was brought by the People's State Bank & Trust Company, as administrator of the decedent and as guardian of the infant, Elizabeth Buckner Lisle, and by Carrie A. Lisle, the widow, against Elizabeth Buckner Lisle and certain creditors of the decedent for the sale of the farm. It was alleged that dower had not been assigned to the widow; that the land was in possession of the widow and the infant; that their estate therein was a vested estate; that owing to its shape and frontage on the turnpike, and the location of the improvements thereon, it was not susceptible of division by laying off dower to the widow, including the mansion house and necessary outbuildings, without impairing its value and the value of the widow's and infant's portions thereof. It was further al-

teged that the land was not susceptible of division after selling off a portion thereof to pay the decedent's debts, without materially impairing its value, or the value of each parcel thereof, and that the widow was willing that the farm be sold free from her dower right, and that the cash value of her dower be paid to her. The petition concluded with a prayer that the farm be adjudged to be indivisible, either by allotting dower to the widow or by selling off a sufficiency thereof to pay decedent's debts, without materially impairing its value as a whole, or the value of each parcel in any such division; that it be adjudged necessary to sell the farm as a whole, or to offer same, both as a whole and in two parcels, and accept the best bid; that the defendant creditors be required to set up their claims; and that the estate be fully settled in the action, etc.

Proof was taken, as required by law, fully sustaining the allegations of the petition as to the indivisibility of the land between the widow and the infant heir, and the further allegation that the land could not be divided by allotting dower to the widow and also cutting off an additional parcel to pay the decedent's indebtedness. A guardian ad litem was duly appointed for the infant defendant, and he answered, saying that, after an examination of the record, he was unable to make any defense. On final hearing, the court adjudged that the land was indivisible between the widow and the heir, and was indivisible for the purpose of cutting off any part thereof for the payment of debts, and ordered the land first sold in two tracts and then as a whole. When offered in two tracts, the first tract brought \$265 an acre, and the second tract \$140 an acre. When offered as a whole, it brought \$295 per acre. The purchasers, M. C. Clay and J. W. Clay, excepted to the sale, on the ground that the land was not appraised. The exception was overruled, and the sale confirmed. The purchasers appeal.

[1-3] The statute requiring an appraisal applies to all coercive sales for the payment of debts. (*Graves v. Long*, 87 Ky. 441, 9 S. W. 297, 10 Ky. Law Rep. 414), but does not apply to sales of land made under section 490, Civil Code, for a division of the proceeds (*Wooldridge v. Jacob's Guardian*, 79

210 S.W.—82

Ky. 250; *Southwick v. Grenzenbach*, 18 S. W. 918, 12 Ky. Law Rep. 263). Of course, where the sale is coercive, the mere fact that the parties consent to the sale, or other joint owners come in and request a sale of the land as a whole, does not change its coercive character. *Oantrill v. Perry's Adm'r*, 7 Ky. Law Rep. 446; *Vivion's Adm'r et al. v. Vivion et al.*, 50 S. W. 984, 21 Ky. Law Rep. 108. Whether an appraisal was necessary in this case depends on whether the sale was coercive. Prior to the amendment of 1916, we held that a dowress and her only child, who owned the fee subject to her dower, were not joint owners within the meaning of section 490, Civil Code, authorizing a vested estate in real property jointly owned by two or more persons to be sold, if the shares of each owner were worth less than \$100, or the estate was in possession and the property could not be divided without materially impairing its value or the value of plaintiff's interest therein. *Van Meter v. Van Meter*, 160 Ky. 163, 169 S. W. 592. To obviate this difficulty, section 490 was amended so as to authorize a sale—

"if the estate shall have passed by devise or descent to the widow and heir or heirs of a decedent, and the widow shall have a life right in a portion thereof, either as a homestead or dower or by devise, and the said property cannot be divided without materially impairing its value, or the value of the plaintiff's interest therein." Acts 1916, c. 119, p. 707.

Here, the property descended to the widow and a single heir; hence the sale thereof on the ground of indivisibility was fully authorized by the Code as amended. The primary purpose of the action was to obtain a sale of the whole farm on the ground of indivisibility and a division of the proceeds, and the proof fully sustains the allegations of the petition. Since the sale was sought, and the chancellor had the jurisdiction to order the sale under section 490 as amended, it seems to us that the fact that the settlement of the estate of the decedent and the payment of his debts were asked as mere incidents to the main relief sought did not make the sale coercive in character. We therefore conclude that no appraisal was required.

Judgment affirmed.

(109 Tex. 367)

**GREENE v. ROBISON**, Com'r of General Land Office, et al. (No. 2868.)

(Supreme Court of Texas. March 12, 1919.)

**1. MINES AND MINERALS ⇨1—PURCHASER OF SCHOOL LAND—TITLE TO MINERALS.**

A purchaser from the state, under Act April 12, 1883 (Acts 18th Leg. c. 88), of school land, not known to contain minerals, but fairly and in good faith classified and sold without reservation as agricultural land by the duly authorized state authorities, acquired title to minerals which might be thereafter discovered, and relator is not, under Acts 33d Leg. c. 173, as amended by Acts 33d Leg. (Ex. Sess.) c. 18 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5904-5920j), entitled to a permit to prospect on the land for oil and gas, in view of Rev. St. 1895, art. 4041, validating title to minerals.

**2. STATUTES ⇨225—RELATING TO THE SAME SUBJECT—CONSTRUCTION.**

The Mining Act of 1883 (9th Gammel's Laws, p. 406), relating to reservation of minerals in school and asylum lands, being a contemporaneous act with that of April 12, 1883 (Acts 18th Leg. c. 88), relating to school lands, each should be construed in the light of the other.

**3. MINES AND MINERALS ⇨1—STATUTE RESERVING MINERALS—CONSTRUCTION.**

The reservation in Act April 12, 1883, § 14 (9th Gammel's Laws, p. 394), of minerals in school lands, was not intended to have effect upon lands classified as other than mineral, or apparently mineral, where the existence of minerals was not known when the land was sold.

**4. MINES AND MINERALS ⇨1—VALIDATING STATUTE.**

Although Rev. St. 1895, art. 4041, validating title to minerals in purchasers of public lands, is a re-enactment of the statute of 1879, in identical terms, it extended the operative force of the latter over the period between 1879 and 1895.

**5. PUBLIC LANDS ⇨1—STATUTE VALIDATING TITLE OF PURCHASER—VALIDITY.**

Rev. St. 1895, art. 4041, validating title to minerals in purchasers of public lands, when treated as a validating act, is not in violation of Const. art. 7, § 4, as to Legislature not having power to grant relief to purchasers of school lands, or section 5, forbidding appropriation of school funds to a foreign purpose.

Original proceeding for mandamus by O. D. Greene, relator, against J. T. Robison, Commissioner of the General Land Office, and others. Mandamus refused.

Carrigan, Montgomery & Britain, of Wichita Falls, and D. Edward Greer, of Houston, for plaintiff.

W. O. Crain, C. L. Carter, and T. J. Lawhon, all of Houston, and F. M. Etheridge, of Dallas, amici curiæ.

B. F. Looney, Atty. Gen., and G. B. Smedley, Asst. Atty. Gen., for defendants.

J. T. Robison, pro se.

**PHILLIPS, O. J.** [1] The question presented by the case is whether a purchaser, under the Act of 1883 (Acts 18th Leg. c. 88), of school land from the State, not at the time of sale known to contain minerals, but fairly and in good faith classified and sold by the State authorities, charged with the duty, as agricultural land, acquired title to the minerals which might thereafter be discovered in the land. Stated more closely, as reduced to the concrete issue of this proceeding, the question is whether the rights of such a purchaser are subject to the right of the State, through the Legislature, to authorize future exploitation of his land in an effort to discover minerals and a right of the State there to if discovered.

The facts here are that the land involved was sold in 1885 by the State authorities under the Act of 1883 to William Armstrong. The authorities referred to were the Land Board, vested under the act with control of the school lands of the State, with the full power to classify them and sell them to settlers. This land was classified by the Board as agricultural land and sold to Armstrong as such. So far as the record shows it was not known to contain any minerals and there was no reason to believe that any were beneath the surface. At that time there had been no development of minerals in that section of the State where the land lies—it being in Wilbarger County. There had been no such development on this land up to the time this proceeding was instituted. There was nothing in the documents relating to the sale indicating any reservation by the State of any minerals that might in the future be found in the land, or the right to assert title thereto if found.

The relator, Greene, seeks a mandamus to compel the Land Commissioner to issue him, under the Act of 1913 (Acts 33d Leg. c. 173, as amended by Acts 33d Leg. [Ex. Sess.] c. 18 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5904-5920j]), a permit to prospect on the land for oil and natural gas. His contention is that according to the Act of 1883 all minerals in the land, whether known or unknown, were reserved from the sale of the land to Armstrong, and that the title to them is yet in the State; and accordingly that under the Act of 1913 the State, through the Land Commissioner, has authority to grant him a permit to prospect on the land for the discovery of oil and gas, and on his offer to comply with the latter act, should issue him such a permit.

On the law governing the relator's contention there was a conflict of views between the then Attorney General, Mr. Looney, the legal adviser of the Land Department, and the Commissioner, Mr. Robison, the Attorney General holding that under the circumstances

of the sale to Armstrong the title to all minerals passed with the title to the land, and the Commissioner holding that they did not, which, if correct, would result in relator's being entitled to the mandamus prayed for. The Attorney General, through his able assistant, Mr. Smedley, therefore appeared in the case in opposition to the relator's suit. The Commissioner, as was his right in the view of the court, also appeared to urge his position, submitting oral and written argument strongly in their support. Because of the general interest in the case, able attorneys not connected with the immediate controversy have, with the court's permission, filed forceful arguments on both sides of the question. We have given careful attention to all of them.

Mindful of the importance of the question, as it affects both the rights of settlers who bought school lands under the Act of 1883 and the rights of the State to the minerals which may repose in them, it has had our mature consideration. Like most questions, a good deal may be said in argument on both sides of it. But the law of the case—the right of it under and as determined by the law—is in our opinion plain.

The basis of the relator's contention is the reservation to the State of minerals in school and asylum lands as expressed in Section 14 of the Act of April 12, 1883. Gamble's Laws, Volume 9, page 304. That reservation was in this language:

"The minerals on all lands sold or leased under this act are reserved by the State for the use of the fund to which the land now belongs."

Reservations of minerals embodied in acts of Congress, in terms as definite and emphatic as the reservation in this section, excepting them from sales of public lands, and just as strongly expressing that the title to them should not pass with the title to the land in its sale but should remain in the government, have repeatedly been before the Supreme Court of the United States for construction. The cases were identical in character with this one,—the mining prospector contending that the reservation was of minerals whether known or unknown; that title to them did not pass with the title to the land issued the settler, though their existence was unknown when the title to the land was conferred, and though the land was sold as other than mineral land; that it was still in the government, and the minerals therefore were subject to appropriation under mining claims whenever thereafter discovered, with the right in the prospector, of course, to fully explore the land within the area of his claim for their discovery. In all such cases that court has held, by unbroken line of decision and in opinions written by judges as eminent as ever adorned its judgment seat, that the reservation was only of minerals known to

exist when the government's title to the land passed to the settler; that if up to that time they were not known to be in the land, they passed, if afterwards discovered, with the land, the settler's right to them relating back to the time of his acquisition of the title; and that his rights to the land in virtue of his title could not be disturbed, impaired, or, as might be, in effect rendered valueless by a foreign exploitation of his land for mineral discoveries. *Deffeback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 428; *Davis v. Webb*, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; *Dower v. Richards*, 151 U. S. 658, 14 Sup. Ct. 452, 38 L. Ed. 305.

The same holding has been made by that court where the exception from the grant was "mineral land" instead of "minerals in the land." *Shaw v. Kellogg*, 170 U. S. 312, 18 Sup. Ct. 632, 42 L. Ed. 1050; *Burke v. Southern Pacific Railroad Co.*, 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527.

As stated in one of the opinions, this holding is in accord with the uniform construction of such reservations by the courts of the mineral States, both State and Federal. It is in accord with the unbroken rulings of the Department of the Interior, in the exercise of whose jurisdiction the question has frequently arisen. It was the holding of L. Q. C. Lamar when at the head of that department of the Federal Government.

Attempt is made to here distinguish these decisions, but they cannot be distinguished. Those which deal with the reservations of "minerals" are decisive of this case in fact. Those which relate to exceptions of "mineral land" are decisive of it in principle.

On the question as to where the title lies, there is in substance no difference between a reservation from a grant of "minerals in land," and a reservation of "mineral land." One is just as certainly a reservation as the other, and says just as plainly that the title to the thing reserved is not to pass. The Supreme Court of the United States holds as the law of such cases that if the reservation be of "minerals" it applies only to minerals known to exist when the government's title to the land passes; if it be of "mineral lands," it applies only to lands known to be such up to the same point of time. If at that time minerals, in the one case, are not known to exist in the particular land, or if in the other, the land is not known to be mineral, the title thereto passes, and passes absolutely and irrevocably.

This court has adopted the same rule of decision, following the United States Supreme Court in the holding. It has done so in unqualified terms, in the light of the very reservation pressed by the relator's counsel here—the reservation of the Act of April 12, 1883, and with its express language before it. *Schendell v. Rogan*, 94 Tex. 585, 63 S. W. 1001.

To sustain the relator's contention these decisions must be ignored, and repudiated. We decline to do so. They are in our opinion sound and unanswerable. They reflect the fair and open policy which ought to characterize all such legislation and which we believe was intended to characterize this legislation—the policy of letting the sovereignty for the full protection of its rights determine before the sale what it wants to sell and what it wants to reserve, with the full authority to ascertain, in such cases as this, whether there is any mineral in the land or reason to believe there is, to classify it as such and sell it as such, or openly sell the surface and the minerals separately; but requiring, if no minerals are found or believed to exist and the land is in good faith classified as other than mineral and is sold in the belief by both parties that such is its nature, that that shall serve as an official determination of its character upon which the frequently unlearned purchaser may rely, in the belief that his title papers, or the records that constitute them—which the law says, generally, shall be the evidence of right—mean what they say and their face imports and are not subject to reservations and exceptions not expressed but only to be found buried in a statute of which he may have never heard. They enable the State to obtain at the time it should do so the full benefit of such a reservation, and they alike protect the rights of the settler who has dealt fairly with the State upon what amounts to an assurance by the State that the land sold him has been investigated by it and found not to be mineral in character and hence in the future will be exempt from attempt by others to ascertain whether it contains minerals or not. They accord with our notions of common right and justice. They deserve to stand as the law.

Davis v. Weibbold well illustrates the holding of the United States Supreme Court in cases where the statutory reservation from the grant was of "mines" or "minerals," as distinguished from "mineral land." The suit was by a holder of a mining claim for the possession of certain premises under his claim. The title to certain lots within the premises was held by the defendant under grant by the government for town-site purposes executed before the mining right was issued. The question was whether the title to certain minerals not known to be contained in the lots of the defendant when the government conferred title to them, passed with that title, since its decision determined the right of the plaintiff to possession for the purpose of prospecting under his mining claim. It is this possession to which the court referred in the opinion where it speaks of "the defendant being deprived of his premises." It was a suit for possession. If the relator, Greene, had procured a permit under the Act of 1913 and were suing for possession

of certain parts of this land in order to exercise the right to prospect under the permit, the cases would be identical. As it is the question determinative of both is identical and its decision equally conclusive. The Town-site Act, the source of the right to the defendant's lots, as the Act of 1883 is the source of the right to the land here, contained this declaration:

"No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper; or to any valid mining-claim or possession held under existing laws." Comp. St. U. S. § 4798.

It would be difficult to state more explicitly than does this language that no title to the minerals of gold, silver, cinnabar or copper in lands granted under the act should pass by the grant of the land, but that such title was reserved and should remain in the government.

In the opinion it was said:

"When the entry of the town site was had, and the patent issued, and the sale was made to the defendant of the lots held by him, it was not known—at least it does not appear that it was known—that there were any valuable mineral lands within the town site, and the important question is whether in the absence of this knowledge the defendant can be deprived under the laws of the United States of the premises purchased and occupied by him because of a subsequent discovery of minerals in them and the issue of a patent to the discoverer. After much consideration we have come to the conclusion that this question must be answered in the negative."

Further in the opinion, after directing attention to the fact that the terms of the reservation were to be read in connection with the clause protecting existing rights to minerals, and with the qualification uniformly accompanying exceptions in acts of Congress of mineral lands from grant or sale—as here the terms of the reservation in the Act of April 12, 1883, are to be read in the light of the contemporary act of the same Legislature, that is, the Act of April 14, 1883 (9th Gammel's Laws, 406), which provided for the issuance by the Land Board of mining rights for minerals in the same lands dealt with by the Act of April 12, 1883, and which, as declared by this court in Mining Co. v. Rogan, 95 Tex. 454, 68 S. W. 155, imposed upon the Land Board powers in respect thereto that "involved the duty of ascertaining, as far as practicable, *what portions of the lands to be sold contained minerals*"—the court said:

"Thus read they must be held, we think, merely to prohibit the passage of title under the provisions of the town-site laws to mines of gold, silver, cinnabar or copper, *which are known to exist*, on the issue of the town-site patent, and to mining claims and mining possessions, in respect to which such proceedings have been taken under the law or the custom

of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth."

Quoting with approval the following from *Cowell v. Lammers* (C. C.) 10 Sawy. 246, 21 Fed. 200:

"If land, which a party has actually occupied, possessed and peacefully enjoyed for a long series of years, claiming title under a patent of the United States fifteen years old, can be entered upon and prospected for a mine by any trespasser who chooses to do so, and a mine being found, the mine can be located, and taken out of the patent on the vague and uncertain exception in the patent in question [one which excluded all mineral lands should any be found to exist in the tracts of land described] it can be done fifty, or a hundred years hence, and the patent instead of being a muniment of title upon which the patentee or his grantees can rest in security, would be but a delusion, and a snare."

—the opinion further declares:

"In connection with these views it is to be borne in mind also, that the object of the town-site act was to afford relief to the inhabitants of cities and towns upon the the public lands, by giving title to the lands occupied by them, and thus induce them to erect suitable buildings for residence and business. Under such protection many towns have grown up on lands which, previously to the patent, were part of the public domain of the United States, with buildings of great value for residence, trade and manufactures. It would in many instances be a great impediment to the progress of such towns if the titles to the lots occupied by their inhabitants were subject to be overthrown by a subsequent discovery of mineral deposits under their surface. If their title would not protect them against a discovery of mines in them, neither would it protect them against the invasion of their property for the purpose of exploring for mines. The temptation to such exploration would be according to the suspected extent of the minerals, and being thus subject to indiscriminate invasion, the land would be to one having the title poor and valueless, just in proportion to the supposed richness and abundance of its products. We do not think that any such results were contemplated by the act of Congress, or that any construction should be given to the provision in question which could lead to such results. Our conclusion, as already substantially stated, is, that Congress only intended to preserve existing rights to *known* mines of gold, silver, cinnabar or copper, and to known mining claims and possessions, against any assertion of title to them by virtue of the conveyances received under the town-site act, and not to leave the titles of purchasers on the town sites to be disturbed by future discoveries."

In *Dower v. Richards*, 151 U. S. 658, 14 Sup. Ct. 452, 38 L. Ed. 305, in approving a decision of the Supreme Court of California placing the same construction upon this statutory reservation, the court said:

"There can be no doubt that the decision of the Supreme Court of the State in this respect

was correct. It is established by former decisions of this court, that, under the acts of Congress which govern this case, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect; but they must at that time be *known* to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them; and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent."

In *Shaw v. Kellogg*, 170 U. S. 312, 18 Sup. Ct. 632, 42 L. Ed. 1050, where the grant authorized by Congress was only of "non-mineral lands," which, of course, amounted to an exception from the grant of lands which were mineral, the court, applying the same reasoning, declared:

"Nor were they [the grantees] at liberty to select lands which were then *known* to contain minerals. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say 'lands then known to contain mineral,' for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States. In cases of homestead, pre-emption or town-site entries, the law excludes mineral lands but it was never doubted that the title once passed was free from all conditions of subsequent discoveries of mineral."

In *Schendell v. Rogan*, 94 Tex. 585, 63 S. W. 1001, this court, as we have said, adopted this same rule of decision in relation to a later reservation of these same school and asylum lands "containing valuable mineral deposits," found in the Act of 1895 (Acts 24th Leg. c. 127). The decision was expressly based upon the holding of *Davis v. Welbhold*. The legislation of the State on the subject of the school and asylum lands and reservations of minerals therein, beginning with the Acts of 1883, is there reviewed, including the later Acts of 1887, 1889 and 1895. It is unnecessary to repeat that here. With the directness and emphasis which marked all his opinions, Judge Brown in there speaking for the court of the reservation expressed in the Act of 1895, said:

"The language, 'All public school, university, and asylum lands \* \* \* containing valuable mineral deposits are hereby reserved from sale or other disposition except as herein provided,' etc., was not intended to operate upon lands

which *had not been found* to contain valuable mineral deposits and were not apparently mineral lands."

If such a reservation did not operate on lands not known to be mineral, how can a reservation of minerals themselves operate on minerals not known to exist?

Citing *Davis v. Webb*, for the ruling, it was then added—and this statement is significant as showing that in the court's view no substantial distinction in principle could be drawn between a reservation of "mines or minerals in land" and a reservation of "land containing minerals":

"In the case last cited, language very similar to that used in our statute was held to reserve only such lands as were known to contain minerals, and a sale having been made and the land patented before it was known that there were mineral deposits therein, the purchaser took the land and all minerals contained in it."

Following this concise statement as to the effect of *Davis v. Webb*, it was emphasized that according to our decisions, as has been often declared, a sale by the State and compliance by the purchaser gives a vested right in the land, just as effectually as was given by the patent in that case under the laws of the United States.

The land involved in *Schendell v. Rogan*, had, like the land here, been classified and sold as agricultural land. Schendell, the owner, was before the court asking for a mandamus to compel the Land Commissioner to issue him a patent absolute and unconditional. His right to such a patent depended upon whether the sale to him of the land carried the minerals which might be in the land. The Commissioner had refused to issue him an absolute patent, contending that since the land had not been sold as mineral land as provided by the Mineral Act of 1896, and since all school and asylum lands not so sold were reserved from sale by the reservation in the act, above quoted, the minerals that might be in the land still belonged to the State and Schendell was not entitled to a patent which did not expressly reserve the minerals to the State. There is no substantial difference between the contention and that here made by the relator which only arises under a different, but, in legal effect, a similar reservation. Both amount to the same thing, which is, that under the respective reservations the title to the minerals did not pass.

The court squarely overruled the contention. It held that with the land sold as agricultural land, not then known to contain any valuable minerals, and being, therefore, not apparently mineral land, the title to any minerals in it passed with the title to the land, and the owner was entitled to an absolute patent, to require the issuance of which it awarded its mandamus writ. Adverting to the fact that four Governors, and four Attorneys-General had construed the laws on

the subjects of the sale of agricultural, pasture and timber lands and the sale of such lands as contained valuable mineral deposits, in force since 1839 up to that time, to mean that in sales of land as agricultural land a good title was conferred on the purchaser, entitling him upon compliance with the general provisions to a patent granting the land without reservation, carrying the title to any minerals in the land, and that the Commissioner's contention would convert such titles from fee simple, absolute titles into titles subject to the claim of the State to all minerals that might be found in them, the opinion concludes:

"The inclosures of those men who have settled upon the land would be liable to the intrusion of prospectors and speculators, with the right to dig ditches, sink shafts, and bore wells for the purpose of ascertaining whether or not minerals are contained therein. No provisions are made for protecting the rights of the State's vendees, nor rules regulating the operations of the seeker after minerals, but the unqualified right is given to explore the lands without regard to the rights of others, which shows that it was not intended to apply to lands which the State had sold. It is inconceivable that the Legislature intended that such results should flow from the policy that it adopted, which at all times has been most liberal for the protection of the actual settler upon the public domain."

[2, 3] The Mining Act of 1883, which has been once referred to, has an important bearing on this question. It was a contemporaneous act with that of April 12, 1883, in which the reservation here relied upon by the relator and which likewise is the basis of personal position of the Land Commissioner, was expressed. It was approved two days later. Each is to be construed in the light of the other. The subject matter of the Mining Act was the minerals in the school and asylum lands. It was enacted to give beneficial effect to the reservation of those minerals expressed in the Act of April 12 and repeated as one of its own sections, by providing a method whereby they might be made of use to the State as well as individuals. The plan adopted did not involve their sale, but provided for the granting of mining claims for the working of mines containing the minerals, upon a royalty basis. The act placed their control in the hands of the Land Board with ample powers to effect its purpose. As already stated, those powers, under the holding of *Mining Co. v. Rogan*, 95 Tex. 454, 68 S. W. 154, contemplated that the Board would ascertain as far as practicable what portion of the lands contained minerals—a wholly vain power and wholly useless duty if, regardless of any such ascertainment, the title to the minerals in all lands sold, whether known or unknown, was to remain in the State through force of law. The powers conferred related to the minerals in all the school and asylum



lands. Yet there is no suggestion in the act that the Board should have authority to grant a mining claim for location upon any of the lands which had been classified and previously sold as agricultural land. It provided no protection for the owner of such land in respect to the possible location of mining claims upon the surface, as to which, under any view, his right would be paramount. It provided for no payment for the taking of his surface, though, if it applied to such land, under its broad and literal terms locations for separate mines over the entire surface of the previous grant might be authorized and permitted. The whole subject was left untouched and unregulated. Why was this? Is it to be believed that the law would have been left in such state, subjecting the rights of the settler to such jeopardy, if the Legislature intended that the lands sold as agricultural, timber or pasture lands might be prospected for minerals at any time in the future? This shows plainly, we think, that the Legislature did not intend that lands so sold should be subject to such claims where at the time of their sale the existence of minerals in them was unknown. The reservation of the minerals was to make possible the ascertainment of their probable existence in any of the lands, so as to give the land in which their existence was probable the character and status of mineral or apparently mineral land, to be dealt with accordingly; with the power in the Land Board, as to such land, to make the use of the minerals which the act provided, without any disposition of the surface rights, or to sell such land with the mineral rights reserved so that the State's right to the minerals should not pass and would not be lost, but might thereafter be separately availed of for its benefit. In our opinion and under the decisions cited, the reservation was not intended to have effect upon the lands classed as other than mineral or apparently mineral where the existence of minerals in them was not known when the land was sold. In the absence of such knowledge by the officials of the State and purchasers, their classification in good faith as agricultural, timber or pasture lands was to serve as an official determination that such was their character, and the State's title to them, if the purchaser had complied with the general provisions, was to pass wholly without reservation and hence subject in the future to no kind of adverse claim at the hands of the State.

Schendell v. Rogan was followed by the court and its ruling re-stated in Chappell v. Rogan, 94 Tex. 650, 63 S. W. 1006. "It was there declared that a purchaser of these lands in the position of Armstrong here, *"secures a right free from any claim of the State for minerals that may be thereafter found in the land."*

As to this reservation, and all like reservations, it may with apparent reason be

urged that by the express terms of the reservation there is no authority of law for the grant of that which by those terms is excepted from the grant, and therefore that the grant can pass no title to the subject of the exception. This states the position of the relator as strongly as it can be stated. It presents what seems to be an unanswerable argument. It does not defy analysis, however, so let us examine it. It is plausible but it is not sound. It is not sound because its necessary result is to leave open for indefinite time—to all futurity—the determination of whether that which an ordinary grant of land purports to pass is within the exception.

Under such a rule, the State might not know for fifty years whether minerals in fact existed in the land granted, and accordingly whether it had any right to them. By the same rule, the settler's land would never be free from invasion under the right of the State to at any time in the future explore it, and all of it, for minerals, or to authorize its exploration. He would never know when his right to undisturbed possession of even the surface had matured. In truth, it never would mature. The minerals, oil and gas are fugitive and vagrant in their nature. They percolate and wander beneath the surface of the earth. Tex. Co. v. Daugherty, 107 Tex. 226, 176 S. W. 717, L. R. A. 1917F, 989. They might not be in place in the land when it was granted. The land might not then contain them. It might happen, however, that at some remote period they would find lodgment or form there. Yet, under such a rule, if they are then discovered, the right to them—which it is here claimed will attach whenever they are discovered—would be, not in the owner of the land, but in the State or some prospector holding a permit from the State. The law does not permit, nor can it wisely or justly permit, the title to granted land or to any valuable substance contained in granted land to remain in any such state of indefinite abeyance. For actual rights to exist and for either governments or men to have security under them there must come a time when, if by their nature left uncertain, they shall be made certain. Under such a reservation as that of the Act of 1883, where there could be no right in the State to the minerals unless they in fact exist, there must be some point of time for determining whether they do exist, so that the State's right may be ascertained and reduced to certainty. And equally for the settler whom for its benefit and development the State encouraged and invited to convert a perilous frontier into a region of homes that it might some day become in itself the seat of empire, the thickly populated abode of a strong and devoted citizenship, there should be a time when he might know what rights his grant

actually carried and whether he was secure in his possession of them.

Were these important rights, both of the State and the settler, to be left indefinitely contingent? Were they to continue in unlimited suspense? Were they to be determined by or be subject to the mysterious processes of natural forces beneath the surface of the earth at possibly remote periods in the future? It is not conceivable that the Legislature so intended. If not, there being no express provision in the law on the subject, at what point of time did it intend that they should be determined? That is the real question which arises under this legislation. Its determination is conclusive of this controversy; and our own decisions, together with those of the United States Supreme Court, conclusively set it at rest. The reason for their holding, that under such reservations as this the minerals pass with the land if their existence in the land is unknown when the sovereignty confers its title, necessarily is that that is the best and fairest time for determining as to their probable existence, and is therefore the time which the law should adopt. Without other aid, it demonstrates the soundness of the holding. It reveals the justness of it. It commends it as having the essence of right and as being the inevitable decision of the question.

This being the primary question in the case, we have given it this much attention because it deserves to be met fully and fairly, and to be determined no less correctly. That we have striven to do, with proper respect for opposing views ably presented, but firmly convinced that this is the true determination of it.

If there were any doubt as to this being a proper disposition of this question, the case must, we think, be resolved against the relator because of the statute, found in the revision of 1895, Article 4041, which, under the opinion in *Cox v. Robison*, 105 Tex. 426, 150 S. W. 1149, operated as a validation of titles of purchasers of public lands prior to its adoption in 1895 to the minerals in lands granted them. That statement in the opinion was not inadvertent. It was made deliberately to prevent confusion in titles because of that decision which upheld the validity of the legislation of 1895 that authorized the reservation of the minerals in lands to be sold in the future. That part of the opinion is here assailed as a dictum, but we do not believe it is to be so regarded. The question before the court was an important one. It involved a constitutional provision and the effect of that provision upon the title to minerals both in lands sold before the adoption of the present Constitution and thereafter, as well. The broad question in both aspects was before the court. We believed it our duty to state

what in our opinion was the existing status of all such titles under the written law of the State, and did so.

That opinion in this respect is also challenged because it is said that the statute referred to, which reads,

"The State of Texas hereby releases to the owner or owners of the soil all mines and minerals that may be on the same, subject to taxation as other property,"

—was but a re-enactment of a statute of 1879 in identical terms. Let that be admitted, yet when the nature of the statute is looked to there could have been only one purpose in bringing it forward in the revision of 1895. That was to extend its operation up to that time. We recognize the general rule in regard to the re-enactment of former laws in revisions. But that is a rule of construction. As said by Judge Williams, a former eminent member of the court, in *State v. Burgess*, 101 Tex. 525, 109 S. W. 922, "it is never conclusive."

[4] The Legislature is not to be credited with doing a vain or useless thing. The laws of a revision have the force of laws, not because they are the work of the codifiers, but only because they are the enactments of the Legislature. There could have been no reason for re-enacting this statute if it was only to have the effect it had in 1879. It had, in such event, fully spent its force and was thereafter a dead letter. If the Legislature in 1895 had, without doubt, desired to extend the operative force of the statute over the period between 1879 and 1895, in what terms could it have better expressed that intent than those of this statute? Having regard for the nature of the statute and the only purpose such a statute could subserve, we think its re-enactment in 1895 was to extend its provisions to that time, just as fully so as it was intended in the re-adoption in the successive Constitutions of 1869 and 1876 of the original validating provision of the Constitution of 1866—expressed in substantially the same terms as this statute—that its operation should be extended over those respective periods. The re-enactment of the statute in 1895 was in pursuance of the same policy reflected in the successive re-adoption of the like constitutional provision, and was for the same purpose.

[5] Treated as a validating act, as it should be, the statute granted no relief to purchasers of school lands and was not unconstitutional under Section 4 of Article 7 of the Constitution, as that provision has been uniformly construed. It merely confirmed to them that which they had already bought and paid the State for, or for which it held their obligations undiminished by its operation.

For the same reason it was not unconsti-

tutional under Section 5 of the same article. It was no appropriation of the school fund to foreign purposes. While these lands were by the Constitution dedicated to the school fund, the school fund acquired no title to them as against the State. The State did not thereby become a mere trustee. As the sovereignty, it continued to own the lands just as fully as before their dedication. This has been definitely settled. Chief Justice Stayton settled it in *Smisson v. State*, 71 Tex. 222, 9 S. W. 112. See also *Imperial Irrigation Co. v. Jayne*, 104 Tex. 395, 138 S. W. 575, Ann. Cas. 1914B, 322. The State, not the school fund, is the source of titles to school lands. And if the Legislature wished to place it beyond doubt that a purchaser of school land had bought and acquired in the purchase of the land all that was in the land, that was in our opinion an authority within its lawful powers.

For these reasons we hold that a purchaser, in the position of Armstrong, of school lands under the legislation of 1883, acquired title to the minerals in the land sold him, and that it is not subject to any claim by the State. Such settlers went upon these lands relying upon the good faith of the State. It is public history that in many instances they have undergone a hard experience. As a rule they were poor men. Many of them have lived there under rude conditions. Through long years their right to all within their lands, save in *Schendell v. Rogan* and *Chappell v. Rogan* where it was confirmed by this court, was not challenged until, apparently, by the Act of 1913. Now, after all this time, when it develops that the lands have possibly become valuable it is proposed to deprive them of that which makes them valuable. We do not believe the State should be permitted to so enrich itself at their expense. A law which would warrant such a result should in our opinion be so plain and unmistakable that no court in good conscience could refuse to give it effect. The school fund is a sacred fund and should be so cherished. But the obligations, the good faith of the State, are equally sacred. An enhancement of the school fund at their sacrifice would make it only poorer. These elements all enter into this case. They do not change these acts of the Legislature, but they should be properly considered in any attempt to arrive at what the Legislature meant in their enactment. If this mandamus is granted, this land, under a permit issued in virtue of the Act of 1913, may, against the will of its owner, be turned into an oil field for the benefit of strangers. The best or most useful part of the surface may be made the field of mineral exploration. Under the terms of that act, the holder of a prospecting permit is given the right of eminent domain for all purposes necessary either to the development of minerals or to the use

of the minerals found within the area of the permit—for buildings and works essential to mining operations, even railroads. The character of the land as a farm—the purpose for which the State sold it—may be destroyed. The surface rights may be rendered no longer of use to the owner. It is possible for the surrender of his possession to be compelled. No such results to settlers of agricultural lands could in our opinion have been within the contemplation of the legislation of 1883. That was not the policy of the laws of the State of that time.

The mandamus is refused.

(110 Tex. 613)

**DIGNOWITY et al. v. FLY et al.**  
(No. 3144.)

(Supreme Court of Texas. March 26, 1919.)

**1. APPEAL AND ERROR ⇨1191—ISSUANCE OF MANDATE—TIME—CONSTRUCTION OF STATUTE.**

The 12 months allowed by statute for taking out a mandate runs from the day of judgment of the Supreme Court, in a case reversed and remanded by the Court of Civil Appeals, in which a writ of error is denied, in view of Rev. St. 1911, art. 1559.

**2. APPEAL AND ERROR ⇨1191—ISSUANCE OF MANDATE—"FINAL JUDGMENT."**

The judgment of the Court of Civil Appeals is not the "final judgment" required by Rev. St. 1911, art. 1559, providing that in cases reversed by the Supreme Court or Court of Civil Appeals no mandate shall be taken out and filed in court where the cause originated, unless taken within 12 months after final judgment, since the appeal, with or without supersedeas, continues a suit, depriving the judgment of the finality necessary for admission in evidence.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Final Judgment.]

Original petition for mandamus by Hallie B. Dignowity and others against W. S. Fly and others as Justices of the Court of Civil Appeals. Mandamus awarded.

W. W. King and Gulnn & McNeill, all of San Antonio, for relators.

Moody & Boyles, of Houston, for I. T. Hambleton.

GREENWOOD, J. On April 25, 1917, the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas reversed a judgment of the district court of Bexar county, in favor of the relators Hallie B. Dignowity et al. against the respondent Imogene T. Hambleton, for \$11,530, and remanded the cause for a new trial. Motions for rehearing were overruled in the Court of Civil Appeals on June 30, 1917. The respondent Imogene T. Hambleton thereupon pre-

sented her petition for writ of error to the Supreme Court, and on February 6, 1918, the writ was denied.

On August 20, 1918, the clerk of the Court of Civil Appeals issued a certificate that no mandate had been taken out on the judgment reversing and remanding said cause, and, the honorable Court of Civil Appeals having denied a motion to recall the mandate, this proceeding was begun to compel, by mandamus, the recall of said certificate.

[1] The right of relators depends on the construction of that portion of article 1559, R. S., which provides:

"In cases which are, by the Supreme Court, or Courts of Civil Appeals, reversed and remanded, no mandate shall be taken out of either of said courts and filed in the court wherein said cause originated, unless such mandate shall be so taken out within the period of twelve months after the rendition of final judgment of the Supreme Court, or Court of Civil Appeals, or the overruling of a motion for rehearing."

In our opinion, the 12 months allowed by the statute for taking out the mandate runs from the date of the judgment of the Supreme Court, in a case reversed and remanded by a Court of Civil Appeals, and in which a writ of error is denied.

The result of construing article 1559 as requiring the mandate to issue, in reversed and remanded cases, within 12 months from the judgment of reversal, or from the order overruling a motion for rehearing in the Court of Civil Appeals, might be to authorize the dismissal of a cause in the trial court, for the nonissuance of mandate, while it was still pending on petition for writ of error to the Supreme Court. For the Supreme Court might not dispose of the petition for writ of error within 12 months from the date of the last action of the Court of Civil Appeals. No such result could have been intended by the Legislature.

[2] The evident purpose of the statute was to allow 12 months from the rendition of a final judgment for the issuance of the mandate. We can see no good reason for declaring the judgment of the Court of Civil Appeals to be the final judgment meant by the statute, while subject to review by this court, when it is the settled law that an appeal, with or without supersedeas, operates to continue a pending suit, so as to deprive the judgment appealed from of that finality "necessary to entitle it to admission in evidence in support of the right or defense declared by it." *Texas Trunk Ry. Co. v. Jackson Bros.*, 85 Tex. 608, 22 S. W. 1032; *Kreisle v. Campbell*, 32 S. W. 581; *Grocer Co. v. T. & P. Ry. Co.*, 95 Tex. 499, 68 S. W. 285, 59 L. R. A. 353.

Article 7764, R. S., allows the plaintiff, who recovers land, "the term of one year after the date of judgment" to pay the

amount adjudged to the defendant who has made improvements in good faith, and article 7765, R. S., allows "six months after the expiration of said year" to the defendant to pay the plaintiff the value of the land without the improvements, when the plaintiff neglects for a year to pay the amount adjudged to the defendant. It is held that neither the term of 1 year nor the additional term of 6 months, as allowed by these articles, begins to run so long as an appeal to the Court of Civil Appeals or an application for writ of error to this court is pending, because the judgment is thereby deprived of the necessary character of finality. *Fain v. McCain*, 199 S. W. 890. In like manner, when a decree of the trial court expressly allows a party a certain time thereafter within which to perform an act, such time does not begin to run until denial of a writ of error, in cases where application therefor is made to this court. *Hume v. Moore*, 204 S. W. 382.

The mandate in this case having been issued within less than a year from the denial of the writ of error, it ought to have been recalled, and hence the mandamus applied for has been awarded by this court.

#### BARTHOLD et al. v. THOMAS et al. (No. 58-2776.)

(Commission of Appeals of Texas, Section B.  
April 2, 1919.)

#### 1. CORPORATIONS ⇐320(5) — MISMANAGEMENT OF DIRECTORS — SUIT BY SINGLE STOCKHOLDER.

For wrongs committed by corporation directors in management of company, a stockholder must seek his remedy, in the first instance, before suing, through the corporation itself by application to the directors and stockholders, and, if unsuccessful, may then bring suit for the company for its benefit, not his personal benefit.

#### 2. CORPORATIONS ⇐320(8)—SUIT BY STOCKHOLDER—PETITION—RIGHT TO SUE.

In stockholder's suit against directors on behalf of company, petition must allege and evidence show plaintiff has made a good-faith effort to obtain action by the corporation, or he must allege and prove such a state of facts as makes it clear that an appeal to the directors or stockholders would have been useless.

#### 3. CORPORATIONS ⇐320(4)—SUIT BY STOCKHOLDERS—COMPANY AS PARTY.

In all suits by stockholders brought to redress wrongs done to corporation by directors, the corporation is a necessary party defendant.

#### 4. FRAUD ⇐58(1) — SALE OF CORPORATE STOCK — MISREPRESENTATION — SUFFICIENCY OF EVIDENCE.

In an action for fraudulent representations, which induced plaintiff to purchase and pay

for corporate stock, evidence as to alleged fraud held insufficient to justify verdict for plaintiff for \$750.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by H. D. Thomas and others against C. C. Barthold and others. To review judgment awarding plaintiffs partial relief, they brought error, defendants cross-assigning errors. The Court of Civil Appeals affirmed the judgment (171 S. W. 1071), and both parties bring error. Judgments reversed, and cause remanded for new trial, on recommendation of the Commission of Appeals.

T. Wesley Hook, of Kingsville, and J. M. Richards and Preston Martin, both of Weatherford, for plaintiffs in error.

R. L. Stennis and J. C. Wilson, both of Dallas, for defendants in error.

MONTGOMERY, P. J. This suit was brought by H. D. Thomas against C. C. Barthold, G. M. Boyd, John H. Price, and G. S. White to recover the amount alleged to have been paid by plaintiff for 15 shares of common stock and 7½ shares of preferred stock in the Weatherford Gas, Light, Heat & Power Company, a corporation.

The suit is predicated upon the theory that the plaintiff was induced to subscribe and pay for said stock by false and fraudulent representations made to him by the defendants, and that the stock was in fact worthless.

The petition also alleged that defendants were directors of the corporation, and promoted and organized it, and that they procured a franchise from the city of Weatherford, authorizing them to use the streets, and that the franchise cost the defendants nothing; that the defendants transferred said franchise to the corporation, and caused said corporation to issue to them \$10,000 of its capital stock, and that said corporation received no other consideration for said stock except said franchise. The plaintiffs asked for judgment for the proportion of the sum of \$10,000 which the stock subscribed and paid for by him bore to all the stock of the corporation.

Plaintiffs also made allegations charging the defendants, as directors, with the fraudulent and negligent mismanagement of the affairs of the corporation, and that said mismanagement resulted in the bankruptcy of the corporation rendering the stock worthless, and sought a recovery against the defendants also on that account.

The defendants denied all the allegations of fraud and negligence.

The case was tried by a jury, and the court submitted several issues. The jury found for the plaintiff for the sum of \$750, being the sum paid by him for the preferred stock. This verdict necessarily imports a finding

that the purchase of the preferred stock by plaintiff was induced by the fraudulent representations of the defendants. As to all other issues submitted, the verdict was for the defendants. The court rendered judgment for the plaintiff Thomas, in accordance with the verdict. Thomas appealed, and the defendants cross-assigned errors. The Court of Civil Appeals affirmed the judgment of the trial court. 171 S. W. 1071. Both parties applied to this court for writs of error, and both applications were granted.

#### Opinion.

For convenience the parties will be here designated as plaintiffs and defendants as they appeared in the trial court.

The plaintiffs sought a recovery upon two grounds:

(1) Upon the theory that the plaintiff was induced to subscribe and pay for the stock, both common and preferred, by false and fraudulent representations made by the defendants, and that the stock was worthless. This is the ordinary action for deceit, and, if the facts pleaded were established, entitled plaintiff to recover the damages suffered by reason of the fraud.

(2) Plaintiffs also sought to recover damages by reason of certain wrongs alleged to have been committed by the defendants towards the corporation itself. It was alleged that the defendants procured or caused to be issued \$10,000 of the stock of the corporation to themselves without other consideration than a transfer by them to the corporation of the franchise procured from the city of Weatherford, and it was further alleged that the franchise was valueless.

The plaintiff also alleged that the defendants were guilty of fraudulent mismanagement and gross negligence, as directors, in the management of the affairs of said corporation.

[1] As to these last allegations, the wrongs alleged are wrongs to the corporation, and affect other stockholders in the same manner and to the same extent as the plaintiff. As to such wrongs, the remedy in the first instance must be sought through the corporation, and if no redress can be obtained through corporate action, that is, by application to the directors and stockholders, a stockholder may bring suit for and on behalf of the corporation for the benefit of the corporation. A single stockholder cannot sue and recover against the wrongdoers damages measured by the depreciation of the value of his stock due to such wrongs.

[2] In a suit brought for and on behalf of the corporation, the petition must allege and the evidence must show that the plaintiff has made a good-faith effort to obtain action by the corporation, or must allege and prove such a state of facts as makes it clear that an appeal to the directors or stockhold-

ers would have been useless. Where the wrongdoers are in complete control and management of the corporation, this fact dispenses with the necessity of an appeal to them or to the corporation; but the facts necessary to excuse the failure to make application to the corporation for redress must be both alleged and proved by the plaintiff.

[3] In all suits by stockholders, brought for the purpose of redressing wrongs done to the corporation, the corporation is a necessary party defendant. The principles we have announced are all elementary. *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Detroit v. Dean*, 106 U. S. 537, 1 Sup. Ct. 500, 27 L. Ed. 300; *Becker v. Street Railway Co.*, 80 Tex. 475, 15 S. W. 1094; *Cates v. Sparkman*, 73 Tex. 620, 11 S. W. 846, 15 Am. St. Rep. 806; 7 R. C. L. 319. From the foregoing, we think it conclusive that the plaintiffs, under the allegations of the petition, could not recover for the alleged wrongs of the officers and directors in so far as said wrongs were to the corporation.

The only cause of action upon which the plaintiff could, in any event, recover was the cause of action based upon the alleged fraudulent representations which induced him to purchase and pay for the stock.

What we have said disposes of all the assignments of error of the plaintiff, H. D. Thomas.

[4] The defendants in the lower court requested a peremptory charge to find for them, and the refusal of this charge was the only error assigned in the Court of Civil Appeals, and the failure of the Court of Civil Appeals to sustain this assignment is the only error here complained of.

The jury found a verdict for the plaintiff for the sum of \$750, the amount paid by him for the preferred stock. We have carefully considered the entire record, and believe there is no evidence justifying this verdict.

The allegation in the plaintiff's petition with reference to this matter is as follows:

"That on April 25, 1907, the defendants, as directors, called a meeting of the stockholders of said corporation, and represented to them that all the money paid in had been expended, and that it would take a further sum equal to one-half of the amount theretofore paid in; that they had more thoroughly informed themselves and had investigated more carefully, and were prepared and qualified to say that for said further sum the proposed gas plant could be completed, installed, equipped, and put on a paying basis, and defendants then moved and caused to be carried a motion to have said corporation issue \$17,500 worth of stock to be known as preferred stock, said stock to be a first lien on the plant and assets of said corporation, and to pay 10 per cent. per annum from the date of its issuance, payable annually, and it was recommended by defendants that each stockholder take one-half as much preferred stock as he then held of the common stock; that plaintiff, relying on the representations set forth by defendants at said meeting of the stockholders, pur-

chased on May 7, 1907, 7½ shares of said preferred stock, and paid therefor in cash \$750, and at the same time there was turned over to the said directors some \$12,000 in all as the proceeds from the sale of said preferred stock."

The plaintiff testified with reference to this transaction as follows:

"At the time I bought this preferred stock I was at Weatherford. The circumstances under which I bought that stock are these: I was at a stockholders' meeting. There was a resolution passed to issue preferred stock, 50 per cent. of the value of the common stock, and each one take his pro rata share. I took my share and paid the money for it. I was at the stockholders' meeting when that resolution passed to issue the preferred stock. There was no objection to it that I remember of. There was nothing else suggested that I remember of. I did not oppose it. I favored it just like they did. I was living here (at Weatherford) at that time. There were no misrepresentations that I recall to mind by any of the parties at that meeting. I recall the representations that were made at the stockholders' meeting. It seemed to be the argument and the sense of those who were in a position to know that that would be sufficient money to put all in good shape. I do not know that I could give in detail what Mr. Bowie said. He made that talk in regard to the preferred stock, 50 per cent. As to details, and how he explained the matter, it would be hard for me to say. He preferred that as the best plan. He did not make any representations that I remember of. I do not remember anything else he said. He thought it the best plan to relieve the situation the company was in at that time. My recollection is that Mr. Barthold, in connection with Mr. Prince, made the first talk in showing what the situation was. Mr. Bowie followed it with this suggestion. It would be impossible for me to give in detail what they said the situation was. The substance was that material had cost more than they had expected, and that the subscribers to the gas were scattered out a great deal, took a great deal of pipe to reach them, and it cost more than they expected, and funds had run out before they had got it on a paying basis; that is about the substance of it; and that it was going to take money to reach their customers."

There was no evidence tending to show the fraud alleged. The defendants, and each of them, denied making the statements alleged to have been made by them in the plaintiff's petition, and denied making any false or fraudulent representations whatever.

It will be seen that the testimony of the plaintiff himself wholly fails to sustain the allegation of fraud.

Without setting out the testimony, we will say that we have examined the entire statement of facts, and in our judgment there is no testimony which authorized the submission of this case to the jury.

In view of the fact that this case has probably not been fully developed, we are of the opinion that judgment should not be here rendered, and we advise that the judgments

of the trial court and the Court of Civil Appeals be reversed, and that the cause be remanded to the district court of Parker county for a new trial.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court. We approve the holding.

**WESTERN UNION TELEGRAPH CO. v. HOLCOMB. (No. 70-2828.)**

(Commission of Appeals of Texas, Section B. April 2, 1919.)

**1. TELEGRAPHS AND TELEPHONES  $\S$  48—ERRORS IN ADDRESSEE'S NAME—NEGLIGENCE OF EMPLOYÉ—AGENCY FOR SENDER.**

Error of telegraph company's employé in writing addressee's name was not chargeable to the company, where he wrote telegram at sender's request, since in writing telegram he was acting as agent of sender and not of the company.

**2. TELEGRAPHS AND TELEPHONES  $\S$  66(4)—NEGLIGENCE OF TELEGRAPH COMPANY—SUFFICIENCY OF EVIDENCE.**

Evidence held to sustain verdict finding telegraph company negligent in failure to deliver message announcing death of addressee's brother in time to permit addressee to attend funeral, notwithstanding error in statement of addressee's name.

Appeal from Court of Civil Appeals of Second Supreme Judicial District.

Action by Fayette Holcomb against the Western Union Telegraph Company. Judgment for plaintiff was affirmed by Court of Civil Appeals (175 S. W. 750), and defendant brings error. Affirmed.

Arch Grinnan, of Brownwood, Francis R. Start, of New York City, and Thompson, Barwise, Wharton & Hiner, of Ft. Worth (Geo. H. Fearons, of New York City, of counsel), for plaintiff in error.

Smith & Palmer, of Comanche, for defendant in error.

MONTGOMERY, P. J. This suit was brought by Fayette Holcomb against the telegraph company to recover damages on account of an alleged negligent failure on the part of the company to deliver a telegram informing him of the serious illness of his brother, Jess Holcomb.

The plaintiff alleged that by reason of the negligence of the company he was prevented from being present at his brother's funeral.

As the plaintiff in error relies entirely upon the insufficiency of the evidence, it is necessary for us to set out such of the facts

as we deem necessary to support the conclusion reached by us.

Fayette Holcomb, the plaintiff, lived near Downing, a village in Comanche county, situated about eight miles from De Leon, a station on the Texas Central Railway Company and about ten miles from the town of Comanche on the line of the St. Louis & San Francisco Railroad. His brother, Jess Holcomb, at the time of his death lived about nine miles from Mt. Pleasant, in Titus county.

On March 18, 1911, Mrs. Lena Raney, a sister of Fayette and Jess Holcomb, who lived with or near Jess Holcomb, requested one Tigert to send a telegram to Fayette Holcomb informing him of the serious illness of his brother Jess, and that he was not expected to recover.

On that day Tigert went to the office of the telegraph company at Mt. Pleasant and informed the agent that he desired to send the telegram, and the agent at his request wrote the telegram as dictated by him. After the telegram was written, it was read over to Tigert by the agent and was also read by Tigert. The telegram thus prepared and approved by Tigert read:

"Mt. Pleasant, Texas, March 18, 1911. Fata Hawkins, De Leon, Texas. Brother Jess sick. No chance for him. Come at once. Lena Raney."

Tigert testified that he informed the agent at Mt. Pleasant that Fayette Holcomb, the addressee of the telegram, lived near Downing, and that he had a telephone in his house, and that there was a telephone connection with De Leon. This telegram was sent as written above, and was promptly received at De Leon, and the agent at De Leon made considerable inquiry, but was unable to locate the party addressed. It will be noted that the name of the party for whom the telegram was intended was "Fayette Holcomb," while the telegram was addressed to "Fata Hawkins."

The agent at De Leon not having been able to deliver the message in the afternoon of the 18th of March, 1911, sent the Mt. Pleasant agent the following service message:

"Yours date signed Raney undelivered. Cannot locate party."

The agent at Mt. Pleasant received this message at 4:30 p. m., on the 18th, and at once, according to his testimony, attempted to get into communication with Mrs. Raney by telephone, but was unable to do so until about 8 o'clock a. m. of the next day, the 19th. Mrs. Raney testified that she talked to the agent at Mt. Pleasant at 8 o'clock a. m., on the 19th, and that she then told the agent that Fayette Holcomb, the party for whom

the telegram was intended, lived near Downing, a little town about eight miles from De Leon, and that there was at Downing a central telephone office and that Fayette Holcomb had a telephone and could be reached through Downing. On the same day, that is, on the 19th, at 10:20 a. m., the Mt. Pleasant agent wired the De Leon agent as follows:

"Received at De Leon Texas SYS 18th, Fate Hawkins signed Raney. Raney/claims party lives at village of Downing about eight miles in the sticks and has 'phone connection with De Leon. Advise delivery."

This message was received at De Leon about 3 o'clock p. m. the same day. Office hours at De Leon on Sunday, the 19th being Sunday, were from 8 to 10 a. m., and 8 to 5, or 4 to 6 p. m. The De Leon agent testified that, after getting this message, he tried to get Downing over the telephone, but was not able to do so; that he knew the telephone agent, but did not see him, and made no effort to see him, although he lived in De Leon, which was a town of about 1,200 inhabitants. The evidence shows that in some way on the afternoon of the 19th the De Leon agent learned that the telegram was probably for Fayette Holcomb. On Monday morning, the 20th, the De Leon agent got Fayette Holcomb over the telephone by calling him through Downing and read the message to him. What transpired after between the two agents of the telegraph company is immaterial. The evidence shows that Jess Holcomb died about 4 o'clock p. m. on Sunday, the 19th day of March, 1911, and was buried the next day the 20th at 4 o'clock p. m. He was buried at a cemetery about nine miles from Mt. Pleasant. After receiving the message, as shown above, Fayette Holcomb immediately went to De Leon, and about 12 o'clock, on the 20th, telephoned to a friend at Mt. Pleasant and was informed of his brother's death and that he would be buried at 4 o'clock p. m. of that day. He made no request for a postponement of the funeral and did not go. The telephone agent at De Leon testified that there was telephone connection between De Leon and Downing and that on Sunday full service was not given between 9 o'clock a. m. and 6 o'clock p. m., but that the telephone company did furnish service between those hours in case of emergency, such as sickness, calls for doctors, and death calls. The evidence also tends to show that on the 19th the agent at De Leon could have reached Fayette Holcomb by telephone had he used the necessary diligence. There is evidence that had Fayette Holcomb received the telegram, or had it been communicated to him at any time before 11 o'clock in the forenoon of the 19th, he could and would have responded to the call and have reached Mt. Pleasant in time to have been present at his brother's funeral.

There was a St. Louis & San Francisco train leaving Comanche at 12:50 noon on the 19th, which reached Ft. Worth in time to connect with the train leaving there which reached Mt. Pleasant at 4:50 a. m. the following morning. This was the last train on the St. Louis & San Francisco Railway Company by which Holcomb could have gone and arrived in time for the funeral.

There was a train which left De Leon at 2 o'clock p. m. on the 19th, going to Waco, and by leaving on this train Fayette Holcomb could have reached Mt. Pleasant at 4:30 a. m. the following morning, and thus have been present at the funeral. There was no other train by way of Waco except one leaving De Leon at 1:25 a. m., and there was no evidence that by taking this train Mt. Pleasant could have been reached in time for the funeral.

The plaintiff recovered judgment in the district court, which was, after a portion of the recovery had been remitted, affirmed by the Court of Civil Appeals. 175 S. W. 750. The telegraph company applied for and obtained a writ of error.

#### Opinion.

[1] The error in the telegram stating the name of the person addressed as Fate Hawkins, instead of Fayette Holcomb, is not chargeable to the telegraph company, as the agent of the telegraph company, in writing the telegram at the request of the person sending it, was acting as the agent of the sender and not of the telegraph company. *Western Union Telegraph Co. v. Edsall*, 63 Tex. 668; *Western Union Telegraph Co. v. Foster*, 64 Tex. 220, 58 Am. Rep. 754.

The question, then, is whether, notwithstanding the fact that the name of the addressee of the telegram was not properly given, there was evidence tending to show that the telegraph company by the use of proper diligence could have delivered the telegram at such time that Fayette Holcomb could have been present at his brother's funeral.

[2] The evidence of Tigert, who acted for Mrs. Raney in sending the telegram, was that he at the time the telegram was sent told the agent where Fayette Holcomb lived, and that he could be reached by telephone through Downing, and that he had a telephone in his house. The agent at De Leon in the afternoon of the 18th, the day the message was sent, reported to the sending office his inability to deliver the message. The effect of this was to ask for a better address. If the agent at Mt. Pleasant had then informed him of the facts which Tigert testified he had communicated to him, it is at least probable that the agent at De Leon by inquiry from the telephone company at Downing could, notwithstanding the error in the name, have delivered the message on the 18th, or early in the day on the 19th, and



in ample time for Fayette Holcomb to have left on the train leaving Comanche at 12:45 p. m., or the train leaving De Leon at 1:45 p. m., and that by either route he could have reached Mt. Pleasant early in the morning of the 20th. Again, we think that if it be true, as testified by Mrs. Raney, that at 8 o'clock on the 19th she told the operator at Mt. Pleasant the true name of the addressee in the telegram and gave him full information as to how he could be reached, the evidence at least tends to show that by proper diligence a message could have been sent and received at De Leon giving full information as to the method to be adopted in delivering the telegram, and that such message would have been received during office hours at De Leon on the morning of the 19th, and communicated to Fayette Holcomb in time for him to have taken a day train on that day either at De Leon or Comanche. In this state of the evidence, we cannot say there is no evidence authorizing the verdict and judgment.

We advise that the judgment of the Court of Civil Appeals be affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

#### VOGT v. SMALLEY. (No. 45-2707.)

(Commission of Appeals of Texas, Section B. April 2, 1919.)

#### FRAUD $\S$ 59(3)—DAMAGES.

Damage for vendor's misrepresentation as to acreage in tract sold at an agreed price per acre is measured by the difference between the price paid by purchaser for the land which it was represented he was receiving by his deed and the value of what he actually received as of the date of his purchase, with interest.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Suit by F. J. Smalley against Gus Vogt. There was a judgment of the Court of Civil Appeals (166 S. W. 1), reversing a judgment in favor of defendant, and defendant brings error. Judgment of Court of Civil Appeals affirmed.

W. D. Love, of Uvalde, for plaintiff in error.

Wilson & Hamilton, of Port Lavaca, for defendant in error.

SADLER, J. For convenience the parties will be designated as in the trial court.

Plaintiff, F. J. Smalley, sued in the district

court to recover from defendant, Vogt, damages on account of a shortage in the number of acres of land which he had purchased from defendant. The petition alleges: That in 1906 plaintiff purchased 624 acres of land from defendant, paying therefor \$9,000. That the land was purchased by the acre at \$15 an acre for 600 acres, 24 acres being thrown in as an inducement to the trade. That by reason of fraud on the part of the defendant, and a surveyor who acted for defendant, the plaintiff only received 544 acres, being 80 acres short of the amount represented by defendant and his agent, and represented as being contained in the description of the land in the deed of conveyance. Plaintiff alleges that he did not discover the fraud until 1913, a short time prior to the filing of this suit. He sets out wherein the fraud consisted, and also the reasons for failure to discover earlier. He seeks to recover \$1,200 damages occasioned by the fraud.

On the trial before the court on the law of the case, defendant presented a general demurrer and six special exceptions to the petition. The general demurrer and the sixth special exception were overruled, but the first, second, third, fourth, and fifth special exceptions were sustained by the court, and, the plaintiff declining to amend, judgment was entered dismissing the action, from which judgment an appeal to the Court of Civil Appeals for the Fourth District was duly prosecuted by the plaintiff, assigning the errors of the court in sustaining the special exceptions. Defendant likewise filed cross-assignments to the action in overruling the general demurrer and the sixth special exception.

The Court of Civil Appeals reversed the judgment of the lower court and remanded the cause for trial. 166 S. W. 1. The defendant filed a motion for rehearing, urging errors by the Court of Civil Appeals in reversing the judgment of the lower court in the matters complained of by plaintiff and in overruling the cross-assignments. In the opinion on rehearing, overruling the motion, the Court of Civil Appeals declared:

"The measure of damages in this case is the amount paid by appellant for the land which he failed to get. The value of the deficit was \$1,200, and to that sum he is entitled, regardless of the increased value of the other land."

Writ of error was granted in the view that this was not the correct measure of damages in a case growing out of fraud.

#### Opinion.

A consideration of plaintiff's pleadings and of the judgment of the Court of Civil Appeals satisfies us that the disposition made of the cause by that court is correct. However, if viewed in the light of a general statement of the law, the pronouncement

made with reference to the measure of damages is incorrect.

The defendant contends that the measure of plaintiff's damage in the instant case is the difference between what the plaintiff paid for the land and the value of the land actually obtained. With a slight modification, this is a correct statement of the rule applicable in cases of this character.

The correct rule is that plaintiff's damage is measured by the difference between the price paid by him for the land which it was represented that he was receiving by his deed of conveyance and the value of what he actually received as of the date of his purchase, with interest. *George v. Hesse*, 100 Tex. 44, 93 S. W. 107, 8 L. R. A. (N. S.) 804, 123 Am. St. Rep. 772, 15 Ann. Cas. 456.

Defendant contends that plaintiff's petition is insufficient to sustain such recovery. We think differently. Plaintiff in the twentieth paragraph of his petition alleges:

"That the purchase by plaintiff of defendant of said 624 acres of land was a purchase by the acre, and not in gross. That plaintiff paid defendant in full for 624 acres of land. That in so doing he paid defendant for 80 acres of land that plaintiff did not get. That said land was worth \$15 per acre, and plaintiff paid defendant for it \$15 per acre, \$1,200. That plaintiff paid to defendant, by reason of defendant's fraudulent conduct and fraudulent representations, \$1,200 more than the value of the land conveyed by defendant to plaintiff. That defendant still retains said \$1,200, \* \* \* above and beyond the actual value of the land conveyed to plaintiff by defendant herein."

Simplifying this pleading it is that the land received by the plaintiff was only of the value of \$7,800 when conveyed to and paid for by him, that he paid \$9,000 for it, and that thereby he was damaged in the sum of \$1,200. The pleading is sufficient to authorize the submission of the cause to the jury, and to admit proof in accordance with the rule governing this action as to recoverable damage.

The judgment of the Court of Civil Appeals, reversing and remanding the case, should be affirmed, and the court below should be governed in the submission of the measure of damages by the rule as here announced.

PHILLIPS, O. J. The writ of error was granted in this case solely on the question of the measure of damages, and on the authority of *George v. Hesse*, 100 Tex. 44, 93 S. W. 107, 8 L. R. A. (N. S.) 804, 123 Am. St. Rep. 772, 15 Ann. Cas. 456. That decision furnishes the proper rule in cases of this character. The Court of Civil Appeals having, for a proper reason, reversed the trial court judgment and remanded the cause for another trial, its judgment to that effect will be affirmed, as recommended by the Commission of Appeals.

MISSOURI, K. & T. R. CO. v. MORGAN.  
(No. 34-2682.)

(Commission of Appeals of Texas, Section A.  
April 2, 1919.)

ACCORD AND SATISFACTION — 23 — PARTIAL  
SETTLEMENT — NEGLIGENCE.

Where a servant was injured and on returning to work applied for pay for the time he was absent, and after negotiating for some time the master agreed to pay him half time, and the servant accepted the same, it must be held, in the absence of an agreement to the contrary or evidence that payment of half wages was a voluntary payment, that there was an accord and satisfaction of the servant's entire cause of action, and he could not thereafter recover for pain and suffering or subsequent loss of time.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by W. C. Morgan against the Missouri, Kansas & Texas Railway Company. There was a judgment by the Court of Civil Appeals (163 S. W. 992), affirming a judgment in favor of the plaintiff, and the defendant brings error. Reversed and rendered.

Fiset, McClendon & Shelley, of Austin, for plaintiff in error.

Dickens & Dickens, of Austin, for defendant in error.

SONFIELD, P. J. Plaintiff, W. C. Morgan, sued defendant railway company for personal injuries received by him while in its employ. Among other defenses, defendant pleaded an accord and satisfaction and settlement and compromise of the cause of action, evidenced by a sight draft in the sum of \$11, which was delivered to the plaintiff and indorsed and cashed by him. Defendant further pleaded that plaintiff executed a release, but that same had been lost. Trial before a jury resulted in a verdict and judgment for the plaintiff, and on appeal the judgment was affirmed.

Error is assigned to the action of the court in refusing to peremptorily instruct the jury to return a verdict for the defendant. The evidence is set out very fully in the opinion of the Court of Civil Appeals. 163 S. W. 992. Plaintiff testified that he was injured on February 16, 1911. About sixteen days after his injury, he resumed work for the defendant company; four or five months thereafter he was discharged. After his discharge he worked in the town of Pfugerville until December, 1911, when he went to work again for the defendant. He continued in the employment until about February or March, 1912, when he was again discharged. Suit was filed on the 2d day of April,

1912. Plaintiff's version of the alleged settlement can best be stated in his own language:

"I asked Newt Rich, the roadmaster, if they would pay me for the time I lost, and he said he would see about it; it went on for about a couple of months, as well as I remember, and he came over and asked me if I would accept half time. I told him I thought they ought to pay me for the time I had lost while injured. Well, it went on and went on for several days, and he came over again, and he said they would give me only half time. It had been going on for a couple of months, and I asked him about it several times, and he said they didn't want to give me more than half time, and I told him I would take that for the time I had lost. There was nothing said about my injuries at all. Nobody talked to me about my time except Mr. Rich. There was nothing said in any of those conversations about settling with me for injuries or damages; there was nothing mentioned about it at all. When they gave me that check they did not tell me that it was in settlement for injuries sustained. The local freight just stopped there a very few minutes, and Mr. Rich gave me that check. I asked what it was, and he said it was for the time I lost while unable to work. There was nothing said about injuries at all. It was about 11 o'clock in the morning, and I was in a hurry, as I had a lot of track torn up, and I put the check in my pocket, and when we went in at noon I just took it out and signed it and gave it to the agent, and he cashed it. I was in a hurry and didn't read it. Mr. Rich told me it was for half time lost, and I took his word for it and never looked at it. That \$11 figured out somewhere about half the time I had lost. No one at any time mentioned to me that that was in full settlement for any injuries that I had sustained or for any suffering that I might have in the future. I never had any talk with any one at all except Mr. Rich, and that was just about my wanting pay for the time I lost. I worked for the company by the month, and received \$55 a month. When they settled with me after the accident they did not pay me for the whole month. They deducted the time lost from my month's pay."

Plaintiff further testified:

"When I accepted that check, I did not accept it as being a release in full. I accepted it as pay for half the time I had lost while injured."

On his direct examination he testified that he did not execute a release at the time of the receipt of the check. On cross-examination, however, he stated that he would not say whether he signed a release on that occasion or not. He did not remember signing one. He would not say for sure whether he did or not. Plaintiff was able to read. On the trial it was agreed between the parties that defendant was not liable to plaintiff for wages as wages for the time lost by him as a result of his injuries; plaintiff having the right to be reimbursed in this particular by the defendant, if his injury was the result of its negligence.

Plaintiff identified the sight draft, which was introduced in evidence by the defend-

ant, and admitted having received, indorsed, and cashed it. It was on the company's regular form, an ordinary sight draft dated May 2, 1911. In the body of the draft appeared the following:

"For personal injuries sustained on or about February 16, 1911, near Pflugerville, Texas, while employed as section foreman, caused by falling from push car while attempting to step from the same to hand car."

Plaintiff testified that he received a letter from the claim agent of defendant, with inclosure of blank forms of release, four or five days before he was discharged the last time, the letter reading as follows:

"On May 2, 1911, I sent you by roadmaster draft 15307 for \$11, account injuries sustained by you on February 16, 1911. Somehow the papers were misplaced in returning them and I have never received the release and voucher. I am inclosing you herewith a duplicate release and voucher and would thank you to kindly execute same and return to me by return mail. This that my records may be complete. Thanking you in advance, I am, Yours truly."

Plaintiff did not reply to the letter, but put the papers in the hands of a lawyer, with instructions to file suit. He did not know that defendant claimed the check was in payment for his injuries until receipt of this letter from the claim agent. He never offered the money back to the company. He did not consult a lawyer or bring suit, nor did he think about bringing suit until his discharge. We quote the following from his evidence:

"As to whether the time when I received this duplicate release from the company, with a request that I sign it was the first time I ever thought about bringing suit, I had to make a living, and I did not think I was able to make a living the way I was hurt, and I had to have some way of getting along. I did not feel like I was able to do hard work. The reason I brought suit was simply because I could not do hard work."

The roadmaster testified that in his conversation with the plaintiff a settlement in full was intended by payment of half time, and also that a release was executed by the plaintiff and turned over to his clerk. Other witnesses testified to the preparation of the release, the search for, and failure to find it. There was evidence of statements by plaintiff to the effect that he had settled with defendant.

Under the findings of the jury, plaintiff had a cause of action against defendant. It existed at the time of the negotiations between plaintiff and defendant, through Rich, the roadmaster. There is nothing in the record to suggest that plaintiff did not know at that time that his injuries were the result of the negligence of defendant, or that there were facts, establishing his cause of action, not known to him at the time of the nego-

tations, and the receipt, indorsement, and cashing of the draft. His cause of action was for a single tort, for which there could be but one recovery. Such recovery would include various elements of damage, among them loss of time and wages as a result of the injury. Had plaintiff brought suit against defendant and recovered this item of damage, he would have been precluded from an additional recovery or a recovery for other items or elements of damage, the result of the same negligent act. *Houston & T. C. R. Co. v. McCarty*, 94 Tex. 293, 60 S. W. 430, 53 L. R. A. 507, 86 Am. St. Rep. 854.

Plaintiff had knowledge of the fact that defendant was within its right in deducting from his wages the time lost by reason of the injury; that it was not liable to him for wages as such, unless the injury was the result of its negligence, in which event he would be entitled to payment therefor as an element of his damage; that this was a very part of his cause of action against defendant, if any he had. Plaintiff took the initial step. He was not approached by any agent or representative of the defendant seeking to negotiate a settlement. To use the language of plaintiff:

"I asked Newt Rich, the roadmaster, if they would pay for the time I lost, and he said he would see about it. \* \* \* He said they did not want to give me more than half time, and I told him I would take that for the time I had lost."

He thus asserted against and presented to defendant a demand for payment in full of one element of his damage, a part of his cause of action. He was offered payment for half his time, which he agreed to and did accept, advising Rich that he would take that for the time he had lost. Under plaintiff's own evidence, it must be held that the presentation of his claim, as made, constituted a presentation of his entire demand against the defendant. That it was so received and acted upon by the defendant is evidenced by the language of the sight draft. Plaintiff having a cause of action against defendant, unliquidated, for personal injuries claimed to have been caused by its negligence, having presented a claim for an element of his damage, a part of his cause of action, and having received from defendant a sum in full settlement of such claim, is as much precluded from further recovery as though he had

filed suit and recovered judgment upon his cause of action for this one item of damage.

Parties can agree to settle one part of a cause of action, leaving the other for future settlement or litigation. The evidence wholly fails to show such an agreement. True, plaintiff testifies that in the negotiations nothing was said of any other damage, and that he did not accept the draft in full settlement. On the other hand, the evidence is clear and conclusive that defendant, in making the payment, intended an accord and satisfaction of the cause of action in its entirety. Hence the evidence negatives an agreement between the parties for a partial settlement.

Plaintiff does not testify, nor is the evidence susceptible of the construction, that he requested payment for full time and accepted payment for half time as a gift or gratuity, or that he believed, when accepting same, that it was tendered him as such. There can be no question but that plaintiff regarded this as a full settlement of his claim for the time lost. The amount awarded him in the judgment herein does not include recovery for his time or wages lost by reason of his injury, there being recognition of a full settlement of this part of his cause of action.

The money paid plaintiff was not a voluntary payment, but was paid in consequence of his asserted claim. There is no evidence that it was tendered to or received by him as a mere gratuity, or of any agreement for a partial settlement of the cause of action.

Plaintiff could not, in the absence of an agreement to that effect, split his cause of action, demand and receive a settlement for one part, and in a suit recover for the remaining part. *Hinkle v. Minneapolis & St. Louis Ry. Co.*, 31 Minn. 434, 18 N. W. 275; *Bowman v. Ogden City*, 33 Utah, 196, 93 Pac. 561.

The trial court should have given a peremptory instruction for the defendant. We are of opinion that the judgment of the Court of Civil Appeals, affirming the judgment of the district court, should be reversed, and judgment here rendered for defendant.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court. We think Morgan was concluded, under the circumstances shown, by his acceptance of the Railway Company's check and his retention of the proceeds.

**AGUINAGA v. MEDINA VALLEY IRR. CO.**  
(No. 47-2715.)

(Commission of Appeals of Texas, Section A.  
April 2, 1919.)

**DEATH — NEGLIGENCE OR DEFAULT OF  
VICE PRINCIPAL — LIABILITY OF CORPORATION.**

Under Rev. St. 1911, art. 4694, subd. 2, a private corporation is liable for wrongful death only where the negligence, unskillfulness, or default is act of its vice principal; and where vice principal was not negligent in directing teamster to travel certain road under the circumstances, and death of plaintiff's wife, riding on top of wagon, was due purely to negligence of teamster in driving of wagon, corporation was not liable.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Nicolas Aguinaga against the Medina Valley Irrigation Company. Judgment for defendant was affirmed by Court of Civil Appeals (168 S. W. 78), and plaintiff brings error. Affirmed.

J. D. Childs and Jas. W. Brown, both of San Antonio, for plaintiff in error.

West & McMillan and Wm. Aubrey, all of San Antonio, for defendant in error.

**STRONG, J.** The plaintiff, Nicolas Aguinaga, brought this suit against the Medina Valley Irrigation Company, a private corporation, for damages for the death of his wife. Plaintiff's wife was killed by being thrown from a wagon driven by a teamster named Chipman, who had been instructed by defendant's vice principal, Mitchell, to transport plaintiff's wife and household goods from what was known as the "Big Dam" to the "Little Dam," where plaintiff was at work for defendant. The negligence charged was in failing to have brakes and a light on the wagon, in failing to have a safe and careful driver, in improperly loading the wagon, in proceeding in the nighttime over a rough road, and in failing to route the wagon over another road. The case was submitted to the jury on special issues, and upon the answers thereto the trial court rendered judgment in favor of defendant, which was affirmed by the Court of Civil Appeals. 168 S. W. 78.

The Court of Civil Appeals, in affirming the judgment of the trial court, in effect holds that the answers of the jury to the issues submitted are inconsistent and contradictory, but that under the undisputed evidence the trial court should have instructed a verdict for defendant, and that therefore it is immaterial whether the judgment in favor of defendant could be based on the verdict or not.

We are unable to agree with the honorable Court of Civil Appeals in its holding that the trial court should have instructed a verdict for defendant. The jury found that Mitchell was the vice principal of defendant, and there is ample evidence in the record to support this finding. The negligence of Mitchell, if any, was therefore the negligence of defendant. We are of opinion, however, that the trial court properly rendered judgment for defendant upon the answers of the jury. The jury found that defendant was not guilty of negligence in failing to provide the wagon with brakes and a light, and further found that Mitchell, the vice principal, was not guilty of negligence in directing Chipman to travel the road which he did travel "at the time and under the circumstances shown by the evidence," but found that Chipman was guilty of negligence "in the manner in which he drove and operated the team and wagon at the time of deceased's injuries." These were the only issues of negligence submitted to the jury, and no request was made by plaintiff that any other be submitted. While, as held by the Court of Civil Appeals, some of the answers of the jury to the special issues submitted are inconsistent and contradictory, none are inconsistent with or contradictory to the findings of the jury on the issues of negligence submitted. The trial court, therefore, properly rendered judgment for defendant under the findings of the jury, unless the defendant is liable by reason of the negligence of Chipman in handling the team and wagon at the time deceased was injured.

Plaintiff's action is based upon the following subdivision of article 4694, R. S. 1911, prior to its amendment in 1913 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4694):

"An action for actual damages on account of the injuries causing the death of any person may be brought in the following cases: \* \* \*

"2. When the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another."

It has been definitely settled that under the above subdivision a private corporation is liable for the wrongful act, negligence, unskillfulness, or default of its vice principal. *Oil Co. v. Camp*, 105 Tex. 130, 145 S. W. 902; *Lumber Co. v. Cooper*, 105 Tex. 21, 142 S. W. 1171; *Hugo-Schmeltzer Co. v. Palz*, 104 Tex. 563, 141 S. W. 521. In the *Hugo-Schmeltzer Case*, above cited, it was held that the corporation was liable for the death of a servant, caused by the negligence of its vice principal in directing the servant to release an elevator in a negligent manner, and it is contended that this case falls within the rule announced in that case.

We think the cases clearly distinguishable. In the *Hugo-Schmeltzer Case*, the vice principal of the corporation was present di-

recting the employes in the use of the elevator. The elevator became fastened in such a way that to release it, except in a certain manner, would cause it to shoot up to the top. The vice principal ordered the elevator to be released in a negligent manner, which caused deceased's injury. There was no negligence of the servant in the manner of releasing the elevator, but the negligence was that of the vice principal in ordering it to be so released. In the instant case, under the findings of the jury, the negligence causing the death of plaintiff's wife consisted, not in the act of Mitchell, the vice principal, in directing Chipman to transport plaintiff's wife at the time and under the circumstances shown by the evidence, but in the manner in which Chipman managed the team and wagon at the time plaintiff's wife was injured. Mitchell, the vice principal, under the findings of the jury, was not guilty of negligence in directing the act to be performed in the manner as directed; but Chipman, the servant, was negligent in the manner in which he performed the act. We think it clear, under the authorities, that defendant cannot be held liable for the negligence of Chipman, who was not a vice principal of defendant, but a mere servant. *Oil Co. v. Camp*, supra; *Lumber Co. v. Cooper*, supra; *Railway Co. v. Freeman*, 97 Tex. 594, 79 S. W. 9, 1 Ann. Cas. 481; *Lipscomb v. Railway Co.*, 95 Tex. 5, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. Rep. 804; *Hargrave v. Vaughn*, 82 Tex. 350, 18 S. W. 696; *Hendrick v. Walton*, 69 Tex. 197, 6 S. W. 749.

We are of opinion that the judgment of the Court of Civil Appeals and that of the trial court should be affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

#### WESTERN UNION TELEGRAPH CO. v. JOHNSTON. (No. 46-2710.)

(Commission of Appeals of Texas, Section A. April 2, 1919.)

#### 1. TELEGRAPHS AND TELEPHONES §38(6) — DEATH MESSAGES—DELAY—NOTICE OF RELATIONSHIP.

A telegraph message by R. to J. that "mother died at 6:30 p. m." was on its face sufficient to give the telegraph company notice that deceased and J. were mother and son.

#### 2. TELEGRAPHS AND TELEPHONES §38(6) — DEATH MESSAGES—DELAY—NOTICE OF RELATIONSHIP.

In an action against a telegraph company for delay in failing to deliver a message to a

son that his mother is dead, it is not necessary that the company have distinct notice of the relationship, where the language of the message itself puts the company on inquiry.

#### 3. TELEGRAPHS AND TELEPHONES §38(6) — DEATH MESSAGES — DELAY — CONSTRUCTIVE NOTICE.

A message from R. to J. that "mother died at 6:30 p. m." charged the telegraph company with notice that J. would probably desire to attend the funeral, and should have anticipated that he would have sent a message requesting postponement.

#### Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by P. A. Johnston against the Western Union Telegraph Company. A judgment sustaining a general demurrer to the petition was reversed by the Court of Civil Appeals (167 S. W. 272), and defendant brings error. Affirmed as recommended by the Commission of Appeals.

N. L. Lindsley, of Dallas (Geo. H. Fearons, of New York City, of counsel), for plaintiff in error.

Carden, Starling, Carden, Hemphill & Wallace, of Dallas, for defendant in error.

TAYLOR, J. This suit was for damages for failure of the Western Union Telegraph Company, defendant, to promptly deliver to the plaintiff, P. A. Johnston, a telegram announcing the death of his mother, whereby he was prevented from attending her funeral.

The message is in the following language:

"Garner, No. Carolina, Dec. 25-12.

"P. A. Johnson, Dallas, Texas.

"Mother died at 6:30 p. m.

"[Signed] H. Rand."

The petition contains the usual allegations of the filing of the message by the sender, its reception by the agent of the defendant, and the payment of the customary charges. It further alleges that, had the message been promptly transmitted and delivered, the plaintiff would have left Dallas on the night of December 25th for the said city of Garner, and would have reached that point on December 27, 1912, in time for the funeral; that the message was not delivered, and plaintiff had no knowledge thereof, or of the death of his mother, until the 11th day of January, 1913, when he received a letter advising him of his mother's death and of the transmission of the message.

Plaintiff's allegations set forth that the funeral of his mother took place in said city of Garner at 4 o'clock Thursday, December 26, 1912, but that, if the telegram had been promptly delivered so that he could have had the opportunity of responding thereto announcing his intention of being present,

he would have requested a postponement of the funeral; and, pursuant to such request, it would have been postponed until his arrival.

The petition disclosed that Rand, the sender of the message, was a brother-in-law of the plaintiff, residing at Garner, N. C., and that plaintiff's mother also resided and died there. The petition charges that the defendant had actual knowledge that the telegram was intended for him, and that the sender, when he delivered the message for transmission, informed the agent at Garner of the facts and circumstances requiring its speedy transmission and delivery. Plaintiff alleged that, as the proximate result of the defendant's negligence in failing to deliver said telegram within a reasonable time, he was prevented from attending the funeral, and that by reason thereof he had suffered, and would continue to suffer, pain and mental anguish.

The trial court sustained a general demurrer to the petition, and the Court of Civil Appeals reversed the judgment of the trial court and remanded the cause. 167 S. W. 272.

The question for decision is, generally speaking, whether the plaintiff's petition states a cause of action against the telegraph company; more particularly stated, whether, if the telegram had been promptly delivered, the defendant should reasonably have anticipated from the language of the message, in the absence of any reference to the time of the funeral, and in the absence of an express invitation to come, that the plaintiff would probably desire to attend his mother's funeral, and respond to the message, and probably undertake, if he could not otherwise be present, to secure its postponement in order that he might attend.

[1, 2] The face of the message is sufficient to give the company notice that the deceased and plaintiff were mother and son. *Telegraph Co. v. Edsall*, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835; *Telegraph Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; *Telegraph Co. v. Moore*, 76 Tex. 66, 12 S. W. 949, 18 Am. St. Rep. 25. It is not necessary in such case to give the company distinct notice of the relationship, as its language was such as to put the company upon inquiry. *Tel. Co. v. Adams*, supra; *Tel. Co. v. Jenkins*, 108 Tex. 374, 194 S. W. 131; s. c. (Civ. App.) 152 S. W. 198; *Herring v. Tel. Co.*, 108 Tex. 77, 185 S. W. 293. In *Tel. Co. v. Kuykendall*, 99 Tex. 323, 89 S. W. 965, the court, in determining the character and extent of the notice with which the telegraph company was chargeable from the face of the following telegram sent from Hollis, Okl., on the 18th of the month addressed to the plaintiff, the sister of the deceased, at Kingsland, Tex.: "Will Arrant died this a. m. Will be at Lampasas tomorrow evening, the 19th day"—says:

"If Will Arrant had been buried in Oklahoma, where he died, and the plaintiff had sued the telegraph company because his wife was, by its negligence, deprived of the opportunity to attend the funeral, the telegram would be held sufficient to give notice to the telegraph company that Mrs. Kuykendall would probably desire to respond to the message by going to the place where her brother had died in order to be present at his burial."

The serious question in this case is whether, under the terms of the telegram, the defendant company should be held to have anticipated that the plaintiff would request a postponement of the funeral. In *Tel. Co. v. Swearingin*, 97 Tex. 295, 78 S. W. 492, 104 Am. St. Rep. 876, the court in answering the question certified, to wit, whether the company could be held in damages on account of its delay in delivery of the following telegram, "Come; Frank is dead," whereby the addressee was prevented from responding and securing postponement of the funeral of his son, says:

"It ought to have been foreseen that upon the delivery of the message there might be a necessary delay in starting upon the trip, and that the plaintiff would have notified the sender of the fact, and of his coming, and the probable time of his arrival, and that the funeral would have been accordingly postponed. Such, we think, would have been the natural and probable consequence if the message had been promptly delivered, and therefore they should be held to be within the contemplation of the parties to the contract."

This case (*Swearingin*) reviews and distinguishes two of the cases relied upon by the plaintiff in error, to wit, *Tel. Co. v. Linn*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58, and *Tel. Co. v. Stone* (Civ. App.) 27 S. W. 144, and specifically approves the holding of the Court of Civil Appeals in *Tel. Co. v. Norris*, 25 Tex. Civ. App. 43, 60 S. W. 982.

The *Stone* Case is distinguished on the ground that the message showed upon its face that the time of the funeral was already fixed, and that the telegraph company could not properly be held to have foreseen that a postponement would be contemplated. The *Linn* Case is differentiated on the ground that from the standpoint of the company the postponement of the funeral depended upon more uncertainties and greater contingencies than in the *Swearingin* Case. The message in the *Linn* Case: "Grace is very low. Can you come and bring Maud"—is held not to show on its face that "Grace" had a husband, and that, if the message had been promptly delivered, plaintiff would have advised the sender of his coming—"Grace" not being dead—and that the unknown husband would have postponed the funeral until plaintiff's arrival.

The telegram in the *Norris* Case, addressed to the plaintiff and his wife, and referring to their son, is as follows: "Come on first train.

John Norris is dying." The company was held in damages in that case, the court's view being that it was within the contemplation of the defendant that the plaintiff would have wired to Chancellor (the sender of the message) to hold the body, and would have taken the morning train for Paris; that the body could have been kept 48 hours longer; and, if Chancellor had received the message, he would have deferred the burial until plaintiff's arrival. Chief Justice Gaines says, in approving the holding of the Court of Civil Appeals:

"We are of opinion that the court \* \* \* correctly held that the damages in this case [Swearingin] were not too remote. The point is ruled by the decision in the [Norris] case \* \* \* in which application for writ of error distinctly presenting the question was refused by this court."

These cases, we think, decisive of the question to be determined.

The defendant in error contends that, while in the Norris and Swearingin Cases the Supreme Court held the matters there contended for were reasonably within the contemplation of the parties, the messages in those cases contain an express invitation to come; whereas, in the Linn Case, and Motley Case, 87 Tex. 38, 27 S. W. 52, there is no such invitation on the face of the messages.

We do not find that the Supreme Court has ever held, in a case arising out of a death message, that whether the telegraph company should contemplate that the addressee in such message will respond and desire to attend the funeral depends upon an express invitation in the message to come. Nor can such holding be inferred from the principles announced in the Linn, Motley, and Stone Cases, supra. The Supreme Court has held that a message containing no express invitation to come is sufficient to charge the company with notice that the plaintiff would probably desire to respond by departing for the funeral. Tel. Co. v. Kuykendall, supra; Tel. Co. v. White (Civ. App.) 162 S. W. 906 (writ refused). The court has also held that notice of the main purpose of the telegram puts the company on inquiry as to the attendant details, and charges it with notice of all that could be learned by such inquiries. Tel. Co. v. Edsall, supra.

The Supreme Court of South Carolina, in determining in the case of Hughes v. Tel. Co., 72 S. C. 518, 52 S. E. 107, the extent of the notice conveyed to the company by a message merely announcing death, reviews the Swearingin Case, supra. The telegram in the Hughes Case, addressed to the plaintiff and signed by his wife, is as follows: "John killed at Panasoffkee at mill this morning." The court points out that the on-

ly difference in the material facts of the cases is that the telegram in the Swearingin Case contains the word "come" in addition to the notification of death; but does not regard the cases as differing in principle, in that under the facts of either case "the probability is that the addressee will follow the promptings of nature and respond to the message, and, if possible, at once set out to attend the funeral." The opinion of the court in the case of Tel. Co. v. Caldwell, 128 Ky. 42, 102 S. W. 840, 12 L. R. A. (N. S.) 748, is to the same effect.

[3] Under the terms of the message, in this case the defendant is charged with notice that the plaintiff would probably desire to depart at once on receipt of the message for Garner to attend the funeral. To hold that the defendant is charged with such notice, and further to hold that it is not chargeable with notice that the plaintiff would, upon receipt of the message promptly delivered, probably send a reply requesting a postponement which would enable him to be present, not only disregards the holding in the Edsall Case, supra, as to the extent to which the company is chargeable with notice, but in effect characterizes a son's desire to pay his last respects to the memory of his mother as a passive rather than an active desire. The defendant should have anticipated that such a message would be sent.

We are of opinion that the judgment of the Court of Civil Appeals should be affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court. We approve the holding on the question discussed.

#### HOTEL DIEU v. ARMENDAREZ. (No. 44-2706.)

(Commission of Appeals of Texas, Section A.  
April 2, 1919.)

#### 1. MASTER AND SERVANT §153(1)—DUTY TO WARN MINOR SERVANT.

It is duty of master to warn and instruct minor servant as to dangers incident to service which are known to master, or could be known by reasonable care, and which the servant, because of immature judgment and want of experience, cannot reasonably be expected to know and appreciate.

#### 2. MASTER AND SERVANT §154(1)—ASSUMPTION OF RISK—DUTY TO WARN AND INSTRUCT.

A minor servant, of capacity to appreciate the danger, or who has acquired the knowledge otherwise than by instruction from master, need



not be warned or instructed, but mere fact servant knows that employment is dangerous does not relieve master of further instruction as to extent of danger and means of avoiding it.

**3. MASTER AND SERVANT — 190(20) — INJURIES TO MINOR SERVANT — NONDELEGABLE DUTY TO INSTRUCT.**

Religious hospital corporation operating a laundry was liable for injury to minor servant resulting from failure of forewoman on request to instruct her as to way to stop mangle before extricating clothes clogging it, and thus to avoid danger; hospital's duty to instruct and warn being nondelegable.

**4. MASTER AND SERVANT — 288(11) — INJURY TO MINOR SERVANT — ASSUMPTION OF RISK — KNOWLEDGE OF DANGER — QUESTION FOR JURY.**

In action against religious hospital corporation operating laundry for injuries to minor servant operating mangle, whether servant understood danger of her hand being drawn between rollers in effort to release entangled garments, so that she assumed the risk, held for the jury.

**5. CHARITIES — 45(2) — LIABILITY TO INJURED SERVANT.**

A religious corporation organized to operate a hospital is liable for injuries to a servant through its negligence, though money received by it was expended in maintaining institution for poor, to pay off a mortgage, and to support its mother institution in another state.

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by Romana Armendarez against the Hotel Dieu. Judgment for plaintiff was affirmed by the Court of Civil Appeals (167 S. W. 181), and defendant brings error. Affirmed on recommendation of the Commission of Appeals.

T. A. Falvey and Davis & Goggin, all of El Paso, for plaintiff in error.

Ralf Border and Lea M. Grady & Thomason, all of El Paso, for defendant in error.

**STRONG, J.** The defendant, Hotel Dieu, is a religious corporation organized for the purpose of maintaining and operating a hospital. The services of the hospital are given free to those who cannot afford to pay; and all sums received for services are expended in the maintenance of the establishment, the payment of a mortgage debt, and of an annual sum for the maintenance of the mother organization located in another state. Defendant owns and operates a laundry in connection with the hospital. The plaintiff, Romana Armendarez, was an employé of defendant and, while at work in the laundry, was injured by having her hand drawn in between the revolving rollers of the mangle while she was in the act of releasing from the machine some garments which had become entangled therein. This

action was brought to recover damages for the injuries thus received. The case has been twice tried. Upon the first trial, the court instructed a verdict for defendant upon the theory that it was, from the nature of its purposes and business, exempt from liability in the matters complained of. The judgment rendered thereon was reversed by the Court of Civil Appeals. 145 S. W. 1031. The second trial resulted in a verdict and judgment for plaintiff, which was affirmed by the Court of Civil Appeals. 167 S. W. 181.

The machine upon which plaintiff was injured consisted of a large cylinder or roller and three smaller ones in position above it, and the appliances by which they were connected with a steam engine by means of which the rollers were pressed together and caused to revolve. The person feeding the machine stood in front of a table or platform provided for that purpose and placed the garments under a guard railing which had been arranged to protect the hand of the feeder. The garments were gripped between the large and small revolving rollers and by action of the machine carried out on the opposite side. At the time of her injury, plaintiff was about 17 years of age and had been in the service of defendant about 7 weeks, during which time she fed the mangle 2 days in each week. She was without previous experience in the operation of machinery. Mrs. Sawyer was forewoman in charge of the laundry, and it was her duty to instruct and direct plaintiff and the other employes in their work. She testified:

"While I worked at Hotel Dieu, I was forewoman in charge of the laundry. I did not employ the servants; Sister Superior did. When they misbehaved, I discharged them. \* \* \* I was in charge of Mexican servants; the Sisters of Charity put me in charge of them. \* \* \* If the clothes got caught in the mangle and choked it or got caught or entangled in it in any way, the proper thing to do would be to stop the mangle and loosen it up; loosen the wheel that is on the end. \* \* \* She (plaintiff) did not know how to stop the mangle. I stopped it most of the time. I never told her how to stop it."

The plaintiff testified:

"Before being hurt, no instructions, warning, or caution were given to me by any one in regard to the mangle. I had no knowledge or experience with machinery prior to the time I was injured. The way in which the injury occurred was this: A few towels were tangled in the mangle, and I told the lady, Mrs. Sawyer, that those towels were tangled in the mangle, and she told me to take them out. I went to take them out at the time my hand was caught. My hand was all burned when it was caught. It was mashed also."

It is not contended that plaintiff's injury was caused by reasons, of any fault or de-

fect in the mangle. The sole ground of negligence relied upon to sustain the judgment is that defendant failed to instruct the plaintiff in the use of the mangle and to warn her of the dangers incident to its operation.

The main questions for determination are: Whether the risk was an obvious one which the plaintiff assumed; and, if not, whether the defendant was negligent in failing to warn and instruct plaintiff as to the dangers incident to her work.

[1, 2] It is the duty of the master to warn and instruct a minor servant as to the dangers incident to the service which are known to the master or which could be known by the exercise of reasonable care, and which the servant, because of immature judgment and want of experience, cannot reasonably be expected to know and appreciate. If the servant has sufficient capacity to appreciate the danger or has acquired the knowledge otherwise than by instruction from the master and is as fully aware of the dangers as if instructed and advised, the master is not negligent in failing to give such warning and instruction, and under such conditions the servant assumes the risk incident to the employment. The mere fact, however, that the servant knows that the employment is dangerous, is not sufficient to relieve the master of further instruction. The duty of the master is to inform the servant, not only that the work is dangerous, but also as to the extent of the danger and the means of avoiding it. If the master fails to perform this duty, it ordinarily is a question of fact for the jury to determine whether the servant has acquired sufficient knowledge of the dangers to exempt the master from liability in case of injury. *Ry. Co. v. Brick*, 83 Tex. 598, 20 S. W. 511; *Royer v. Tinkler*, 16 Pa. Super. Ct. 457. In the *Brick Case*, *supra*, it is said:

"It is insisted that on account of the plaintiff being 19 years old, and the evidence as to his intelligence and the duration of his employment in the particular service in which he was injured, the court should have treated the case as if he were *sui juris*. It has been held that when a minor attains the age of 14 years he is to be considered, as to the question of his assuming the risks of a dangerous employment, as a person of full age, until the contrary is made to appear by evidence. *Nagle v. Ry.*, 88 Pa. 35 [32 Am. Rep. 413]. But we think the great weight of authority supports a different rule, and that if a servant be under the age of 21 years, and he has not been instructed by the master as to the dangers of his employment, it is a question for the jury whether he has acquired sufficient knowledge of the dangers to exempt the master from liability in case of injury. In the first place, it is the duty of the master to inform him not only that the work is dangerous, but also as to the extent of the danger and how to avoid it. If that be done he assumes the risk, and in case he is injured by

reason of the risks so assumed he cannot recover. So, also, if he knows not only of the danger but also of its extent, and has the capacity to appreciate it, he then assumes the risk, and the master cannot be held liable. It is not sufficient that he knows the employment is dangerous, but he must also be aware of the extent of the danger, and have the discretion to understand the risk, before he can be held to have assumed it. These are questions of fact to be determined by the jury. *Coombs v. Cordage Co.*, 102 Mass. 572 [3 Am. Rep. 508]; *Donlin v. Allen*, 74 Mo. 1 [41 Am. Rep. 298]; *Hill v. Gust*, 55 Ind. 45; *Schwander v. Brigs*, 33 Hun, 186."

[3, 4] The undisputed evidence shows that the proper method of releasing the entangled garments was to stop the mangle, and it was the duty of defendant to so instruct plaintiff. This was a nondelegable duty, and when defendant placed plaintiff under the control of Mrs. Sawyer, who had authority to instruct and direct her in the method and manner of doing her work, Mrs. Sawyer became the representative of defendant in its relations to plaintiff, and, as such representative, the duty of the master rested upon her to give plaintiff proper warning and instruction as to the duties and dangers of her position. Plaintiff applied to Mrs. Sawyer for instructions before undertaking to release the entangled garments from the mangle, and the jury was warranted in finding that she was guilty of negligence in failing to instruct plaintiff as to the proper method of releasing the garments. Her negligence in this respect was the negligence of defendant. *Contracting Co. v. McCracken*, 105 Tex. 407, 150 S. W. 1156; *Oil Co. v. McLain*, 27 Tex. Civ. App. 334, 66 S. W. 226. It does not appear from the testimony that plaintiff had, prior to her injury, been confronted with the duty of releasing entangled garments from the mangle, and the fact that she applied to Mrs. Sawyer for instruction indicates that she had not. She knew how to feed the mangle and knew if her hand came in contact with the revolving rollers that she would be injured, but it cannot be held, as a matter of law, that she understood and appreciated the danger of her hand being drawn between the rollers in an effort to release the entangled garments while the machine was in operation. Under the evidence, this was a question of fact which was properly left to the determination of the jury.

[5] It is insisted that, because defendant is a charitable corporation, it is not liable for an injury caused by negligence in the conduct of its business. We think this question was correctly disposed of by the Court of Civil Appeals on the first appeal of this case. See 145 S. W. 1030, and authorities there cited.

We are of opinion that the judgment

of the Court of Civil Appeals and that of the trial court should be affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

**FIRST NAT. BANK OF AMARILLO et al.  
v. RUSH. (No. 54-2733.)**

(Commission of Appeals of Texas, Section B.  
April 2, 1919.)

**1. APPEAL AND ERROR §27(7)—REVIEW—  
DIRECTING VERDICT—EVIDENCE.**

In considering whether the giving of a peremptory charge in favor of plaintiff was proper, only the evidence of defendant is to be considered, and, if sufficient to authorize a finding in his favor, giving of charge must be held improper, even though all of such evidence was controverted.

**2. EVIDENCE §448 — CONSTRUCTION — PAROL EVIDENCE.**

Although a contract of partnership or joint adventure standing alone was unambiguous, parol evidence was admissible to show that sums recited to be paid therein and things recited to have been done were not in fact true, and to clarify uncertainty arising by reason of such recitation.

**3. JOINT ADVENTURES §5(3) — ABANDONMENT OF CONTRACT—JURY QUESTION.**

In action involving contract whereby parties were to divide profits arising from purchase and sale of certain land, whether such contract was abandoned, held for jury.

**4. JOINT ADVENTURES §4(1)—RESCISSION OF CONTRACT.**

Under an executory contract for a joint adventure, where a member after agreeing to furnish the necessary money failed to do so, the other member might treat contract as abandoned.

**5. PARTNERSHIP §267 — DISSOLUTION — ABANDONMENT—FAILURE TO PAY MONEY.**

The mere failure of a partner to pay money into the partnership under a partnership agreement will not work a forfeiture of his interest and a dissolution of the partnership, but abandonment may be implied from acts and conduct of the parties inconsistent with an intention on their part to continue the contract, especially in regard to contracts executory in their nature where little has been done toward their performance.

**6. BANKS AND BANKING §180—LOANS TO OFFICERS AND STOCKHOLDERS.**

A bank with the knowledge of all of its officers could properly make a loan to a partnership of which its president, a large stockholder, was a member.

**7. PARTNERSHIP §340 — ACCOUNTING — DIVISION OF PROPERTY—SALE OF NOTES AND ACCOUNTS.**

In the settlement of partnership affairs, uncollected notes and accounts should not be treated by the court as money and charged to either party, but the court should provide for the collection or sale of the notes.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Suit by the First National Bank of Amarillo against J. W. Rush, in which W. H. Fuqua intervened. There was a judgment of the Court of Civil Appeals reversing a judgment in favor of plaintiff (160 S. W. 319, 609) and plaintiff and intervener bring error. Judgment of Court of Civil Appeals affirmed.

W. F. Ramsey, of Dallas (Reeder & Dooley, and Madden, Trulove & Kimbrough, all of Amarillo, of counsel), for plaintiffs in error.

H. H. Cooper, of Houston, J. A. Stanford, of Waco, and L. C. McBride, of Dallas, for defendant in error.

MONTGOMERY, P. J. This suit was instituted by the First National Bank of Amarillo (hereinafter for convenience designated as the bank) on the 16th day of March, 1910, against J. W. Rush and Mattie E. Rush, his wife.

The plaintiff alleged that the defendant had on the 24th day of March, 1906, executed and delivered to it a promissory note for \$12,000, payable on demand and bearing interest at 10 per cent., and providing for 10 per cent. attorney's fees. The bank sought a judgment for the amount of the note, interest, and attorney's fees, and also a foreclosure on certain notes executed by one Gid Jowell to defendant J. W. Rush of the face value of \$20,000, which the bank alleged had been pledged to it as collateral to secure the notes sued on. The defendant Rush answered and admitted the execution of the note and pleaded payment in full thereof, setting out the several items of the alleged payment with the dates thereof. The defendant Rush also claimed ownership of the collateral notes and sought a judgment for their possession. On January 13, 1911, W. H. Fuqua intervened in the suit, and among other things alleged that in the year 1904 intervener and defendant Rush entered into a partnership for the purpose of buying and selling cattle; that under the terms of the partnership the intervener was to furnish the necessary money and the defendant Rush pasturage for the cattle, and also to give the business his personal attention; and that the intervener should first be reimbursed for the money advanced by him without interest, and all profits divided equally between the parties.

Intervener alleged that the cattle copartnership was in force on March 24, 1906, and that on that day the intervener and defendant entered into a copartnership agreement for the purchase and sale of a section of land in Swisher county, which contract was in writing, and was as follows:

"This memorandum of agreement, made and entered into by and between W. H. Fuqua of Potter county, Texas, and J. W. Rush of Swisher county, Texas, witnesseth:

"That the said J. W. Rush has purchased a certain section of land situated in Swisher county, Texas, and described as follows: Being section No. 27, block W-1 in Swisher county, Texas, being the section of land just east of the town of Tulia, Swisher county, Texas, for the consideration of \$9,600 cash; and the said W. H. Fuqua has paid \$9,600.00, being the purchase price of said land, for the said Rush.

"In consideration of the premises, the said Rush is to handle said section of land and to dispose of the same to the best advantage possible and is to pay the said Fuqua back the \$9,600.00, so paid by him as above set out, without interest and is to further pay the said Fuqua two thirds of all the profits made on said section of land over and above the said \$9,600.00 paid for same, as aforesaid; the said Rush to have and be entitled to the other one third of the profits made on said lands, if any.

"The said Fuqua hereby agrees not to charge any interest on the \$9,600.00 advanced by him to the said Rush and invested in the above described lands, but is to have, when said lands are sold, the said \$9,600.00 back together with two thirds of the profits on the same.

"We, the said W. H. Fuqua and J. W. Rush, hereby bind ourselves, our heirs, executors and administrators to carry out the terms of this contract.

"In testimony whereof we have signed our names, this the 24th day of March, 1906.

"[Signed] W. H. Fuqua.  
"J. W. Rush."

The Intervener further alleged that, pursuant to this contract and before the execution thereof, the defendant Rush drew a check on the bank to pay 10 per cent. of the purchase money for said land, and the intervener, who was president and actively in charge of the affairs of the bank, procured said check to be cashed, and that after the execution of the contract the deed was made to defendant and by his direction sent to the bank, and that the intervener procured said bank to pay the balance due for said land. The total price for the land was \$9,600.

Intervener further alleged that all the partnership business, both as to the land and the cattle, was conducted in the name of J. W. Rush and all the money for said partnership was furnished by the intervener by causing the bank to pay checks drawn by Rush on the bank, which checks were charged on the books of the bank to J. W. Rush, and that Rush knew all the facts and accepted the same as a compliance by Intervener with his obligation to furnish the necessary funds.

Intervener further alleged that as cattle were sold the proceeds of such sale were remitted to the bank and by Fuqua's direction deposited in an impersonal account called "Fuqua-Rush Cattle Account," and as the lands were sold the proceeds were deposited in the bank by the direction of Fuqua to "Fuqua-Rush Land Account."

The plea of intervention set out various sums of money alleged to have been furnished, as above specified, and also alleged the several sums deposited in the cattle account and the land account and set up various other matters connected with the two alleged partnerships for the purpose of showing the condition of said partnerships.

It was alleged that the collateral note upon which a foreclosure was sought was the property of the land partnership, and that the note sued on by plaintiff was a liability of the partnership, although executed in the name of J. W. Rush, and that the payments alleged by defendant Rush to have been made to the bank on the note sued on were partnership funds, and that same were not payments on the note sued on, and that said payments were properly applied to overdrafts which had been incurred by Rush drawing checks on the bank, and which were charged to his account. Intervener sought a dissolution of and winding up of the affairs of both partnerships, and prayed that Rush be required to pay the note sued on out of partnership assets alleged to be in his possession, and for other relief.

The defendant Rush replied to the plea of intervention by exceptions and general denial. He also alleged and claimed in substance that, after the execution of the contract for the purchase of the land, the intervener failed and refused to advance the money in payment for same, and that by mutual consent the contract was in fact abandoned and rescinded.

The bank by supplemental petition denied the allegations of the defendant's answer, and especially pleaded that the payments alleged to have been made by defendant were not applied on said note, and that there had been no direction to apply same on the note, and that the defendant at the time of making such payments gave no directions as to the application thereof, and that the said alleged payments were in fact deposited by plaintiff and Fuqua in the bank as cash deposits and by request of Fuqua were carried in impersonal accounts as pleaded by Fuqua, and that the bank received said funds to be held pending a settlement of the partnership affairs between Fuqua and Rush and subject to such disposition as they might agree upon or as might be directed by Fuqua and subject to its right to apply same to the discharge of any balance in its favor that might be standing on its books on the J. W. Rush account, except interest which

Fuqua was to pay personally, and further alleged that some of the items on said account were for checks drawn by Rush for his individual business and not connected with the partnership business, and such items were to be charged to and paid by J. W. Rush. The bank further alleged: That by procurement of Fuqua, who was the owner of all its capital stock except director's shares, the defendant Rush was permitted to draw funds from the bank for the purpose of carrying on the land and cattle business, and that under such arrangement Rush drew various checks which it paid, and that some of the checks were for the personal use and benefit of Rush, of which, however, plaintiff had no notice at the time same were paid, and that at the time the notes sued on were executed there was a balance of overdrafts standing on its books against the defendant Rush for about \$14,000, and it was expected and understood that Rush would continue to draw checks on the plaintiff and become indebted to it otherwise, and that the note was executed and delivered by the defendant and accepted by plaintiff to be credited to J. W. Rush on his account for the purpose of absorbing the overdraft, which then stood on plaintiff's books against Rush, and the balance charged against him on said account, except interest on the items incurred in behalf of said land and cattle business, which interest was to be paid by Fuqua personally. That the proceeds of said note passed to the credit of the account of Rush for the full amount of the face value thereof, and that Rush had the benefit thereof on the account, and that all of these facts were well known and understood by defendant Rush. That, after the execution of the note, Rush continued to draw checks and to incur the items of indebtedness which were charged upon said account, and that the checks and indebtedness so charged not only absorbed the note, but left a large overdraft charged against defendant Rush. That numerous deposits were made by Fuqua to the credit of the impersonal accounts above referred to, subject to the right of plaintiff to appropriate same to the discharge of the indebtedness standing on the books of the bank against Rush. That the bank did not know what part of the funds held in said impersonal accounts belonged to the defendants, or either of them, but was willing and ready to account for whatever might be ascertained to be Rush's share of said funds after the indebtedness due to the plaintiff from Rush and the partnership was satisfied.

Plaintiff further alleged that about the 16th day of November, 1907, it transferred the amount standing on its books in said impersonal accounts, amounting to about \$22,000, to the credit of said account standing on its books in the name of Rush, intending thereby to appropriate said deposits

which had been made in the impersonal accounts to the payment of the items charged to said J. W. Rush's account, except interest for which it looked to Fuqua alone, and to hold the remainder of said transfer, if any, subject to settlement and distribution between Rush and Fuqua, and that the transfer should be subject to the rights and equities of all the parties to the litigation. Attached to this answer was a statement of the several accounts referred to. The bank asked that Fuqua be made a party to the suit, and that an accounting be had between Fuqua and Rush and between them and the bank, and that an auditor be appointed, and that the rights of the parties as to all the transactions might be fully determined. The bank further alleged that the amount of the funds which would be due to Rush would not be sufficient to liquidate or discharge the overdrafts, and that no part of the funds deposited in said impersonal accounts could be applied to the discharge of the note sued on. The court appointed an auditor who made a report, and upon trial by jury the court gave the jury a peremptory charge, to find the following verdict:

"We, the jury, find that the Intervener, W. H. Fuqua, and the defendant, J. W. Rush, were partners in the cattle business and the land business in controversy; that the amount of funds advanced by Intervener through plaintiff for the cattle business was \$10,458.17; that the receipts from cattle sales were \$15,305.70, to which should be added interest on the cattle notes collected by Intervener through said bank amounting to \$994.60, making in all \$16,300.30; that the net profits of the cattle business were \$5,842.13, to be divided equally, \$2,921.06 to Intervener and defendant each; that the amount of funds advanced by Intervener through plaintiff bank for the land business was \$9,720.00; that the receipts from the land sales were \$32,750.00, to which should be added interest collected on the land notes by Intervener through plaintiff bank \$947.81, making in all \$33,697.81; that the profits of the land sales were \$23,997.81 to be divided one-third to the defendant, \$7,972.60, and two-thirds to the Intervener, \$15,985.20; that defendant's total profits land and cattle are \$10,913.66; that defendant Rush has in his hands cattle proceeds amounting to \$2,881.25, besides the Gid Jowell notes of the face value of \$20,000.00, making a total of \$22,881.25; that after deducting his total profits of \$10,913.66 from said amount there remains for which he should account to the Intervener \$11,967.59; that the amount of the defendant's personal overdraft on the plaintiff with six per cent. interest on each item from its date after deducting the deposit of \$2,500, on November 8th, 1906, with 6 per cent. from its date is \$10,890.36."

From the judgment rendered on said verdict the defendant Rush appealed, and the Court of Civil Appeals of the Seventh District reversed and remanded the cause for a new trial. A full statement of the case and the reasons of said reversal will be found

in the two opinions of the Court of Civil Appeals (160 S. W. 319, 609).

Such other facts as we deem essential to be considered in connection with the propositions considered by us will be stated in the opinion.

#### Opinion.

As will be seen from the statement, the trial court gave the jury a peremptory charge to find that Rush and Fuqua were partners in the land transaction and that Fuqua was entitled to two-thirds of the profits of said venture.

[¶] In determining whether this action of the court was authorized by the evidence, it will only be necessary to state the testimony relied upon by the defendant Rush. If the testimony offered by him was sufficient to authorize a finding that the contract was purely executory and had never been executed, or that the parties by mutual consent or agreement had abandoned or rescinded it, then the giving of the peremptory charge was improper, even though all this evidence was controverted by testimony offered by Fuqua and the bank.

We do not think it necessary to go into the cattle transaction further than to say that the evidence shows that such a partnership existed, and that the bank had at Fuqua's direction paid numerous checks drawn on it by Rush, and that all of said sums so paid were charged on the books of the bank to Rush and there carried as an overdraft until, as alleged by the bank, the items in the impersonal accounts in the name of "Fuqua-Rush Cattle Account" were transferred on the books and credited to the account of Rush. Rush testified that he did not know how the accounts were carried on the books of the bank, and that he did not know until long after the purchase of the land that the moneys to be advanced by Fuqua in the cattle transaction had not been in fact advanced by him. He further testified that, while he had drawn on the bank for money for his personal use, this was done under an agreement with Fuqua that he might do so, and that he should account for the funds so drawn.

With reference to the land transaction, Rush testified that, before making any contract for the purchase of the land, he saw Fuqua, and that Fuqua then told him to go ahead and buy the land, and that he would have his check for the first payment paid by the bank, and that he (Fuqua) would either go in with him in the purchase of the land and furnish all the necessary money without interest and take two-thirds of the profits after repaying the purchase money, or would loan Rush the money to pay for the land; that under this agreement he contracted for the land at the price of \$9,600 and gave a check on the bank for \$960, which was paid by the bank; that a short time after con-

tracting for the land he saw Fuqua; and that Fuqua then directed him to have the deed made to himself (Rush) and to instruct the seller to send the deed, reciting a full cash consideration to the bank, and he would pay for the land. At the time of this last conversation, the written agreement set out in the statement was prepared and signed. According to Rush's testimony, on the same day and about two or three hours after the execution of the written agreement, and before any payment for the land had been made except the \$960, he saw Fuqua again, and that Fuqua then told him that he had decided that it would be best for Rush to make a note to the bank for the money and to make it for \$12,000, as Rush would need a little more money or owed a little more, or words to that effect, and directed Rush to secure the note to the bank by making a deed of trust on the land purchased and a section adjoining it.

Rush testified that he then told Fuqua that the adjoining section belonged to his wife, and that Fuqua then said, "You sign up a note and deed of trust and she will have to sign it with you or it won't be any account"; that he acquiesced in the demand of Fuqua; and that Fuqua then had the note for \$12,000 payable to the bank prepared and also the deed of trust, and both were executed by Rush and his wife, and the deed of trust, after being recorded, was with the note delivered to the bank. Rush testified that the foregoing was all that occurred at that time. The \$12,000 proceeds of the note was credited on the account of J. W. Rush, and, when the deed was received by the bank, the balance of the purchase money was paid by the bank and charged to the account of Rush.

The books of the bank show that on April 6, 1906, the date of the execution of the note, Rush had drawn on the bank checks for about \$2,500 for his personal account, which were not properly chargeable to the cattle partnership, and that these checks had been paid and charged to the J. W. Rush account. Omitting the personal checks drawn by Rush for his personal account, and giving credit for the funds deposited in the Fuqua-Rush cattle account, the J. W. Rush partnership account was overdrawn on April 6, 1906, only about \$1,265; and, treating the Rush partnership and individual account as one, the total of the overdraft on the day the note was executed was approximately \$3,900. Rush testified that as he sold the land he delivered all money and notes received from such sales to Fuqua and instructed him to credit the same on the note, and that he also delivered to the bank \$2,500 of his individual funds and directed that it be credited on the note. The proceeds of the sale of the land and the \$2,500 of his individual funds paid to the bank by Rush was more

than sufficient to pay the note. None of these payments were in fact credited by the bank on the note, but were instead deposited to the credit of Fuqua-Rush land account, and subsequently in 1907 were transferred and credited to the J. W. Rush account. Rush further testified that, when he instructed Fuqua to credit the payments on the note, Fuqua made no objection.

The note remained in the bank without credit until the suit was filed, and no demand was ever made for payment until a short time before the suit was filed in the year 1910.

The \$20,000 Gid Jowell notes were given for 200 acres of land which was the last sold of the section referred to in the written contract.

Rush testified that, when he sold the 200 acres, he requested a release of the deed of trust, and that Fuqua agreed to send it to Tulsa where the land was situated, but that the release was sent with instructions not to deliver it unless the purchase-money notes received by Rush were delivered to the bank, that he protested against this, but finally indorsed the notes in order to effect the sale.

We have omitted the testimony as to transactions after the controversy arose.

Whether the contract, if fully executed, would have made Rush and Fuqua partners as to the land itself, is not material to be decided. Whether there was to be a community interest in this land, or Rush was to hold the legal title merely as trustee for Fuqua and was to receive a portion of the profits, as seems to have been decided in construing a similar contract in *Mansfield v. Wardlow*, 91 S. W. 859, is, we think, immaterial. The contract does evidence an agreement to engage in a joint adventure for profit, and if executed would have entitled the parties to share in the profits as provided therein.

Fuqua and the bank insist that the written agreement evidences an executed contract at least on the part of Fuqua, and that therefore from the time of its execution it was in fact an existing partnership. Fuqua and the bank further insist that parol evidence was not admissible for the purpose of showing that the contract was in fact not an executed one. On the other hand, Rush insists that the contract, when read in the light of the conditions existing at the time of its execution, was a mere executory agreement to enter into a partnership, and that the evidence shows that the same was never in fact carried out, but was by the parties abandoned.

The proper construction of this contract is, we think, important. Fuqua and the bank insist that the contract was unambiguous and that there is no room for construction.

[2] Looking at the contract alone, and assuming the recitals thereof to be true, the contract is unambiguous, and there is no room for construction. When, however, the

contract is read in the light of the situation of the parties and the circumstances as they then existed, it is apparent that, while the contract speaks of certain things as having been done, it must be interpreted as an agreement to do the things. It recites that Rush has purchased the land and that Fuqua has paid the purchase money. In fact, both parties pleaded, and the evidence showed, that Rush had not in fact purchased the land and that Fuqua had not paid the money. Rush had contracted for the land and Fuqua had in fact paid nothing, unless the payment by the bank of Rush's check for \$900 be construed as a payment by Fuqua. Notwithstanding the contract read literally shows an executed agreement, yet we think that properly construed in the light of the evidence it was purely executory. In other words, it was an agreement to be executed by the parties in the future. The rule excluding parol evidence to aid in the construction of the contract does not apply to this case, although the contract standing alone is not ambiguous. The ambiguity or uncertainty as to the meaning of the words used clearly appears in the contract as applied to the subject-matter and the situation of the parties.

Quoting from the case of *Klueter v. Joseph Schlitz Brewing Co.*, 143 Wis. 347, 128 N. W. 43, 32 L. R. A. (N. S.) 383:

"It seems to be thought that, unless ambiguity can be discovered in the language of the paper, looking at that only, it must, regardless of circumstances, be taken in its literal sense as expressing what the parties agreed to. There is no such rule, though it may be there is room for one to be misled in respect to the matter as he reads the numerous discussions found in the books on the subject, unless he carefully notes differences in situations treated.

"The very familiar rule is often stated and applied, that oral testimony is not admissible to contradict or vary a written contract. It is perfectly consistent with that other rule, likewise often stated and applied, that oral testimony is admissible for the purpose of applying the contract to the subject with which it deals, and, in case of ambiguity then appearing, to establish the facts and circumstances under which the agreement was made, in order that the language thereof may be read in the light of the environment at the time the parties chose such language to express their intention.

"It is said that when the language of a contract is plain, it is not open to construction. That is true in a general sense, but, unless viewed broadly, it does not convey accurately the full scope of the field where rules for construction are applicable. The words of a contract, in themselves, may be plain, yet, when applied to the situation with which it deals, not plain, the literal sense leading to such unreasonableness as to suggest that the parties probably did not so intend. In so applying the contract, oral testimony is generally necessary and permissible to the end that the full scope of the situation dealt with may be observed. As to when the language of a contract, in its literal sense, is to be taken as expressing the intention

of the parties, is correctly indicated by Vattel's rule which has been often cited by this and other courts: 'When the meaning is evident, and leads to no absurd conclusions, there can be no reason for refusing to admit the meaning which the words naturally present.' Note the language, 'when the meaning is evident.' The meaning is not evident when, if looking at the subject-matter, it is so unreasonable as to appear unlikely that the parties so intended. To enable one to read the contract in the light of the subject-matter and the effects and consequences, obviously evidence of facts and circumstances, not mere conversations, leading up to and concurrent with the making of the contract, is often necessary. One of the elementary rules found in 1 Greenl. Ev. (15th Ed.) § 286, and often cited by this and other courts, covers this subject. It is phrased thus:

"As it is a leading rule, in regard to written instruments, that they are to be interpreted according to their subject-matter, it is obvious that parol or verbal testimony must be resorted to, in order to ascertain the nature and qualities of the subject to which the instrument refers. Evidence which is calculated to explain the subject of an instrument is essentially different in its character from evidence of verbal communications respecting it. Whatever, therefore, indicates the nature of the subject, is a just medium of interpretation of the language and meaning of the parties in relation to it, and is also a just foundation for giving the instrument an interpretation when considered relatively, different from that which it would receive if considered in the abstract."

These principles have been announced in cases in this state. *Watrous' Heirs v. McKie*, 54 Tex. 69; *Haldeman v. Chambers*, 19 Tex. 46; *Kingsbury v. Carothers* (Civ. App.) 27 S. W. 15 (writ of error refused). Also by many other authorities. *Kauffman v. Raeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; 6 R. C. L. 836 and 837, and cases cited.

Read in the light of the situation of the parties and the circumstances surrounding the transaction, in order to give this contract any reasonable interpretation we are bound to conclude that the true effect and meaning of the contract was that Rush was to procure a conveyance of the land to himself, and that Fuqua was to repay to the bank the \$960 which had been drawn by Rush and applied as a first payment on the land, and that Fuqua was to pay the balance due for the purchase of the land. As will be seen from our interpretation of this contract, the contract on Fuqua's part was purely executory. If it is true, as testified by Rush, that Fuqua had agreed that he would either furnish the money and take a part of the profits from the sale of the land, or would have the bank loan Rush the money, then prior to the time the contract was signed, Fuqua was under no obligation to Rush to pay the \$960 which had been advanced by the bank. After the execution of the contract, Rush had nothing more than Fuqua's promise to pay the \$960 to the bank and to advance the other money necessary to pay for the land.

[3] After the execution of the contract, if, as testified by Rush, Fuqua demanded the execution by Rush and his wife of a note and deed of trust to the bank for the purpose of securing the moneys which Fuqua had agreed to advance and pay, and if Rush, as testified by him, acquiesced in this demand and executed the note for \$12,000 to the bank, bearing 10 per cent. interest, we think that these facts standing alone would be sufficient to authorize a finding that the written contract had been abandoned by mutual consent. Standing alone, and viewed in the light of the previous conversations between Rush and Fuqua, a reasonable interpretation of the transaction is that after the execution of the written contract Fuqua determined that instead of advancing the money he would, as had been previously suggested, have the bank to loan Rush the money upon security, and that Rush should pay interest to the bank and not divide the profits with Fuqua. There are other circumstances which tend to show that Fuqua did not consider himself bound to pay the bank the money advanced to pay for the land. The fact that interest was by his order regularly charged upon all amounts drawn by Rush—we say by his order because it is shown that the books were kept under his direction—the fact that he caused the suit to be instituted against Rush alone for the amount due the bank, while if the partnership existed, as claimed, a large part of this indebtedness was in fact his own debt to the bank, and the writing by him of a letter to Rush demanding payment of the note—are such circumstances. Our conclusion is that, while the evidence is not conclusive that the executory agreement had been abandoned, the evidence clearly raised the issue, and that therefore the trial court erred in giving the jury a peremptory charge to find that Rush and Fuqua were partners in the land transaction.

[4] We are also of opinion that if the contract is construed, as we have done, as an executory agreement for a joint adventure which is but a species of partnership, that if Fuqua after agreeing to furnish the necessary money failed to do so, that Rush had the right to treat the contract as abandoned by Fuqua, and thereafter Fuqua would not be entitled to recover any part of the profits. See *Rowley on Partnership*, vol. 2, § 981, and cases cited.

[5] In view of the fact that this case must be reversed, we will say that in our opinion the testimony of Fuqua to the effect that Rush at all times knew and was fully informed of the manner in which the account had been carried on the books of the bank, and the further testimony of Fuqua to the effect that the execution of the note and deed of trust by Rush and wife to the bank were not intended by him as an abandonment of the original agreement, but that it was fully understood with Rush that the money to be



advanced by Fuqua under the terms of the contract would be furnished by the bank upon Rush's account, and that Fuqua as between Rush and Fuqua should assume the liability to the bank, raises an issue of fact; the issue being whether the executory written agreement had been by the parties abandoned. We have not undertaken to set out all the evidence on this issue, but only enough to show that whether the contract had been abandoned was a controverted issue. We fully agree with the contention of the bank and Fuqua that, where a partnership exists, the mere failure of one of the parties to pay money into the partnership under the partnership agreement will not work a forfeiture of his interest and a dissolution of the partnership. A partnership agreement, however, like any other contract, may be rescinded or abandoned by the parties, and the fact of abandonment or rescission need not be shown by proof of an express agreement, but may be implied from acts and conduct of the parties inconsistent with an intention on their part to continue the contract, and this is especially true of a contract executory in its nature and where little or nothing has been done towards its performance. 8 R. O. L. tit. Contracts, § 307, and cases cited.

The Court of Civil Appeals held that the verdict which we have set out in the statement of the case and the judgment rendered thereon did not appear to be based on the cause of action sued on; that is, on the note. We do not think it necessary to determine this question; but, as we construe the bank's pleading, its suit was against Rush to recover on the note, and not for any balance due upon open account. The defendant Rush admitted the execution of the note and relied entirely upon his plea of payment. Under these circumstances, the issues made by the pleading as between the bank and Rush should have been tried, and it is not clear to us that the judgment rendered was based on these issues. It seems to be predicated on other issues involving a settlement of the partnership affairs as between Fuqua and Rush.

It may well be doubted whether Fuqua ought to have been permitted to intervene in this suit in order to obtain an adjudication and settlement of the partnership affairs. The confused condition of this record is a strong argument against permitting such intervention. The error, if any, in permitting Fuqua to intervene, however, was not assigned in the Court of Civil Appeals; and taking into consideration the fact that the right of intervention is to some extent discretionary with the trial court, and also considering the great lapse of time since this suit was filed, we think that the plea of intervention should not at this late day be dismissed. The right of the bank in its suit on the note should not, however, be confused with the

partnership settlement between Fuqua and Rush. Under the pleading, the bank was entitled to recover against Rush the amount of the note sued on less such payments as had been made, which ought to have been credited thereon.

If it should be found upon another trial that Fuqua and Rush were not partners as to the land transaction, and that Rush had instructed Fuqua or any other authorized officer of the bank to credit the moneys and securities derived from the sale of the land on the note sued on, then such credit should be entered as of the dates of the respective payments.

If, on the other hand, it should be determined that Fuqua and Rush were partners in the land transaction and that there were no instructions to the bank to credit the payments on any particular debt, then the payments made by the firm of Fuqua and Rush, out of the proceeds of the sale of the land should be credited on the indebtedness incurred in the land transaction whether evidenced by note or open account. Fuqua, in that event, as between him and Rush should be charged with all principal and interest on moneys expended in the land transaction. Rush should, of course, be charged as between the partners with all partnership money appropriated by him. If any recovery is had by the bank on the note sued on, it will be, we think, entitled to a lien on the Gid Jowell notes or the proceeds thereof to secure its payment.

[6] We think that the contention of Rush that Fuqua's method of handling the transaction through the bank was such a breach of his duty to the bank as would prevent any recovery by him is not sustained by the testimony.

As we read the record, Rush's testimony as to the land transaction shows a loan by the bank to him of the \$12,000 upon ample security. Fuqua's testimony is that the bank really loaned the funds to Fuqua and Rush, transacting business in the name of J. W. Rush, and that as to the bank both partners were liable, but as between the partners he was to pay the debt. He further testified that all the other officers of the bank were familiar with the entire transaction and knew that while his name did not appear that he was in fact a partner and was liable to the bank. We have been cited to no law which prohibits this transaction in either form.

[7] Other questions involved in this case will probably not arise on another trial. We will, however, say that in the settlement of the partnership affairs uncollected notes and accounts should not be treated as money and charged to either party. The court under its equity powers can provide for the collection or sale of the notes and the proper distribution of the proceeds.

Our conclusion is, and we advise, that the

judgment of the Court of Civil Appeals reversing and remanding this case for a new trial should be affirmed, and that the case be remanded to the trial court for further proceedings not inconsistent with this opinion.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court. We approve the holding on the question discussed.

**CHARLES CLARKE & CO. v. MANNHEIM INS. CO. (No. 2583.)**

(Commission of Appeals of Texas, Section B. April 2, 1919.)

**1. INSURANCE ⇨403—"PERIL OF THE SEA."**

Generally, any loss or injury is occasioned by a peril of the sea which has for its proximate cause the fortuitous action of the sea, operating either singly or in conjunction with other elements or causes, or is peculiar to transportation by vessels supported by the sea or its buoyancy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Perils of the Sea.]

**2. INSURANCE ⇨406—"PERIL OF THE SEA."**

Loss or damage occasioned by natural deterioration or decay, or by ordinary wear and tear of the vessel, are not within the term "perils of the sea."

**3. INSURANCE ⇨415—UNSEAWORTHINESS.**

Any loss proximately caused by unseaworthiness of the vessel at the time of leaving port is not a loss by peril of the sea.

**4. INSURANCE ⇨403—"PERIL OF THE SEA."**

Where the loss or damage is from causes independent of the sea or its action, or is not peculiar to navigation, it is not by a peril of the sea; in other words, the peril must be one "of the sea," and not merely one occurring "on the sea."

**5. INSURANCE ⇨418—MARINE INSURANCE—PROXIMATE CAUSE OF LOSS.**

The co-operation of other causes will not prevent the loss or damage from being one by perils of the sea.

**6. INSURANCE ⇨416—NEGLIGENCE OF OWNER OR AGENT.**

A loss or damage is not prevented from being one by perils of the sea by the co-operation of such other causes as acts or omissions of the owner or his agent amounting to negligence, but not amounting to fraud or design.

**7. INSURANCE ⇨416—MARINE INSURANCE—NEGLIGENCE OF OWNER OR AGENT.**

The protection of marine insurance embraces, in the absence of a contrary stipulation, losses arising from negligence of the owner or his agent, if contributed to by a peril insured against.

**8. INSURANCE ⇨416—MARINE INSURANCE—NEGLIGENCE OF CREW.**

Where a vessel listed and sank while in harbor because a watchman neglected to close a sea cock opened to take in water for use in boilers, the accident was one of the perils of the sea, and a marine insurance company was liable under its policy for the expense of raising and repairing the vessel.

**Error to Court of Civil Appeals of First Supreme Judicial District.**

Action by Charles Clarke, doing business under the name of Charles Clarke & Co., against the Mannheim Insurance Company. Judgment was rendered for plaintiff, which was reversed and rendered for defendant by the Court of Appeals, 157 S. W. 291, and the plaintiff brings error. Judgment of the Court of Civil Appeals reversed, and judgment of the trial court affirmed.

James B. & Charles J. Stubbs, of Galveston, for plaintiff in error.

Wm. B. Lockhart and W. T. Armstrong, both of Galveston, for defendant in error.

McCLENDON, J. The plaintiff, Charles Clarke, doing business under the name of Charles Clarke & Co., brought this suit against the defendant, Mannheim Insurance Company, upon a policy of marine insurance assuring the plaintiff against all damage, etc., during the life of the policy, occasioned to "the good tug called Seminole," while in "the Gulf waters of the United States between Key West, Florida, and the mouth of the Rio Grande Del Norte, both inclusive," "against the adventures and perils of the harbors, bays, sounds, seas, rivers and other waters as above named." The plaintiff recovered in the trial court, but this judgment was reversed and rendered by a majority of the Court of Civil Appeals (157 S. W. 291), that court holding that the damages sought to be recovered were not within the risk covered by the policy, in that they were not occasioned by "adventures and perils of the harbors, bays, sounds, seas, rivers and other waters." The main question for our determination and the one upon which writ of error was granted, is the correctness of this holding of the Court of Civil Appeals.

The theory upon which plaintiff sought recovery and upon which the jury were warranted, under the charge of the court, in returning a verdict for plaintiff, was that the loss to the vessel was occasioned in the following manner: The tug Seminole was engaged generally in towing barges loaded with ties between various Gulf ports. At the time of the accident complained of she was lightering lumber from Morgan City, La., which is a port situated 18 miles north of the mouth of the Atchafalaya river, to a schooner anchored in the Gulf some 40 miles

distant from Morgan City. About 10:30 p. m. on the night of January 13, 1910, the tug arrived at Morgan City and tied up for the night alongside another boat, the Alarm. The latter was a stern wheeler, some 97 feet in length, and was moored against Market wharf, headed up stream. The Seminole was moored against the Alarm, headed down stream; its port side towards the port side of the Alarm. It was made fast to the Alarm by three ties or ropes.

While the evidence is not free from conflict, it is sufficient, we think, to warrant the conclusion that the free board of the Alarm was lower than the free board of the Seminole at the points of contact between the two vessels so that the deck or guard rail of the latter projected over the deck of the former. The Seminole was due to leave the port at 3 o'clock the following morning. The Seminole had originally been a coal burner, its bunkers being located on each side of the vessel, but later the vessel was converted into an oil burner, and these bunkers were converted into fresh water tanks for the purpose of supplying the boiler of the engine. These tanks were each about 18 feet long, with a mean width of  $4\frac{1}{2}$  feet, and extended from the bottom of the vessel up to the under side of the deck. The hull of the vessel formed the outer side of each tank. The height of the tanks was approximately 7 feet. These tanks were filled by means of a sea cock extending through the bottom of the tug, with cut-offs so arranged that either or both of the tanks could be filled by a gravity flow from the outside. About 11:30 p. m. on the night in question orders were given to fill the port tank. It was the custom to fill this tank first, on account of the fact that the machinery of the vessel was so placed that more weight was thrown to starboard. It was also in evidence that the starboard tank already had some water in it, but the port tank was empty. The orders were to fill the port tank to the same capacity as that of the starboard, and then to cut off the water entirely. At 12 o'clock midnight all the crew retired except one Taylor, who was left on duty as watchman, and who was instructed to close the sea cock when enough water had been admitted to the port tank. Shortly after 12 o'clock Taylor lay down with his head on a steam pipe, smoking a cigarette, and soon went to sleep. Later he waked up, lighted another cigarette, and again went to sleep. About 2 o'clock a. m. the crew were awakened by a sudden list of the Seminole to port, and upon awaking they found the water was rushing into the hold of the vessel over the port guard rail. The crew had barely sufficient time to get off of the Seminole onto the Alarm before the vessel sank, stern first, in 60 feet of water. The vessel was afterwards raised, and the damage claimed is the cost of raising and repair.

210 S.W.—34

Plaintiff's theory was that the flow of the water into the port tank caused the vessel to list until its port guard rail rested and became hung on the deck of the Alarm; that the water continued to flow into the port tank until the weight on the port side became so great that the list of both vessels caused the Seminole to slide off of the Alarm with a sudden plunge, the momentum of which submerged the port guard rail and caused the water to flow over the port side of the vessel and thereby sink it. The evidence, we think, is sufficient to sustain this contention. The majority of the Court of Civil Appeals held that under this state of facts the injury to the vessel was not caused by an adventure or peril of the sea, but from the negligence of the watchman in going to sleep with the sea cock open admitting the water into the port tank.

[1-6] The question here presented, namely, whether the loss occasioned to the tug came within the meaning of the terms of the policy, as being from a peril of the sea, is not free from difficulty. The courts of America and England have frequently had to consider what is a peril of the sea, as that term is used both in policies of marine insurance and in bills of lading and charter parties. But to quote from a well-considered note in Annotated Cases:

"Compared with the large number of cases in which the question has arisen whether a particular loss was caused by a peril of the sea, within the meaning of a policy of marine insurance, but few attempts have been made to define the term 'perils of the sea' as used in this connection. It is undoubtedly true that the purpose of the policy of insurance against the perils of the sea is protection against contingencies and against possible dangers, and such a policy does not cover a loss for injury which must inevitably take place in the ordinary course of things." Ann. Cas. 1912D, 1038.

Without presuming to lay down any general definition of the term "peril of the sea," as applied to all circumstances that may arise, we think the following general principles may be deduced from the various decisions upon the subject: Any loss or injury is occasioned by a peril of the sea which has for its proximate cause the fortuitous action of the sea, operating either singly or in conjunction with other elements or causes, or is peculiar to transportation by vessels supported by the sea or its buoyancy, subject to the following well-defined limitations:

(1) Loss or damage occasioned by natural deterioration or decay, or by ordinary wear and tear of the vessel, are not within the term "perils of the sea."

(2) Whether expressed in the contract of insurance or carriage or not, there is an implied warranty that the vessel is seaworthy; that is, that she is so constructed, manned, supplied, equipped, and in such condition of repair as to be able reasonably to perform the service in

which she is engaged; from which it follows that any loss proximately caused by unseaworthiness of the vessel at the time of leaving port is not a loss by peril of the sea.

(3) As a corollary to the general statement above, where the loss or damage is from causes independent of the sea or its action, or is not peculiar to navigation, it is not by a peril of the sea; in other words the peril must be one "of the sea" and not merely one occurring "on the sea."

(4) The co-operation of other causes will not prevent the loss or damage from being one by perils of the sea; and this is true even where the contributing causes are acts or omissions of the owner or his agent amounting to negligence, but not amounting to fraud or design.

[7] These general principles are applied without distinction both to policies of marine insurance and to contracts of carriage, with the exception that a common carrier by water, equally with other common carriers, cannot, at least under the American decisions, contract against liability for its own or its agent's negligence, and when such negligence is a contributing cause of the loss or damage, liability is not defeated even though a peril of the sea is also a contributing cause. On the other hand, protection of marine insurance embraces, in the absence of a contrary stipulation, losses arising from such negligence, if contributed to by a peril insured against. Our investigation discloses that when the loss may be fairly attributable to a peril of the sea as one of its contributing causes, the authorities are uniform that negligence of the owner or his agent is not a proper subject of inquiry.

[8] In the leading case of *Waters v. Insurance Co.*, 11 Pet. 213, 9 L. Ed. 691, which was decided by the Supreme Court of the United States in 1837, Judge Story, speaking for the court, quotes from Lord Tentorden in *Walker v. Maitland*, 5 Barn. & Ald. 174:

"No decision \* \* \* can be cited, wherein such a case [the loss by a peril of the sea], the underwriters had been held to be excused in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such a rule. It will introduce an infinite number of questions, as to the quantum of care, which, if used, might have prevented the loss. Suppose, for instance, the master were to send a man to the masthead to look out, and he falls asleep, in consequence of which the vessel runs upon a rock, or is taken by the enemy; in that case it might be argued, as here, that the loss was imputable to the negligence of one of the crew, and that the underwriters are not liable. Those, and a variety of other such questions would be introduced, in case our opinion were in favor of the underwriters."

Commenting upon this quotation, Judge Story said:

"His lordship might have stated the argument from inconvenience, even in a more general form. If negligence of the master or crew

were under such circumstances a good defense, it would be perfectly competent and proper to examine on the trial any single transaction of the whole voyage, and every incident of the navigation of the whole voyage, whether there was due diligence in all respects, in hoisting or taking in sail, in steering the course, in trimming the ship, in selecting the route, in stopping in port, in hastening or retarding the operations of the voyage; for all these might be remotely connected with the loss. If there had been more diligence, or less negligence, the peril might have been avoided or escaped, or never encountered at all. Under such circumstances, the chance of a recovery upon a policy for any loss, from any peril insured against, would of itself be a result of no inconsiderable hazard."

The following decisions are illustrative of the principles we have set forth above:

In the case of *Orient Ins. Co. v. Adams*, 123 U. S. 67, 8 Sup. Ct. 68, 31 L. Ed. 63, which was a suit upon a marine policy of insurance insuring against the perils of the sea, lakes, rivers, canals, etc., the facts were that a boat, operating on the Ohio river, drifted over a fall and was stranded. During the course of the voyage a part of the machinery of the vessel had become deranged, and it put into Louisville for repairs. In order to make the repairs, it was necessary to blow off the steam from the boiler. On leaving the dock, the master negligently failed to ascertain that there was a sufficient head of steam to navigate the vessel and gave the signal to let go the boat. It was shown that this order was given in direct violation of a custom that before giving the order the master should inquire of the engineer as to the condition of the steam, and await his reply before giving the order to let go. The vessel was then in a position to be carried over the fall by the current, if she was let go without sufficient steam, which she did not have. The loss of the vessel by being carried over the fall, under these circumstances, was held to be a peril insured against. The trial court instructed the jury that the mere fault or negligence of the captain of the vessel, by which it was drifted into the current and drawn over the fall, would not constitute a defense to the policy, unless the jury should be satisfied that the captain acted fraudulently or willfully with design in doing so. This charge was complained of, but it was held to correctly state the law. In so holding the court say:

"The court proceeded upon the ground that, if the efficient, and therefore proximate, cause of loss was a peril of the river, the company could not escape liability by showing that the loss was remotely caused by mere negligence in not ascertaining, before giving the signal to let the vessel go, that she had steam enough for her proper management. The court committed no error in so ruling."

In arriving at this conclusion, the court quote with approval from *Insurance Co.*

v. Lawrence, 35 U. S. (10 Pet.) 517, 9 L. Ed. 512, as follows:

"A loss by fire, occasioned by the mere fault and negligence of the assured, or his servants or agents, and without fraud or design, is a loss within the policy, upon the general ground that the fire is the proximate cause of the loss, and also upon the ground that the express exceptions in policies against fire leaves this within the scope of the general terms of such policy."

The following is also quoted with approval from *Waters v. Insurance Co.*, 11 Pet. 224, 9 L. Ed. 691, which quotation relates to the former decision in *Insurance Co. v. Lawrence*:

"The court then thought that in marine policies, whether containing the risk of barratry or not, a loss whose proximate cause was a peril insured against, is within the protection of the policy, notwithstanding it might have been occasioned remotely by the negligence of the master and mariners."

Again in the case of *Steamship Co. v. Insurance Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788, the same court held that stranding of a vessel caused by negligence of the master, in not taking proper bearings or any bearings at all, was by a peril of the sea, as that term is used in a policy of marine insurance. In that case there is no question but that the negligence of the master was the direct, proximate, and immediate cause of the stranding, as those terms are generally understood in negligence cases. We quote the following from the decision in that case:

"Collision or stranding is, doubtless, a peril of the seas; and a policy of insurance against perils of the sea covers a loss by stranding or collision, although arising from the negligence of the master or crew, because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall use due care to avoid them. *General Ins. Co. v. Sherwood*, 14 How. [55 U. S.] 351, 364, 385 [14 L. Ed. 452]; *Orient Ins. Co. v. Adams*, 123 U. S. 67, 73 [8 Sup. Ct. 63, 31 L. Ed. 63, 66]; *Copeland v. New England Ins. Co.*, 2 Met. 432, 448-450. But the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception, in the bill of lading, of perils of the sea or other specified perils does not excuse him from that obligation, or exempt him from liability for loss or damage from one of these perils, to which the negligence of himself or his servants has contributed. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. [47 U. S.] 344 [12 L. Ed. 465]; *U. S. Exp. Co. v. Kountze*, 8 Wall. [73 U. S.] 341 [19 L. Ed. 457]; *Western Transp. Co. v. Downer*, 11 Wall. [78 U. S.] 129 [20 L. Ed. 180]; *Grill v. General Iron Screw Collier Co.*, L. R. 1 C. P. 600, and L. R. 3 C. P. 476; *The Zantho* [L. R.] 12 App. Cas. 503, 510, 515."

In *Steamship Co. v. Bennett*, 207 Fed. 510, 125 C. C. A. 172, it was held that where a

lighter, which was being towed by a gasoline engine, struck on the banks of a creek, although this was caused by the negligence of the crew towing the boat, the loss came within the risk in a policy insuring against perils of the sea, etc.

In *Steamship Co. v. Insurance Co.*, 204 Fed. 255, 122 C. C. A. 523, the vessel became unmanageable by reason of the stripping of the blades of its propeller, which rendered the vessel unmanageable and occasioned the loss for which recovery was sought. The cause of the breaking of the propeller appears to have been unknown, but it was shown that some of the blades of the propeller had broken before arriving at a certain port where repairs might have been made, and the stripping of the remaining blades was no doubt due to this failure to repair the other blades, and was no doubt negligence on the part of the master of the vessel. The loss occasioned was held to be a peril of the sea, and in so holding the court say:

"It is the object of insurance to protect owners, among other things, against the negligence of their servants."

*Insurance Co. v. Monarch*, 99 Ky. 578, 36 S. W. 563, was decided by the Court of Appeals of Kentucky in 1896. In that case a vessel employed in river navigation sank from causes entirely unknown and unexplained, yet the evidence introduced tended strongly to show that the captain was negligent. It was there held that the sinking of the vessel was a peril of the river, and that negligence of the master or crew constituted no defense.

In *Insurance Co. v. Packet Co.*, 69 Miss. 208, 13 South. 254, 30 Am. St. Rep. 537, which was a suit upon a policy of marine insurance, insuring against perils of rivers, etc., the loss was occasioned to part of a cargo of cotton which fell into the river under the following circumstances: In the course of the transportation, the cargo had to be transferred from one boat to another. In the process of unloading the cotton was entirely removed from one side of the boat, leaving the other side so heavily laden that the vessel suddenly listed, throwing the cotton into the river. It was held that:

"The injury to the cotton by water of the river, into which it was thrown by a mishap to the boat, was a peril of the river within the terms of the policy; and, if it be true that the careening of the boat resulted from negligence in unloading, the insurer is liable. \* \* \* The immediate cause of injury to the cotton was water of the river. That it got into the river because of some carelessness or unskillfulness of those engaged in unloading does not relieve the insurer from liability. To relieve from liability because of the acts of the master or crew, there must be want of good faith and honesty of purpose. \* \* \* On this subject there is no difference between marine and other

insurance. Whatever diversity of view on this question once existed, it is now firmly settled in England and America, as stated above. "Where a peril of the sea is the proximate cause of a loss, the negligence which caused that peril is not inquired into."

The case of *Hamilton v. Pandorf*, which may be considered one of the leading cases, at least in England, upon the question at issue, involved the construction of a bill of lading covering a cargo of rice, which exempted the shipper from loss occasioned by perils of the sea. The rice was damaged by sea water flowing by gravity into the boat through holes eaten by rats in a lead pipe connecting a bathtub with the sea. There was no negligence on the part of the carrier. In the trial court, it was held that the loss was occasioned by a peril of the sea, and came within the excepted risk. 18 L. R. Q. B. D. 629. On appeal to the Appellate Division, this decision was reversed. 17 L. R. Q. B. D. 670. The House of Lords, however, reversed the latter decision and affirmed the judgment of the trial court. 12 L. R. App. Cas. 518.

It was urged in that case and it was held by the Court of Appeals that the damage by sea water was not to be considered a cause at all, but merely an effect produced by the gnawing of the hole in the pipe by the rats. To quote the exact language of the learned Master of the Rolls:

"If rats gnaw through a pipe and let the water in, nevertheless, as the rats are the cause, and the sea is not, and the letting in of the sea water is only an effect of the cause, the real effective cause being the rats, what the rats do is not damage caused by perils of the sea. I think, myself, the cases would make it doubtful, even in a policy of insurance, whether it ought not to be held that where rats gnaw through the planks of the ship, the act is so closely immediate that the coming in of the sea water should be treated not as a cause at all, but as an effect, so that even in that case there would be *causa proxima* as well as *causa causans*; but this is a matter which we need not determine on the present occasion, and which must remain open until the point is raised."

In reversing this decision the Lord Chancellor says:

"One of the dangers which both parties to the contract would have in their mind would, I think, be the possibility of the water from the sea getting into the vessel, upon which the vessel was to sail in accomplishing her voyage, it would not necessarily be by a storm, the parties have not so limited the language of the contract; it might be by striking on a rock or by excessive heat so as to open some of the upper timbers; these and many more contingencies that might be suggested would let the sea in, but what the parties, I think, contemplated was that any accident (not wear and tear, or natural decay) should do damage by letting the sea into the vessel, that that should be one of the things contemplated by the contract. A subtle

analysis of all the events which led up to and in that sense caused a thing may doubtless remove the first link in the chain so far that neither the law nor the ordinary business of mankind can permit it to be treated as a cause affecting the legal rights of the parties to a suit. In this case, the existence of the rats on board, their thirst, the hardness of their teeth, the law of gravitation, which caused the water to descend upon the rice, the ship being afloat, the pipe being lead, and its capacity of being gnawed, each of these may be represented as the cause of the water entering; but I do not assent to the view that this contract can have a different meaning attached to it according as you regard each step in a chain of events as the origin out of which the damage ultimately arose."

"One ought, if it is possible, to give effect to all the words that the parties have used to express what this bargain is, and I think in this case it was a danger, accident, or peril, in the contemplation of both parties, that the sea might get in and spoil the rice. I cannot think it was less such a peril or accident, because the hole through which the sea came was made by vermin from within the vessel, and not by a swordfish from without, the sea water did get in."

In a concurring opinion, Lord Watson says:

"If the respondents were preferring a claim under a contract of marine insurance, expressed in ordinary terms, I should be clearly of opinion that they were entitled to recover, on the ground that their loss was occasioned by a peril of the sea within the meaning of the contract. When a cargo of rice is directly injured by rats, or by the crew of the vessel, the sea has no share in producing the damage, which in that case is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship. But in the case where rats make a hole, or where one of the crew leaves a porthole open, through which the sea enters and injures the cargo, the sea is the immediate cause of mischief, and it would afford no answer to the claim of the insured to say that, had ordinary precaution been taken to keep down vermin, or had careful hands been employed, the sea would not have been admitted, and there would have been no consequent damage."

In this connection it might be added that in a very early case in Pennsylvania it was held that damage from leaks caused by rats gnawing through the side of a wooden vessel was by a peril of the sea. *Garrigues v. Coxe*, 1 Bin. (Pa.) 592, 2 Am. Dec. 493.

The case which furnishes perhaps the strongest support for the contention of the insurer in the present case is that of the *G. R. Booth*, decided by the Supreme Court of the United States in 1898. 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234. In that case the plaintiffs sued upon a bill of lading covering a shipment of sugar destined to New York. The vessel was iron, and a part of

the cargo consisted of detonators or blasting caps. The undisputed evidence showed that these detonators were so constructed and packed as to render them immune from explosion when handled as ordinary freight. After the vessel was docked at the wharf in New York, and while discharging its cargo, one of these cases of detonators exploded from some cause unknown, tore a hole in the side of the vessel, thereby immediately admitting sea water which came in contact with the sugar and produced the damage. The bill of lading exempted the carrier from loss occasioned by perils of the sea. It was conceded that there was no negligence on the part of the carrier, and the question arose whether the loss was within the excepted risk. It was held not to be. The following quotation embraces the ground upon which the court rest this holding:

"The explosion, in consequence of which, and through the hole made by which, the water immediately entered the ship, must be considered as the predominant, the efficient, the proximate, the responsible, cause of the damage to the sugar, according to each of the tests laid down in the judgments of this court, above referred to. The damage to the sugar was an effect which proceeded inevitably, and of absolute necessity, from the explosion, and must therefore be described to that cause. The explosion concurred, as the efficient agent, with the water, at the instant when the water entered the ship. The inflow of the water, seeking a level by the mere force of gravitation, was not a new and independent cause, but was a necessary and instantaneous result and effect of the bursting open of the ship's side by the explosion. There being two concurrent causes of the damage—the explosion of the detonators and the inflow of the water—without any appreciable interval of time, or any possibility of distinguishing the amount of damage done by each, the explosion, as the cause which set the water in motion, and gave it its sufficiency for harm at the time of the disaster, must be regarded as the predominant cause. It was the primary and efficient cause, the one that necessarily set the force of the water in operation; it was the superior or controlling agency, of which the water was the incident or instrument. The inflow of the sea water was not an intermediate cause, disconnected from the primary cause, and self-operating; it was not a new and independent cause of damage; but, on the contrary, it was an incident, a necessary incident and consequence of \* \* \* events brought into being by the explosion—events so linked together as to form one continuous whole."

The court refer to the decision in *Hamilton v. Pandorf*, above, and hold that the two cases are distinguishable:

"There is nothing in the report of any stage of that case to show that the sea water entered the ship immediately upon the gnawing by the rats of the hole in the pipe; and any such inference would be inconsistent with one of the opinions delivered in the House of Lords, in

which Lord Fitzgerald said: 'The remote cause was in a certain sense the action of the rats on the lead pipe; but the immediate cause of the damage was the irruption of sea water from time to time through the injured pipe, caused by the rolling of the ship as she proceeded on her voyage.' [L. R.] 12 App. Cas. 528. However that may have been, that case differs so much in its facts from the case now before us that it is unnecessary to consider it more particularly."

The writer confesses some difficulty in grasping this distinction in principle. The proximity in point of time of two occurrences would not seem to affect the status of one of those occurrences in the matter of causation as related to some ultimate effect. As between themselves, one of such occurrences may occupy the relation of effect to the other. But as to the ultimate effect each occurrence may occupy the relation of a contributing cause. Regardless of the rule in metaphysics (and we apprehend that there is as little unanimity in that branch of science as there is in the law) there may be, as viewed by the law, more than one direct and proximate cause of a given effect. The question of causation, in adjusting the rights of litigants, is determined by applying general principles, deduced from common experience, to a given state of facts. In so far as failure may obtain in any particular case, such failure is due to the infirmity of human reason and the difficulty at all times to apply general principles, which are themselves primarily deduced from specific facts, to the manifold transactions of human life arising after these principles have been announced.

But while difficulty is experienced in distinguishing in principle the *Booth Case* from the *Hamilton Case*, the same difficulty arises when we seek to reconcile the former with the other cases above referred to, decided by that great court. We do not find that in any of the other cases the question of what may or not be the predominant or controlling cause has been considered as having any controlling weight. In all these cases, where it can be said that a danger or peril insured against proximately contributed to the loss, liability exists. We do not find that the case of the *Booth* has been followed in the application it makes of the doctrine of predominant cause. It might be added that it is evident that the terms "proximate" and "remote cause" are not used in the cases quoted from in the same sense that those terms are used in ordinary negligence cases. In many of these cases when the term "remote cause" is used it is quite apparent, under the facts, that such cause would be denominated proximate, were the question at issue one of liability for negligence.

From these authorities, we conclude that

any sinking of a vessel not brought about by the recognized excepted causes is by a peril of the sea, as that term is used in marine insurance. To hold otherwise would, in our opinion, render such insurance valueless in a large number of cases where sinking arose either from negligence or from other causes operating from within the vessel as distinguished from those operating from without. The sinking, while from one angle it might be viewed merely as an effect and not a cause, is, we think, clearly a cause within the meaning of marine insurance. It would be equally logical to hold that the stranding of a vessel, its striking upon a rock, or collision with another vessel is only an effect, and in order to determine whether such disaster to the vessel was produced or brought about by a peril of the sea, the cause of such stranding, etc., must be inquired into. Yet, it seems to be held universally, or at least by the great weight of authority both in this country and in England, that stranding, striking upon a rock or shoal, or collision, however caused, are perils of the sea. To hold that sinking comes within a different rule is to our mind untenable. All disasters to vessels and their cargoes are produced by natural causes, and disasters, whatever their particular form, whether it be stranding, collision, sinking, or striking upon a rock, are, in every sense, effects of some cause or series of causes. But as applied to insurance indemnifying against loss from these particular perils, they must be regarded as causes, otherwise the insurance is of little or no value. It were equally as logical, we think, to hold that the negligence of the insured in a fire policy, in dropping a lighted match into inflammable substances, thereby causing property insured to be consumed, was the predominant, efficient cause of the loss, and that the fire was only an effect of the negligence, and no cause at all, as to hold that the sinking of the vessel, from whatever cause, is merely an effect of other causes which only brought about the result.

We, therefore, conclude that the trial court correctly submitted the case to the jury, and that the majority of the Court of Civil Appeals committed error in holding that the loss was not covered by the policy.

The other questions presented for our decision have, in our opinion, been correctly determined by the Court of Civil Appeals.

We conclude that the judgment of the Court of Civil Appeals should be reversed, and the judgment of the trial court affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

(85 Tex. Cr. R. 151)

## VENN v. STATE. (No. 5279.)

(Court of Criminal Appeals of Texas. March 5, 1919. On Motion for Rehearing, April 2, 1919.)

## 1. INTOXICATING LIQUORS §17 — STATE-WIDE PROHIBITION—CONSTITUTIONALITY.

The state-wide prohibition law is unconstitutional.

## 2. INDICTMENT AND INFORMATION §132(1)—STATUTES §168—ELECTION BY ACCUSED—VOID STATUTE.

A void act of the Legislature cannot repeal existing valid statutes, and a void penal statute, not being operative, can furnish no ground for an accused to elect under which act he would be prosecuted, or to elect as to which punishment should be inflicted in case of a conviction.

## 3. JURY §95 — COMPETENCY — PRIOR SERVICE IN SIMILAR CASE.

Jurors who served in a prosecution for violation of local option law, in which a verdict of guilty has been rendered against defendant, could not be challenged for cause in a later prosecution for a violation of the local option law against the same defendant, where the violation charged was sale at a different time, and to different parties and under different circumstances.

Appeal from Upshur County Court; W. H. McClelland, Judge.

Will Venn was convicted of a violation of the local option law, and he appeals. Affirmed.

Briggs & Florence, of Gilmer, for appellant.  
E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was had in the county court of Upshur county for violating the local option law. It being a misdemeanor, the prosecution was brought by complaint and information.

[1, 2] Appellant interposed a plea to the jurisdiction based upon the proposition that the act of the recent called session of the Legislature, enacting state-wide prohibition (Acts 35th Leg. [4th Called Sess.] c. 24), thereby repealed the local option law and its operation. The basis of this plea to the jurisdiction was that he, under those conditions, had the right to elect under which statute he should be tried, and demanded a trial under the state-wide prohibition act instead of local option statute. The court overruled the plea. Had the state-wide act been constitutional, another question would have been presented, but said act is unconstitutional. See *Ex parte Myer*, 207 S. W. 100, *White v. State*, 210 S. W. 200, and *Jarrott v. State*, 209 S. W. 663, recently decided. A void act of the Legislature cannot and does not repeal existing valid statutes,



and therefore the void statute, not being operative, would furnish no ground for an accused to elect under which act he would be prosecuted, or to elect as to which punishment should be inflicted in case of a conviction. The court, therefore, did not err in overruling appellant's contention.

[3] Challenge for cause was urged against three jurors who had served in a previous case against appellant in which a verdict of guilty had been rendered. The theory of the cause of challenge was that the jurors were not fair, and were either biased or prejudiced, or had come to some conclusion as to defendant's guilt by reason of the facts in the prior case. Had the two cases been based upon the same or similar facts, the challenge for cause should have been sustained, but, if not, the court correctly overruled the challenges. See *Segars v. State*, 35 Tex. Cr. R. 45, 31 S. W. 370; *Obenchain v. State*, 35 Tex. Cr. R. 400, 34 S. W. 278; *Arnold v. State*, 38 Tex. Cr. R. 1, 40 S. W. 734; *Irvine v. State*, 55 Tex. Cr. R. 347, 116 S. W. 591; *Edgar v. State*, 59 Tex. Cr. R. 252, 127 S. W. 1053. A number of other cases could be cited to the same effect. There is a line of cases holding that where the facts are the same or similar in both cases, challenge for cause should be sustained, but as the facts in this case are not similar to those had in the trial of the former case, we are of the opinion that line of cases does not obtain here. The facts in this case and the prior case are not similar. The sale was at different times, to different parties, and under different circumstances. The evidence introduced on the former trial was not before the jury in the instant case. The jurors fully qualified by answers on their voir dire, and the court qualified the bill by stating the facts were entirely different in the two cases, and therefore he overruled the challenges for cause.

As presented we are of opinion there is no such error shown under the cases above cited as would require this court to reverse the judgment; it is therefore affirmed.

LATTIMORE, J. I concur in the result reached, without expressing an opinion as to the constitutionality of the state-wide act, which is not here necessary.

#### On Motion for Rehearing.

DAVIDSON, P. J. Appellant has filed a motion for rehearing, alleging error in the affirmance on a former day of the term, in that the court should have sustained his exceptions to the jurors on the theory that they had tried another case similar in its nature, and therefore the challenge for cause should have been sustained and the jurors not permitted to sit in this case. We have gone over the matter again in the light of

the motion and what was previously written. We do not know that it would add anything to what was said in the original opinion to express the views of the court with reference to the conditions as shown by the record and the exceptions. We are still of opinion it is not brought within the rules of the authorities cited by appellant, and that this was not a similar case, but a different case with different facts, occurring at a different time and under different circumstances. The mere fact that defendant was the same in both cases would not render it similar in nature under the circumstances stated.

We are of opinion the motion is not well taken and should be overruled, which is accordingly ordered.

35 Tex. Cr. R. 153)

#### VENN v. STATE. (No. 5279½.)

(Court of Criminal Appeals of Texas. March 5, 1919. On Motion for Rehearing, April 2, 1919.)

#### 1. CRIMINAL LAW §101(4) — TRANSFER OF CAUSE—FINDING OF INDICTMENT.

An order of the district court transferring a case to county court, reciting that grand jury came into open court and through their foreman delivered to the court the following indictment, to wit: "The State of Texas v. Will Venn, File No. 4558"—sufficiently shows that indictment was filed in district court.

#### 2. CRIMINAL LAW §101(4) — TRANSFER OF CAUSES FROM DISTRICT TO COUNTY COURT—BILL OF COSTS.

A bill of costs accruing in the district court, which accompanies an indictment in its transfer to the county court, need not be itemized.

#### 3. CRIMINAL LAW §1091(2) — REVIEW—BILLS OF EXCEPTION.

Bills of exceptions must be complete in themselves and point out the error complained of without the necessity for reference or resort to other parts of the record.

#### 4. INTOXICATING LIQUORS §236(1) — LOCAL OPTION—UNLAWFUL SALES—SUFFICIENCY OF EVIDENCE.

In a prosecution for a violation of the local option law, evidence held sufficient to sustain a conviction.

#### On Motion for Rehearing.

#### 5. INDICTMENT AND INFORMATION §176—ISSUES.

The date alleged in an indictment for violation of the local option law is not binding, and the state may show any date within the period of limitation as the date of the sale on which it elects to seek a conviction.

#### 6. CRIMINAL LAW §1091(4) — BILLS OF EXCEPTION—EVIDENCE.

A bill of exceptions, containing an objection that evidence that defendant bought whis-

ky a year before the alleged sale of a less quantity was too remote, was insufficient to show error, where the bill did not show the date of the sale sought to be proved by the state.

**7. CRIMINAL LAW** ⇨1091(4)—**BILLS OF EXCEPTION.**

An objection in a bill of exception that certain evidence objected to was not admissible under the issues is too general for consideration, where the bill does not show what the issues in the case were.

**8. CRIMINAL LAW** ⇨1091(4)—**MATTERS REVIEWABLE—BILLS OF EXCEPTIONS.**

An objection in a bill of exceptions that certain evidence was prejudicial is too general for consideration, when followed by no statement showing how or in what manner it was prejudicial.

**9. INTOXICATING LIQUORS** ⇨233(2)—**ILLEGAL SALES—EVIDENCE—POSSESSION OF LIQUOR.**

In a prosecution for a violation of the local option law, evidence that prior to sale defendant had purchased large quantities of liquors was not inadmissible, in that the liquor bought by him was in quarts and the sale for which he was being prosecuted was only claimed to be in pints.

**10. CRIMINAL LAW** ⇨1093, 1144½—**BILLS OF EXCEPTION—PRESUMPTIONS.**

The utmost legal effect that can be given bills of exceptions which are not in themselves sufficient to show not only the objection, but also the facts showing the propriety of such objection, is to consider them in the light of general demurrers, from which it must follow that every reasonable intendment in favor of the legality of that to which objection is made must be indulged.

Appeal from Upshur County Court; W. H. McClelland, Judge.

Will Venn was convicted of a violation of the local option law, and he appeals. Affirmed.

Briggs & Florence, of Gilmer, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

**LATTIMORE, J.** In this case appellant was tried in the county court of Upshur county for violation of the local option law, and his punishment fixed at a fine of \$50 and 30 days in jail.

[1, 2] His first complaint is of the action of the trial court in overruling his plea to the jurisdiction upon the ground that the order transferring the case from the district court to the county court does not show that the indictment was filed in the district court, and does not contain an itemized bill of costs. We think appellant is in error in his first contention. The certified copy of the proceedings had in the district court which

is in the record from the certificate of the clerk of the district court appears to us to be in sufficient compliance with the statute. The order of the court directing the transfer, as set out therein, seems to have been made in the cause of the State of Texas v. Will Venn "No. 4558." Said order recites that the grand jury came into open court, and through their foreman delivered to the court the following indictment, to wit: "The State of Texas v. Will Venn, file No. 4558." The bill of costs shown in said certified copy of the proceedings appears under the style of "The State of Texas v. Will Venn, No. 4558." We think this sufficiently shows that the indictment was filed in the district court. An examination of the statute, requiring that a bill of costs accruing in the district court accompany the indictment in its transfer to the county court, does not specifically require that such bill of costs be itemized, and we are cited to no authority holding that the same must be so set out. We have accordingly overruled this contention.

[3] There are a number of bills of exceptions in the record complaining of the action of the trial court in admitting certain testimony. The grounds of objection are too general to demand consideration. That one bought whisky in quantities large or small a year before the alleged sale of a less quantity might become very material in some cases. No facts are stated in said bill of exceptions which would enable us to pass intelligently upon the same. It is a well-settled rule that such bills must be complete in themselves, and point out the error complained of, without the necessity for reference or resort to other parts of the record. *Clayton v. State*, 67 Tex. Cr. R. 311, 149 S. W. 119.

[4] The motion for new trial complains of the fact that the evidence is wholly insufficient to support the verdict of guilty. An examination of the testimony of the one witness who testified for the state as to the immediate facts attending the sale, shows that he asked the appellant if he could get him some whisky, to which appellant replied that he thought he could; that witness gave appellant some money, and he went away and came back directly and delivered him some whisky. Upon the direct question as to whether it was whisky witness said, "Yes, sir; he sold it for whisky." He further said that it tasted to him like it was one-half whisky and one-half tobacco juice. The appellant denied selling the witness anything. The court submitted the matter fairly to the jury, and they have decided the case against appellant's contention. We think there is evidence justifying the verdict.

There being no other errors found in the record which we can consider, the judgment of the lower court is affirmed.

## On Motion for Rehearing.

This case comes before us upon appellant's motion for rehearing, and it is courteously, but urgently, insisted that we were wrong in our former opinion, in holding that the bills of exceptions, shown in the record complaining of the admission of the evidence given by the witness Tabb, were not so framed as to entitle the same to our consideration. In view of this insistence of able counsel in said motion we have again examined each of said bills so taken to the testimony of the state, showing the receipt by appellant of quantities of whisky on four occasions at dates prior to that of the alleged sale in the instant case. The objections to said evidence appear to be substantially the same in each instance as set out in the bills, to wit: That it was too remote to have any connection with the case on trial; it was not admissible under the issues herein; was prejudicial; and showed purchases in quart quantities when the alleged sale was of a pint.

[5, 6] It has been often decided by this court that, to be sufficient, a bill of exceptions must set out enough of the proceedings in the court below to make it apparent that error was committed, without the necessity of a search through the remainder of the record for matters to supplement the facts stated in the bill. In other words, all that is necessary to disclose the error complained of must appear from the bill itself. *Thompson v. State*, 29 Tex. App. 208, 15 S. W. 206; *Tweedle v. State*, 29 Tex. App. 586, 16 S. W. 544; *McGlasson v. State*, 38 Tex. Cr. R. 351, 43 S. W. 93; *Livar v. State*, 26 Tex. App. 115, 9 S. W. 552; *Wilkerson v. State*, 31 Tex. Cr. R. 86, 19 S. W. 908; *Wright v. State*, 36 Tex. Cr. R. 35, 35 S. W. 287; *Monk v. State*, 44 S. W. 1101. An inspection of each of these bills discloses that it is impossible for this court to tell therefrom whether the evidence objected to was in fact too remote, for no date is stated in said bills as being that on which the state was attempting to show a sale. It is well settled that the date alleged in the indictment is not binding, and that the state may show any date within the period of limitation, as the date of the sale on which it elects to seek a conviction. To be sufficient on this point, each of said bills should have shown the date of the sale sought to be proven by the state, in order that the question of remoteness of the purchases or receipts complained of might appear. We trust this is clear.

[7] The objection that the evidence objected to was not admissible under the issues herein is clearly too general. No statement is made in either of the bills as to what are the issues herein, so that this court might be able from the bill to determine the question raised. It was clearly an issue as to

whether or not appellant had any whisky within the period of limitation, which fact he might have denied as far as the allegations of said bills disclose. If, by way of inducement, he had claimed that he had gotten some whisky within the period of limitation, but no more than he wanted or needed for personal use, it might easily have been an issue as to whether or not he had so received more than he needed for personal use. Illustrations ad infinitum might be multiplied to show various hypotheses as to issues which might have been raised upon such a trial, but we do not deem them necessary.

[8, 9] The objection made that the evidence was prejudicial is not only general, but is followed by no statement of the bill showing how or in what manner same was prejudicial. *Wilson v. State*, 68 Tex. Cr. R. 81, 138 S. W. 409; *Leggett v. State*, 62 Tex. Cr. R. 99, 186 S. W. 784; *Black v. State*, 63 Tex. Cr. R. 151, 151 S. W. 1053; *Vick v. State*, 71 Tex. Cr. R. 50, 159 S. W. 50; *Eads v. State*, 76 Tex. Cr. R. 647, 178 S. W. 574; *Galan v. State*, 76 Tex. Cr. R. 619, 177 S. W. 124. We can see nothing in the remaining part of the objections made, to wit, that the purchase or receipt was in quarts and the sale only claimed to be in pints.

It is held by our court that if the allegations of the bill be such as to necessitate resort or reference to other parts of the record, in order to ascertain or determine whether the ground set out is or is not well taken, the bill is insufficient. *Williams v. State*, 67 Tex. Cr. R. 590, 150 S. W. 185; *Banks v. State*, 62 Tex. Cr. R. 552, 138 S. W. 406; *Campbell v. State*, 63 Tex. Cr. R. 595, 141 S. W. 232, Ann. Cas. 1913D, 858; *Harrison v. State*, 69 Tex. Cr. R. 291, 153 S. W. 130; *Williams v. State*, 195 S. W. 860.

[10] The utmost legal effect that can be given bills of exceptions which are not within themselves sufficient to show, not only the objection, but also the facts showing the propriety of such objection, is to consider them in the light of general demurrers, from which it must follow that every reasonable intendment in favor of the legality of that to which objection is made must be indulged; and, if there be any tenable hypothesis to which such matter so attacked is pertinent, the well-known presumptions in favor of the correctness and legality of the actions of the court until the contrary is shown will obtain, and such bills will not be sustained.

The authorities cited in the motion for rehearing bear upon the question of the admissibility of the evidence of the witness Tabb, and not upon the question as to whether the bills of exceptions properly present here the question of the court's error in admitting such evidence. This disposes of all the questions raised in the motion. It is to be regretted if adherence to the estab-

lished rules of the courts as to such matters prevents consideration of bills setting up objections which might have been urged if properly presented in a particular case; but these rules have been so often announced, and the necessity for following them is so obvious, we did not go into these questions at length in the original opinion.

No error of this court in its former opinion having been shown, and believing the same to be correct, appellant's motion for rehearing will be overruled.

(85 Tex. Cr. R. 126)

BENSON v. STATE. (No. 5333.)

(Court of Criminal Appeals of Texas. March 5, 1919. On Rehearing, April 2, 1919.)

1. CRIMINAL LAW  $\S$  1092(8), 1099(7)—APPEAL—BILL OF EXCEPTIONS—DATE OF FILING.

Where trial term of court adjourned October 25th, and a bill of exceptions and statement of facts were filed January 25th thereafter, they were filed on the ninety-first instead of the ninetieth day, as limited by law, and too late for consideration.

On Rehearing.

2. INTOXICATING LIQUORS  $\S$  236(11)—SALE—EVIDENCE—SUFFICIENCY.

If the statement of facts in a prosecution for violation of the intoxicating liquor law was filed in time to be considered, the evidence of the unlawful sale of whisky by the defendant held sufficient to sustain the conviction.

Appeal from District Court, Palo Pinto County; J. B. Keith, Judge.

Jimmie Benson was convicted of violation of the local option law, and he appeals. Affirmed.

J. W. Birdwell, of Mineral Wells, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for violation of the local option law, his punishment being assessed at two years' confinement in the penitentiary.

[1] He prepared a statement of facts and bill of exceptions which were approved by the court. These were not filed until after the time had expired granted for the purpose of filing same. The court adjourned on the 25th day of October. The bill of exceptions and statement of facts were filed on January 25th thereafter. They were therefore filed on the ninety-first day instead of the ninetieth day, the time allowed for such filing. The questions suggested under the exceptions cannot be reviewed: First, because filed too

late; and, second, the statement of facts is not before us. In fact, the bill of exceptions was simply reserved to the overruling of the motion for a new trial on the ground of the insufficiency of the evidence.

As the record is presented, the judgment will be affirmed.

On Rehearing.

On a former day of the term, the judgment herein was affirmed without reference to the statement of facts; it having been filed too late. Appellant files an affidavit in connection with his motion for rehearing in which he assigns reasons why the statement of facts should be considered. Under our decisions, we do not agree with appellant; but it is unnecessary to discuss that proposition, as the matter has been discussed in the opinions for several years back.

[2] But in the light of the insistence of counsel, the writer will state enough of the case to show that, if the evidence was considered, his only ground for reversal, to wit, want of sufficient evidence, is not well taken. The state, through the witness Reece, proved that he bought a pint bottle of Hill & Hill whiskey from the defendant. On Sunday evening, before the whisky was delivered Monday evening, he gave defendant a \$5 bill which he said would pay for the pint. The next day he went for the whisky, and appellant delivered him the whisky, but demanded another dollar, and he gave him another \$5 bill, which the defendant took and had changed, keeping \$1, returning to him \$4; that the whisky was delivered by appellant to him and he left the building, and as he went upon the street the chief of police halted him and took the whisky. This witness says he asked the defendant to get him some whisky, and he said he would, and it was for that purpose he gave him the money, and when appellant handed it to him he told him it was whisky; that he (witness) did not have an opportunity to taste it because the officers took it from him too suddenly. Richardson, the policeman, testified he took it from witness Reece, and that it was whisky; that he did not examine it, but turned it over to the sheriff of the county. The sheriff testified that he kept the whisky, and that during his campaign and while in his possession the bottle came open and some of it was spilled on some election cards and they were saturated with it; that there was no question about it being whisky; and that later he tasted it and found it was whisky. This is the state's case in substance. The defendant denied selling the witness Reece any whisky, or receiving any money from him. It was a direct issue of fact as to the transaction. He raised no issue as to what was in the bottle, because he said he did not have a bottle and never transferred one.

This is the case in a nutshell, and we think, if the facts were considered, the jury was correct in their finding. It was a matter for the jury to pass upon; the witnesses were before them. •

The motion for rehearing will be overruled.

(85 Tex. Cr. R. 101)

**TAYLOR v. STATE. (No. 5325.)**

(Court of Criminal Appeals of Texas. March 19, 1919.)

**1. INDICTMENT AND INFORMATION ⇐137(1)—  
MOTION TO QUASH COMPLAINT—GROUNDS.**

That evidence showed that tires stolen belonged to P. was no ground for motion to quash complaint, which alleged that property belonged to H.; proper procedure being an objection to proof on ground of variance.

**2. CRIMINAL LAW ⇐1091(10)—BILLS OF EX-  
CEPTION—REQUEST FOR INSTRUCTION.**

A bill of exception complaining of refusal of court to give certain special charges will not be considered, where it fails to show whether charges were asked before argument began, or after it ended, or at what step of proceeding.

**3. CRIMINAL LAW ⇐677 — WITHDRAWING  
WRITTEN EVIDENCE.**

One offering a writing as evidence may at any time withdraw same before it reaches the jury.

**4. CRIMINAL LAW ⇐680(1)—INTRODUCTION  
OF EVIDENCE—ORDER OF PROOF.**

Where state offered a writing in evidence, and on defendant's objection, but before a ruling by the court, it was withdrawn, accused had no right to vary sequence of introduction of testimony, so as to compel introduction or reception of such writing in his behalf while state was introducing its testimony.

**5. CRIMINAL LAW ⇐1091(4)—BILLS OF EX-  
CEPTIONS—ADMISSION OF EVIDENCE.**

A bill of exceptions complaining of testimony, that property defendant was charged with having stolen was identified by owner at a certain time and place, in that such identification was out of hearing and presence of accused, will not be considered, where there is nothing in the bill which negatives fact of accused's presence at such identification.

**6. CRIMINAL LAW ⇐938(2)—NEW TRIAL—  
NEWLY DISCOVERED EVIDENCE.**

An accused is not entitled to a new trial upon the ground of newly discovered evidence, consisting of testimony of defendant's wife and another woman, who were both present at court but were not put on stand by defendant.

Appeal from Tarrant County Court; Jesse M. Brown, Judge.

Coy Taylor was convicted of theft, and he appeals. Affirmed.

Philip O. Lopp and Roberson & Cogdell, all of Ft. Worth, for appellant.

W. E. Myres, Asst. Co. Atty., of Cleburne, and E. A. Berry, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted of misdemeanor theft of automobile tires, and his punishment fixed at 30 days in jail and a fine of \$25.

[1] Complaint is made that the evidence does not support the verdict. The proof shows that appellant worked for the Panther Auto Supply Company, of which W. M. Harrison was president and manager and in whom the ownership and possession of the alleged stolen property was laid; that appellant had a friend named Shaw, who owned a Ford car which appellant sometimes borrowed, and that on one occasion, shortly before the institution of this prosecution, appellant borrowed the car, and when he brought it back it had two new casings on it, and that appellant said to his friend Shaw, "I put two new casings on your car." These were the alleged stolen casings and were identified as the property of the Panther Auto Supply Company. Appellant offered no testimony to controvert any of these facts. He moved the court to quash the complaint because same alleged that the property belonged to one Harrison when, as he claimed, the proof showed it belonged to the Panther Auto Supply Company. This would not have been ground for a motion to quash, but, if available to appellant at all, same should have been presented in the form of an objection to the proof on the ground of variance.

[2] Complaint is also made of the refusal of the trial court to give certain special charges, but the bill of exceptions to the court's action fails to show whether the charges were asked by appellant before the argument began or after it ended, or at what stage of the proceedings, and thus same are insufficient.

[3, 4] The sixth ground of appellant's motion for new trial shows that the state offered a written memorandum to which appellant objected, but that, before the court ruled, the appellant withdrew his objection, and thereupon the state withdrew said proffered instrument, whereupon appellant immediately offered the same in evidence, and, the state objecting, the court sustained said objection. There was no error in the court's action. The document had not gotten to the jury, and one offering evidence may at any time withdraw same before it reaches the jury. The appellant had no right to vary the sequence of the introduction of testimony so as to compel the introduction or reception of any evidence in his behalf while the state was introducing its testimony.

[5] Complaint is made of the testimony of the witness Langdon that the tires gotten by him from the witness Shaw were identified by the Panther Auto Supply Company people at the city hall. As stated in the bill of exceptions, the ground of the complaint, to wit, that such identification was out of the hearing and presence of the appellant, is not well taken; there being nothing in either the bill or the testimony of the witness Langdon which negatives the fact of appellant's presence at the time of such identification. In order to be sufficient, the bill of exceptions must not only show that a certain ground of objection was stated to the court by appellant's counsel, but must go further and show that the ground stated in fact existed.

The language of the state's attorney was not seriously objectionable in either of the instances complained of; we do not think that same constituted a reference to the appellant's failure to testify.

[8] Appellant further sought a new trial upon the ground of newly discovered evidence, attaching to his motion the affidavits of two women, one of whom was the appellant's wife. No sufficient showing is made either in the motion or in the affidavits, or in any other way, that such evidence was newly discovered. The court's approval of the bill of exceptions in this matter shows that both said witnesses were present at court and neither were used or put on the stand by appellant.

There being no errors shown by the record, the judgment of the lower court is affirmed.

(35 Tex. Cr. R. 64)

#### BEACH v. STATE. (No. 5289.)

(Court of Criminal Appeals of Texas. March 12, 1919.)

#### 1. LARCENY $\S$ 71(1)—INSTRUCTIONS—INTENT.

In prosecution for theft of an automobile casing from a garage, in which defendant claimed that he took the casing in absence of the owner, but in the presence and with the consent of a watchman in charge, and with intent to pay for the same, and did thereafter so offer to pay, it was error to refuse to charge that, if defendant entered the garage and took the casing with the consent of one in charge, and without fraudulent intent, he was not guilty.

#### 2. WITNESSES $\S$ 405(2)—IMPEACHMENT ON IMMATERIAL MATTER.

In a prosecution for theft, defendant's testimony that he did not make inquiry as to the illness of the owner of the property stolen held to be an immaterial matter, not affording a basis for impeachment.

#### 3. WITNESSES $\S$ 405(2)—IMPEACHMENT ON IMMATERIAL MATTER.

In a prosecution for theft, defendant's testimony as to his efforts to call the owner of the

property by telephone before taking such property held to be an immaterial matter, not affording a basis for impeachment.

#### 4. WITNESSES $\S$ 406—IMPEACHMENT—COMPETENCY OF EVIDENCE.

In a prosecution for theft, testimony of a telephone exchange operator concerning the working of his telephone, introduced with the view of impeaching defendant on his testimony as to his efforts to call the owner of the property by telephone before taking such property, held to be inadmissible being largely matters of opinion and guesswork.

#### 5. CRIMINAL LAW $\S$ 722½, 730(13)—ARGUMENTS AND CONDUCT OF COUNSEL.

In a prosecution for theft, where defendant testified on cross-examination that he had not been indicted in another county, and there was no testimony of such an indictment, a statement by state's counsel in closing that defendant had been so indicted was unauthorized and prejudicial, and the court's instruction not to regard it did not cure the error.

Appeal from Collingsworth County Court; C. C. Small, Judge.

A. H. Beach was convicted of theft, and appeals. Reversed and remanded.

R. H. Templeton, of Wellington, and Chas. L. Black, of Austin, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of theft of property under the value of \$20.

Briefly, the case shows that appellant entered a garage, the same being the property of T. J. Stewart, at night and took an auto casing. The alleged owner, Stewart, testified he did not give appellant his consent to take the property. He had employed a constable named Weaver to watch his garage at night. Weaver entered the garage and occupied a back seat in one of the autos. His testimony is to the effect that early in the morning, a couple of hours before day, appellant came in the garage, and as he was getting the casing he spoke to him. They talked about the matter a little while, appellant stating that he would take the casing and would pay for it; thereupon Weaver let him leave with the casing, and opened the door so he could go out. Appellant's testimony is to the effect that, not only through himself, but two of the sons of Stewart, he had a right to enter the garage and take whatever he saw proper from it, and to pay for it either at the time or have it charged; that he was interested in a drug store with his brother, Dr. Beach, just across the street in front of the garage, and that by an understanding with the Stewarts he (appellant) could enter the garage and take what he saw proper, and had at times worked in the garage when the Stewart boys were in charge of it, in the absence of their father, who was

living in Oklahoma, and up to the time of this occurrence in August the Stewarts would go into their drug store under the same character of conditions and contract; that he often carried the keys to the garage when young Stewart was in charge of it; that under this understanding, and as he thought with concurrence of the father, he had a right to enter the garage and take what he wanted, provided he either paid for it then or later; that at this time he had occasion to want an auto casing to put on a car that he was going after a few miles distant, and that he had to go very early in the morning; that he could not find Mr. Stewart to get in the garage the night before, when he ascertained he had to go for the other car; that the car he was going after belonged to an uncle; that he wanted to get this car to make a trip to Knox county. That he did go after the car seems not to be questioned, and that he took the casing that he got out of Stewart's garage with him, but when he reached his uncle's he had sold the car, and the uncle bought the casing and gave him a blank check signed, to be filled out for the amount and the name of the payee; that when he returned to town, where the garage is situated, he ascertained there was some talk about his having entered the garage, and he went to see Mr. Stewart, who was sick at his home, and wanted to pay for it; that he had a check, and, if Stewart would name the price of the casing, he would insert it. Stewart was not aware of the value of it at the time, and that prevented appellant filling out the check. Appellant also testified that before he entered the garage he went to the usual entrance door and knocked on it and made a noise to wake Weaver, whom he knew was on the inside, and failing to do so he went to a window and entered the garage in that manner, and went to the car where Weaver was, and found him asleep, shook him and waked him, and told him his mission, and that Weaver got up and got the casing and let him out.

[1] Quite a number of exceptions were reserved to the court's charge, and refused special charges requested. The vital question with reference to the charge is that the court did not charge, and refused requested instructions, that if the jury should find that he had the consent of Weaver to take the casing at the time he took it, and that he did not enter the house with fraudulent intent, and did not take the casing with fraudulent intent, the jury should acquit, or if the defendant believed he had a right to enter the garage under the circumstances indicated, and take the casing, the fraudulent intent would be absent, and the jury should acquit. We are of opinion this phase of the law should have been given. Appellant's testimony shows that he was aware of the fact that Weaver was in the house at the time, and his mission and purpose of being in the house,

and that he undertook to wake him, so he could get the casing; that he went in the garage and woke Weaver and did get it. This testimony raises the question of want of fraudulent intent. Appellant should have had the benefit of it in the charge to the jury. In a qualified sense Weaver was in possession of the garage under a special appointment by the owner, Stewart. In a general sense, the ownership and possession was in Weaver. Taking all the facts and circumstances together, we believe same justified appellant in asking the court to charge the jury that, if he took the casing with Weaver's consent, he would not be guilty of theft. The charge should also have presented appellant's theory of want of fraudulent intent.

[2] There is a bill of exceptions to the effect that the court permitted the county attorney to impeach appellant in regard to matters arising out of his knowledge or want of knowledge of the sickness of Mr. Stewart. The county attorney asked defendant if he had not made inquiry concerning the health of T. J. Stewart on the day prior to the taking of the auto casing, by asking Jeff Stewart, the young son of T. J. Stewart, and the court compelled the defendant to answer, and defendant did answer said inquiry by stating that he did not make inquiry concerning the health of T. J. Stewart, as he knew his condition, as he saw them take him home that day. The court then permitted Jeff Stewart to testify that defendant, on the day before the casing was taken, had asked him whether his father was sick that day. Upon another trial we are of opinion this matter should not occur as stated in the bill. This was impeachment on an immaterial matter.

[3, 4] Another bill recites that, while defendant was being cross-examined by the county attorney, he was asked if he knew that T. J. Stewart had a telephone in his house, and if he tried to call T. J. Stewart that night before getting the casing. Appellant answered that he knew Stewart had a telephone, and that he tried to call him, but could not get his residence. After defendant made these statements the state was permitted to show by McCauley that he (McCauley) was proprietor of the telephone exchange, and that he had a bell alarm arrangement on his telephone that never failed to ring, and that if defendant had tried to ring central that night he would have known it by the bell ringing, which would have awakened him, or, if this failed, there would be a drop plug from defendant's telephone, which would show that he had tried to ring central, and that this plug never failed to drop when there was a ring into central. Mrs. McCauley was permitted to testify to the same facts. Various objections were urged to this testimony on the ground that it was not brought out by the defendant, but by the state, for the purpose of impeaching

defendant on immaterial matters. We are of opinion that upon another trial this should not occur as it is stated in this bill. We think the matter was immaterial, and, as claimed by appellant, was but a conclusion of the witness and argumentative opinion, based on things that may not be true. The statements of McCauley were matters of opinion and guesswork largely, and especially with reference to the working of his telephone and the drop of the plug, and the fact that the ringing of the bell would have awakened him. This character of impeachment was prejudicial, and but a conclusion of the witness.

[5] There is another bill showing that, about the time appellant had finished testifying in his own behalf, the state took him on cross-examination and asked the following question: "It is a fact that you have been indicted in Knox county, is it not?" Objection was urged, which was sustained, on the ground that it was not a proper way to question the witness, and the county attorney changed the form of the question to this: "Then, to be more specific, you were indicted for arson in Knox county, were you not?" Again objection was urged. The witness answered that he had not been indicted in Knox county, but that he had a civil suit for collecting insurance. The county attorney then asked witness "if the suit was not in regard to collecting insurance on a building that was burned." The witness answered, "Yes." The court sustained the objection to this testimony, and verbally instructed the jury not to consider it. Thereafter, in his closing speech, the county attorney used this language: "Defendant is a criminal, for he has been indicted in Knox county, and is the black sheep of the Beach family." Appellant urged exception, because it had been ruled out by the court, and the jury instructed not to consider it, and the county attorney was out of the record, and indulging in undignified abuse of defendant, and it was prejudicial. These were sustained by the court, and the county attorney requested to confine his remarks to the record. Appellant took his bill of exceptions.

The court, having rejected appellant's bill, wrote that here quoted, and then qualified it with the statement that the witness answered that he was not indicted, and there was no testimony before the jury on the subject, and the jury could not have been misled. It occurs to us the reason given by the judge in his qualification is a strong reason why the remarks of the county attorney were erroneous. If there had been testimony before the jury that he had been indicted, it could be used in argument for impeachment purposes. The only reason why it could be shown appellant had been indicted for a felony was to impeach his standing as a

witness. The appellant denied the fact that he had been indicted, and this should have ended the matter. There was no testimony before the jury that he had been indicted for arson as sought to be proved by the county attorney. The statement of the county attorney was that appellant had been indicted when he had testified he had not been indicted. The county attorney did not take the witness stand, or testify in regard to the matter, but made statements in his speech which were unauthorized. This matter has been the subject of many decisions by this court. The writer deems it unnecessary to go into the matter or discuss it. See *Davis v. State*, 54 Tex. Cr. R. 249, 114 S. W. 366, which is a well-considered opinion written by Judge Ramsey when a member of this court; *Smith v. State*, 55 Tex. Cr. R. 569, 117 S. W. 966; *McKinley v. State*, 52 Tex. Cr. R. 182, 106 S. W. 342; *Smith v. State*, 44 Tex. Cr. R. 142, 68 S. W. 995, 100 Am. St. Rep. 849; *Taylor v. State*, 50 Tex. Cr. R. 362, 97 S. W. 94, 123 Am. St. Rep. 844; *Johnson v. State*, 66 Tex. Cr. R. 586, 148 S. W. 328; *Wilson v. State*, 194 S. W. 828, and many cases there cited. That the judge instructed the jury not to consider it did not cure the error. See *Powell v. State*, 70 S. W. 219.

The question of newly discovered testimony attached to the motion for a new trial is not discussed, as those matters can be brought before the jury upon another trial. We would be inclined, however, to reverse the judgment upon some of the grounds set out in the motion for a new trial.

The judgment is reversed, and the cause remanded.

(85 Tex. Cr. R. 94)  
**WILSON v. STATE.** (No. 5328.)

(Court of Criminal Appeals of Texas. March 19, 1919.)

**1. RECEIVING STOLEN GOODS §8(4) — KNOWLEDGE—SUFFICIENCY OF EVIDENCE.**

In a prosecution for receiving stolen sheep, evidence held sufficient to support finding that defendant, while the sheep were on his premises, learned of theft of them.

**2. RECEIVING STOLEN GOODS §8(2)—EVIDENCE—RELEVANT CIRCUMSTANCES.**

In prosecution for receiving stolen sheep, state's dependence being on circumstances alone, it was permissible for defendant to introduce every relevant circumstance from which a conclusion could be drawn favorable to his innocence.

**3. CRIMINAL LAW §673(2) — RECEIVING STOLEN GOODS §8(2)—EVIDENCE—KNOWLEDGE OF THEFT.**

In prosecution for receiving stolen sheep, in determining whether facts excluded every reasonable hypothesis except defendant's guilty



knowledge of theft, defendant was entitled to have jury afforded privilege of considering evidence of his advanced age and infirmities due to sickness, and court's action in limiting such evidence to amount of punishment was unauthorized.

**4. CRIMINAL LAW §656(3)—REMARKS OF COURT—COMMENT ON EVIDENCE.**

In prosecution for receiving stolen sheep, court's remarks, in admitting evidence of defendant's advanced age and infirmities, that jury might take such matters into consideration in fixing penalty, were improper, under Code Cr. Proc. 1911, art. 787, as a comment on the evidence prejudicial to defendant.

Appeal from District Court, Sutton County; James Cornell, Judge.

J. L. Wilson was convicted of receiving stolen property, and he appeals. Reversed and remanded.

M. E. Blackburn, of Junction City, W. A. Wright, of San Angelo, M. E. Sedberry, of Eldorado, and Horace E. Wilson, of San Antonio, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

**MORROW, J.** The conviction is for receiving stolen property.

Some sheep were stolen by appellant's son Henry and one Kiser from the ranch of Faulkner, which was situated about six or seven miles from the ranch of appellant. Kiser and Henry Wilson drove the sheep, about 160 head, to appellant's ranch, consisting of about 1,200 acres. They reached there about midnight, and put the sheep in a pen without telling appellant. The next morning, according to the testimony of Kiser, they, in appellant's presence, painted a figure 7 in front of the letter H which was painted on the sheep. They remained in his pasture for something like a month, and were then taken by Kiser and Henry Wilson to the ranch of the latter on the Divide. Henry Wilson had another ranch near that of Faulkner, on which he had stock.

The central issue was the knowledge of appellant that the sheep were stolen. Kiser said appellant took no part and gave no directions in painting the brand. The state relied on circumstances alone to corroborate the accomplice and show appellant's knowledge that the sheep were stolen. Appellant had another son, Tom Wilson, and claimed that, some six years prior to the offense, he had bought some sheep and sold them to his son Tom, who had sold them to Henry, who since that time had been running the sheep, and that he (appellant) had no knowledge of the theft, but believed the sheep were a part of them owned by his son Henry. He said Henry had made previous arrangements to pasture some sheep in the pasture of appellant, and that Kiser had previously

brought some sheep and put them in his pasture claiming that they belonged to Henry Wilson.

When Kiser and Wilson removed the sheep, the state's evidence showed that a witness asked appellant if he was going out of the sheep business, getting rid of his sheep, and that appellant replied, no, not exactly, that he was going to send the sheep to Henry's ranch; that his grass was short and the wolves bad, and that Henry's pasture had a wolf-proof fence. A deputy sheriff testified that, some months after the sheep had been taken away from appellant's premises, he inquired of the appellant where the sheep came from, and appellant said they were sheep he had bought in Mason county and had let Tom have them and Tom had let Henry have them; that he had bought the sheep in Mason county about six years before.

The appellant proved his age as 68 years, and offered to prove that he had been in bad health for a certain length of time, to which, upon the state's objection, counsel for the appellant stated the evidence of bad health was offered to show that, in connection with his age, he was inactive and would not take the notice of things that a younger and more active and healthy man would take, and would not be apt to notice any fact or circumstance tending to show that any sheep put in his pasture were stolen sheep. Whereupon the trial judge remarked in the presence of the jury:

"I believe it is admissible upon another theory. The penalty would be from two to four years in the penitentiary, and, if the defendant should be convicted, the jury might take into consideration his age and condition of his health in fixing the penalty, and I will admit the testimony."

These remarks were excepted to upon several grounds.

[1] The appellant insists that the evidence is not sufficient, stressing the failure of the state to corroborate the accomplice Kiser. We do not find any direct corroboration of Kiser's testimony to the effect that appellant saw him while he was changing the brand. The fact that the sheep were stolen and driven by Kiser and Henry Wilson to appellant's pasture is well established by the evidence, and we think the circumstances are sufficient to support a finding by the jury that appellant learned of their theft. Cyc. vol. 34, p. 527, note 97, and cases cited. There was evidence that the 7 painted on the sheep appeared newer than the H; that the sheep remained in appellant's pasture for some time; that he handled some of them in doctoring them for worms; that, while he disclaimed his presence at the time they were branded by Kiser, he was on the premises; that Kiser had previously brought some

sheep which he had stolen to appellant's pasture; that appellant had some opportunity to have acquainted himself with the sheep which his son owned; that the inference of a claim of ownership was deducible from the testimony that appellant said he was sending them to Henry's pasture.

[2-4] The state's dependence, however, being upon circumstances alone, it was permissible for the appellant to introduce every relevant circumstance from which a conclusion could be drawn favorable to his innocence. *Vernon's Tex. Crim. Stats.* vol. 2, p. 595; *Taylor v. State*, 195 S. W. 1148. In deciding whether facts proven were such as to exclude any reasonable hypothesis except the guilty knowledge of appellant, the appellant, we think, was entitled to have the jury afforded the privilege of considering the evidence of his age and infirmities due to sickness. These may have, in their opinion, dulled his powers of perception and the alertness of his mind to a degree that would have led them to the conclusion that the incidents noticeable by one more active would have escaped his attention, and would, if discerned, have made an impression upon him different from that made by the same facts upon the state witnesses or upon the jury. Being entitled to the consideration of this evidence on the issue of his guilty knowledge, the court's action in limiting it to the issue of the amount of punishment was unauthorized. Even if the admissibility of the evidence was doubtful, the remarks of the court in admitting it constituted a comment prejudicial to the appellant, in that it was susceptible to the construction by the jury that in the mind of the court the evidence of guilt was such as to render it necessary that the appellant should introduce evidence to mitigate the punishment. The statute (article 787, C. C. P.) provides that—

"In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing on the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceedings previous to the return of a verdict, make any remark calculated to convey to the jury his opinion of the case."

The evidence was offered for its supposed favorable bearing on the proof of guilty knowledge of the theft. The remark of the court, in effect, disclosed that to his mind it had no bearing on that issue, but that it did have a bearing on the amount of punishment which the jury might assess. Expressions by this court on the subject of the effect of the statute quoted will be found in *McGee v. State*, 37 Tex. Cr. R. 668, 40 S. W. 987; *Moore v. State*, 33 Tex. Cr. R. 306, 26 S. W. 404; *Simmons v. State*, 55 Tex. Cr. R. 441, 117 S. W. 141; *Gribble v. State*, 210 S. W. 215, recently decided. The evidence be-

ing wholly circumstantial, and that showing guilty knowledge quite conflicting, we think the incident mentioned was such as to require a reversal of the judgment.

Reversed and remanded.

(85 Tex. Cr. R. 153)

### CLARK v. STATE. (No. 5261.)

(Court of Criminal Appeals of Texas. Feb. 12, 1919. On Motion for Rehearing, April 2, 1919.)

#### 1. CRIMINAL LAW §1086(14)—APPEAL—RECORD—MOTION TO QUASH INDICTMENT.

Court's refusal to quash indictment will not be considered on appeal, where record does not show whether motion to quash indictment was presented to the court.

#### 2. CRIMINAL LAW §1092(8), 1099(7)—APPEAL—BILL OF EXCEPTIONS—TIME FOR FILING.

Where court adjourned in late August and appellant was given 30 days after adjournment for filing of bill of exceptions and statement of facts, and on September 16th was given an additional 30 days, and on October 11th secured order granting him "30 days additional from and after September 16th," bill of exceptions and statement of facts filed on November 4th will be considered; the final order, if literally construed, curtailing time granted by previous order.

#### 3. CRIMINAL LAW §1091(1)—APPEAL—BILL OF EXCEPTIONS.

A bill of exceptions must be complete in itself, without the necessity of reference to any other part of the record.

#### 4. CRIMINAL LAW §665(2)—EXCLUSION OF WITNESSES—DISCRETION OF COURT.

The matter of excusing a witness from the rule is one confided to the sound discretion of the trial court.

#### 5. CRIMINAL LAW §1153(5)—REVIEW—DISCRETION—EXCLUSION OF WITNESS.

The action of the court in excusing a witness from the rule will not be reviewed on appeal, unless it appears from the bill of exceptions that discretion of the court has been abused.

#### 6. CRIMINAL LAW §1166(2) — REVIEW — HARMLESS ERROR.

Court's action in permitting witnesses to remain in courtroom after the rule has been invoked, and permitting them, each in the presence of the other, to testify as to statement by defendant written by one and signed as witness by the other, was harmless, where defendant himself admitted having made the statement.

#### 7. CRIMINAL LAW §412(2) — EVIDENCE — STATEMENTS BY ACCUSED.

Evidence as to statements made by accused when he was not in custody or under restraint or arrest, was properly admitted.

## On Motion for Rehearing.

## 8. CRIMINAL LAW §538(3) — EVIDENCE — CONFESSIONS.

Defendant's confession of his connection with the crime will justify conviction when the facts making out the substantive crime were shown otherwise.

## 9. CRIMINAL LAW §534(1) — EVIDENCE — CONFESSION — SUFFICIENCY OF CORROBORATION.

In prosecution for injuring or damaging railroad track in such manner as to endanger the lives of any person, in violation of Pen. Code 1911, art. 1229, evidence held sufficient to corroborate defendant's confession as to his guilty connection with the commission of the crime.

## 10. CRIMINAL LAW §1036(1) — ADMISSION OF EVIDENCE — REVIEW — FAILURE TO OBJECT.

Court on appeal will not consider alleged errors in the admission of evidence, where no objection to the evidence was made in lower court, though appellant is represented by different attorney on appeal.

Appeal from District Court, Taylor County; Joe Burkett, Judge.

W. G. Clark was convicted of injuring or damaging a railroad track in such manner as to endanger the lives of persons in violation of Pen. Code 1911, art. 1229, and he appeals. Affirmed.

Stinson & Chambers, of Abilene, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the district court of Taylor county for a violation of the provisions of article 1229, P. C., which forbids any person in any way injuring or damaging any railroad track in such manner as to endanger the lives of any person, and his punishment was fixed at confinement in the penitentiary for a term of six years.

It appears that on the night of December 13, 1915, some one removed various spikes, fishplates, and angle bars from portions of the track of the Wichita Valley Railway Company in Taylor county, Tex., in such manner as to cause a wreck of the passenger train the next morning. These facts are fully testified to by a number of witnesses without contradiction. In a short time after the wreck the sheriff of the county found a fresh buggy track in a field adjacent to the place of the wreck, and trailed same back to Abilene, and testified as to the tracks of the horse, apparently pulling the buggy, and described them minutely. It was also shown that appellant owned a buggy and horse, whose tracks were similar to those accompanying the buggy tracks from the scene of the wreck. The section foreman

testified that a claw bar, such as was used for pulling spikes out of cross-ties, was missing from among his tools just before the time of the wreck. Various statements, oral and written, of the appellant were introduced, in which he fully stated that he was induced by one Felix Jones to assist and accompany him in the matters leading up to and surrounding the removal of the spikes, fishplates, and angle bars from the railway track. It is said, among other things, that he went with Jones down to where he got the tools, and hauled them out to the place in his buggy, and kept watch for him while he was doing the work, also stating that Jones told him he was going to fix the track so there would be a wreck, and that he was going to be on the train and claim to be hurt, and would sue the company and get a good sum for damages, out of which he would give the appellant \$1,000. Appellant's testimony was for the purpose of establishing an alibi, and he denied having anything to do with the wreck, but claimed that he had been trying to get in with Jones, and wanted to assist in catching Jones. It was in evidence that Jones was a notoriously bad man who had been tried and convicted for murder. It was also in proof that Jones was on the train the next morning after the removal of the parts of the railroad track, and was in the wreck, and claimed to have been hurt, and sued the railway company for damages, but failed to recover.

Appellant has filed no motion for a new trial, but we have as fully considered the statement of facts and other matters contained in the record as if such motion had been on file.

[1] A motion was filed to quash the indictment, but, owing to the fact that the record is silent as to whether same was ever presented to the court, we cannot consider same.

No exceptions were taken to the charge of the court, and the only two special charges which were asked by appellant having been given, and there being no motion for a new trial raising any objections to the charge, we presume the same sufficiently presented the law of the case, and observe no error therein.

A motion in arrest of judgment was made, questioning the constitutionality and validity of the statute under which the prosecution was had. No specific objection is pointed out, and we think the motion was properly overruled.

[2] There appears some confusion in the various orders of the trial court extending the time for filing bills of exception and statement of facts, one construction of which would make it appear same were filed too late for consideration. The record does not show when the trial court adjourned, but the

trial ended August 21st, and the motion in arrest of judgment was overruled August 23d, and an order then entered, giving 30 days after adjournment for filing bills of exception and statement of facts. On September 16th following the court made an order, giving appellant "30 days additional in which to file statement of facts and bills of exception." On October 11th the court made another order, specifically granting 30 days additional from and after September 16, 1918, within which to file bills of exception and statement of facts. This last order would seem to make the time expire October 16, 1918, but we cannot understand why the need for three orders extending such time for filing. It is clear if the court adjourned in late August, giving 30 days' time, and on September 16th made another order granting 30 days' additional time, and on October 11th made another order, which only gives 30 days from September 16th, this last order would be a curtailment of the time granted by the order of September 16th. In this condition, and the bills of exception and statement of facts being filed on November 4th, we have considered same.

[3] Appellant's bill of exception No. 1 raises the question of the court allowing the sheriff of El Paso county, Mr. Orendorff, and the witness J. B. Dooley, to remain in the courtroom during the trial and after the rule had been invoked, it being set forth in said bill as reasons for such objection that each of said witnesses swore to alleged statements of appellant, for the contents of which reference is made to the statement of facts. It is a well-settled rule of this court that a bill of exceptions must be complete in itself without the necessity of a reference to any other part of the record. *Banks v. State*, 62 Tex. Cr. R. 552, 138 S. W. 406; *Campbell v. State*, 63 Tex. Cr. R. 595, 141 S. W. 232, Ann. Cas. 1913D, 858; *Harrison v. State*, 69 Tex. Cr. R. 291, 153 S. W. 139.

[4-6] The matter of excusing a witness from the rule is one confided to the sound discretion of the trial court; and, unless it appears from the bill that such discretion has been abused, the action of the court below will not be revised. In this case appellant himself seems to have admitted making the statement referred to in said bill, and we can see no possible injury resulting in allowing the sheriff of El Paso county to testify, in the hearing of another witness, that he was called to sign as a witness a written statement, the contents of which he did not know, and in allowing said other witness to testify, in the presence of the sheriff, that he wrote out the statement which the sheriff was called to witness. *Clary v. State*, 68 Tex. Cr. R. 290, 150 S. W. 919.

[7] There is no merit in appellant's second bill of exceptions to the court's action in allowing in evidence the statement, both writ-

ten and oral, made by appellant. He was not in custody, nor under restraint or arrest, and it is not so claimed by the appellant. Some of the statements were made to private citizens, and some to officers, but at the time of making them appellant was a witness in another case, and appeared to be lounging around the sheriff's office and talking very freely. The materiality of the statements is evident on their face.

There appears in the record certain assignments of error, in a separate document, but they only relate to what has already been discussed herein.

We have gone through this record with the greatest care, and are unable to discover any reversible error, and the judgment of the trial court is affirmed.

#### On Motion for Rehearing.

This case is before us on appellant's motion for rehearing.

[8, 9] It is urged therein that the evidence does not establish the corpus delicti. The appellant was charged with wrecking a train under article 1229, P. C. The proof was ample and uncontroverted that there was a wreck of a train at the time alleged in the indictment, and that the same was caused by the removal of fishplates, angle bars, and spikes which held the rails together and fastened them to the cross-ties. The wreck being shown, and that it occurred through the criminal agency of some one, but one question remained to be proven, to wit, appellant's guilty connection therewith. It is the settled law of this state that the confession of one accused of crime, of his connection therewith, will justify his conviction when the facts making out the substantive crime have been shown otherwise. *Attaway v. State*, 35 Tex. Cr. R. 403, 34 S. W. 112; *White v. State*, 40 Tex. Cr. R. 366, 50 S. W. 705; *Sullivan v. State*, 40 Tex. Cr. R. 633, 51 S. W. 375; *Landreth v. State*, 44 Tex. Cr. R. 239, 70 S. W. 758. If the rule required that there be corroboration of the confession as to the fact of appellant's guilty connection with the act shown by other evidence to be criminal, we should still be compelled to hold the evidence sufficient in this case. *Willard v. State*, 27 Tex. App. 386, 11 S. W. 453, 11 Am. St. Rep. 197; *Kugadt v. State*, 38 Tex. Cr. R. 681, 44 S. W. 989; *Barrett v. State*, 55 Tex. Cr. R. 182, 115 S. W. 1187; *Harris v. State*, 64 Tex. Cr. R. 594, 144 S. W. 232.

[10] This court recognized in its former opinion the fact that the record was before us without motion for new trial, but nevertheless every point in the case was carefully scrutinized and passed upon by the court. The appellant was represented in the trial court by a different attorney than the one who appeared here for him, and it is now urged that many errors were committed in the admission of evidence to which no ob-

jections were made; and counsel now representing the appellant asks this court to reverse this case because of these errors. No cases are cited in the motion, and none are known to the court in which it is held that this is cause for reversal. When one employs an attorney of his own choice, and in an action free from any fraud or taint of unfair dealing loses his case before the court or jury, it has never been held, as far as we know, that thereby the loser gains the right to another trial. None of the matters so complained of appear to the court to materially affect the result of the trial.

No reversible error being pointed out in our former opinion, the motion for rehearing is overruled.

(85 Tex. Cr. R. 118)

**WINGO v. STATE. (No. 5172.)**

(Court of Criminal Appeals of Texas.  
March 19, 1919.)

**1. CRIMINAL LAW §772(4) — TRIAL — INSTRUCTIONS—EVIDENCE OF ACT BARRED BY LIMITATION.**

In a prosecution for incest, refusal to amend an instruction authorizing conviction if act of intercourse took place "on or about the day alleged in the indictment," by stating the jury must believe the act to have occurred within three years anterior to filing of indictment, was error, where there was evidence of an act more than three years prior thereto.

**2. CRIMINAL LAW §369(8)—EVIDENCE—PREVIOUS OFFENSE—ACT BARRED BY LIMITATION.**

In an incest prosecution, evidence of an act of sexual intercourse occurring more than three years prior to filing indictment, and barred from prosecution by limitation, was admissible; the defendant having testified and denied the offense and having introduced testimony controverting prosecutrix's testimony.

**3. CRIMINAL LAW §742(2)—EVIDENCE—ACCOMPLICES—INCEST—QUESTION FOR JURY.**

Where prosecutrix testified that she engaged in an incestuous relation with defendant through fear he would harm her, and gave evidence that he took advantage of his relationship to influence her to submit, which she did and kept silent, it was a question for the jury whether she was an accomplice witness, requiring corroboration as to commission of offense and defendant's connection therewith, under Code Cr. Proc. 1911, art. 801.

**4. CRIMINAL LAW §780(3)—EVIDENCE—ACCOMPLICES—INCEST—INSTRUCTIONS.**

An instruction, in a prosecution for incest, held unduly restrictive in predicating the jury's right to find prosecutrix an accomplice witness upon belief that she "did voluntarily, and with the same intent which actuated defendant, unite with him in the alleged commission of the offense."

**5. CRIMINAL LAW §507(7), 507½ — EVIDENCE—ACCOMPLICE WITNESS—INCEST.**

A general statement of prosecutrix that accused had carnal knowledge of her without her consent or that she resisted, or that it was had through force, fear, or threats, must be considered with all other testimony and facts, in determining whether she is an accomplice witness, and, if shown that the act could not have occurred without her consent or she did not oppose it, she is an accomplice, unless consent was obtained by duress or fraud.

Appeal from District Court, Crosby County; W. R. Spencer, Judge.

W. J. Wingo was convicted for incest, and he appeals. Judgment reversed, and cause remanded.

J. W. Burton, of Crosbyton, for appellant.  
E. B. Hendricks, Asst. Atty. Gen., for the State.

**MORROW, J.** This is a conviction for incest.

[1, 2] The indictment was filed on May 14, 1918, and charged that the offense was committed on or about June 1, 1915. The court in instructing the jury authorized a conviction if the act of intercourse took place "on or about the day alleged in the indictment." The timely objection to this phase of the charge was made, with the suggestion that it be so amended as to tell the jury that to authorize the conviction they must believe that the act of intercourse took place within three years anterior to the time the indictment was filed, and he complains of the refusal of the court to so correct the charge, pointing out that there were other acts of intercourse testified to by the accomplice, occurring at a date at which a prosecution based thereon would have been barred by the statute limiting the time for such prosecution to a period of three years after the offense is committed. The contention of appellant is enforced by condition of the evidence.

The prosecutrix gave birth to a child the 1st day of January, 1918, and thereafter, in testifying before the grand jury, declared that she had not had intercourse with appellant, but claimed that the birth of the child was occasioned by intercourse with other persons. She was the stepdaughter of appellant, was 22 years old at the time of the trial, and thereon testified that appellant began having intercourse with her when she was about 13 years of age, and continued until after she became pregnant. The most cogent fact corroborating the prosecutrix, and connecting appellant with the offense, was the testimony of a witness who claimed that, some time in the fall of 1914, he saw appellant and the prosecutrix in the act of sexual intercourse. The state of the evidence was

such that the court in its charge should have made it clear to the jury that the conviction could not be based on the act described by the witness mentioned, it having occurred more than three years before the indictment was filed. The act occurring in 1914 was, we think, admissible in evidence; the appellant having testified and denied the offense, and having introduced testimony controverting that of the prosecutrix. *Bradshaw v. State*, 198 S. W. 942. But we think, responding to the objection made by appellant to the charge, that it should have been specifically stated therein that a conviction could be had only on an act occurring within three years prior to the filing of the indictment.

[3] The prosecutrix testified that she engaged in the relation with appellant through fear he would harm her if she failed to do so, and to facts indicating that he took advantage of his relation to her to influence her to submit to him. She did consent, however, and kept silent. Under the evidence, whether she was an accomplice or not was a question of fact. *Mercer v. State*, 17 Tex. App. 452; *Dodson v. State*, 24 Tex. App. 514, 6 S. W. 548; *Branch's An. P. C.* § 1030; *State v. Duff*, 138 Am. St. Rep. 281, note.

[4] The charge, under the facts, was, we think, unduly restrictive, in predicating the jury's right to find that she was an accomplice upon their belief that she "did voluntarily, and with the same intent which actuated defendant, unite with him in the alleged commission of the offense." *Clifton v. State*, 46 Tex. Cr. R. 20, 79 S. W. 824, 103 Am. St. Rep. 983; *Buford v. State*, 68 Tex. Cr. Rep. 295, 151 S. W. 538.

In *Clifton's Case*, supra, the court, submitting the issues arising out of facts quite similar to those developed in the instant case framed his charge in substantially the same language as that complained of. Because of its restrictive effect, a reversal was ordered.

[5] To the same effect was the ruling in *Pate v. State*, 93 S. W. 556; *Tate v. State*, 77 S. W. 793. The principle by which the question whether the prosecutrix should be regarded as an accomplice should have been tested is that stated by Mr. Branch as follows:

"A general statement of the prosecutrix that the accused had carnal knowledge of her without her consent, or that she resisted, or that it was had through force, fear, or threats, must be considered in connection with her other testimony and all the other facts in the case, in determining whether or not her testimony given in behalf of the state is accomplice testimony, and if the proof shows that the act of intercourse alleged to be incestuous could not have occurred without her consent, or that she did not oppose it, she is an accomplice witness, unless under duress or induced to consent by fraud."

And in instructing the jury the court, in our opinion, on the suggestion of the appellant in his exceptions to the charge, in lieu of the language used, should have in appropriate terms embodied the principles stated above, and his failure to do so entitles appellant to a reversal of the judgment, for the reason that, except for the transaction referred to, occurring in 1914, the corroborating facts are extremely meager. On the proof of that transaction, there was a sharp conflict and vigorous assault upon the credibility of the witness from whom it was developed, and his identification of the appellant as one of the parties engaged in the act was rather his inference from circumstances than from direct statement. The act of intercourse upon which the prosecution is predicated must, if it occurred about the 1st of June, as testified to by prosecutrix, have been several months after she became pregnant, as she claimed on the trial, by appellant, but, as she previously testified under oath, through intercourse with others whom she named. The question whether her evidence was to be measured by the rule of accomplice testimony, which under our statute, article 801, C. C. P., requires corroboration, not only showing that the offense was committed, but tending to connect the appellant therewith, was of vital importance, and the failure to furnish the jury the correct rule by which to determine that issue was, under the facts in the case, of such consequences as to require that the judgment of the trial court is reversed, and the cause remanded.

#### HICKMAN v. SWAIN et al. (No. 8797.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 8, 1919. Rehearing Denied  
March 15, 1919.)

#### 1. DISMISSAL AND NONSUIT ⇐79—ORDER OF DISMISSAL—SUFFICIENCY.

Although inference might be drawn from preliminary recitals in an order of dismissal that court intended to dismiss suit as to all parties, yet order would not effect a dismissal as to defendants whose names were omitted in decree of dismissal proper; names of other defendants being given.

#### 2. APPEAL AND ERROR ⇐376—BOND—NECESSARY PAYEES.

Where plaintiff dismissed a motion to set aside an order of dismissal, as against certain defendants who had not been served with notice, such dismissal was in legal effect a dismissal of plaintiff's original suit against such defendants, and it was not necessary to make them payees in a writ of error bond in order to have reviewed an order refusing to reinstate as to the other defendant.

**3. APPEAL AND ERROR** **←876—BOND—NECESSARY PARTIES—EFFECT OF DISMISSAL.**

Defendants, as to whom an action was not dismissed on plaintiff's default, need not be named as payees in a writ of error bond in order to have reviewed an order refusing to set aside the order of dismissal as to other defendants.

**4. APPEARANCE** **←8(3)—VOLUNTARY APPEARANCE—FILING ANSWER TO CROSS-ACTION.**

A defendant, who appeared by an attorney and filed an answer to a cross-action, thereby made an appearance for all purposes, and it was not necessary for plaintiff to serve him with citation as a predicate for a recovery against him, although petition was not served upon him.

**5. DISMISSAL AND NONSUIT** **←81(7)—ORDER—MOTION TO VACATE—TIME.**

A motion to vacate an order of dismissal for want of prosecution is in the nature of a bill in equity, and such a motion may be granted at a succeeding term of court, if plaintiff shows that he was not negligent and has a meritorious suit.

**6. DISMISSAL AND NONSUIT** **←81(1)—ORDER—SETTING ASIDE—GROUNDS.**

Where plaintiff's attorney was diligent in preparation of his case for trial and had a meritorious cause of action, but did not appear when case was called because mistaken as to time when term of court convened, trial court erred in refusing to set aside an order of dismissal, in absence of a finding that attorney was negligent in mistaking time of convening of court.

Error from District Court, Knox County; J. H. Milam, Judge.

Suit by C. W. Hickman against M. F. Swain and others. There was an order overruling a motion to set aside an order of dismissal, and plaintiff brings error. Reversed and remanded.

Wm. J. Berne, of Ft. Worth, for plaintiff in error.

Brookerson & Howell and James A. Stephens, all of Benjamin, for defendants in error.

**DUNKLIN, J.** This suit was instituted by C. W. Hickman on a promissory note executed by M. F. Swain, G. P. Gibner, C. C. Tucker, A. L. Lea, J. W. Smith, G. D. McCarty, R. E. Butler, and W. B. Williams. The note was given in part consideration for a German coach stallion purchased from Crouch & Son, horse dealers doing business in La Fayette, Ind., and the vendors were made payees in the note. In his petition, Hickman alleged that he had acquired the note by purchase from those parties before its maturity for a valuable consideration and without notice of any defense thereto. The suit was instituted originally in Tar-

rant county, but the venue was changed to Knox county in compliance with the decision of our Supreme Court on a former appeal which involved the issue of venue only. See *Hickman v. Swain*, 106 Tex. 431, 167 S. W. 209. On August 2, 1915, after the decision of the Supreme Court on the former appeal, the papers in the case were filed in the district court of Knox county, to which court the venue had been changed. The suit was originally filed March 22, 1911, and on May 22, 1911, all of the defendants except J. A. Wood filed their answers to the merits of the case, in which they pleaded specially that they had been induced to purchase the horse by fraudulent misrepresentations made to them by the defendant J. A. Wood, who acted in collusion with and as agent for the vendors in a design to swindle and cheat the buyers. The misrepresentations so made by the said Wood consisted of statements of certain qualities of the horse which were material inducements to the buyers to make the purchase. Such alleged fraudulent misrepresentations were pleaded in bar of plaintiff's suit and also as a basis for a cross-action contained in the answer for damages to be recovered against Crouch & Son and J. A. Wood. But no citation on such cross-action was ever served upon Crouch & Son, nor upon Wood, although Wood filed an answer to the cross-action on August 16, 1915, after the transfer of the cause to Knox county.

The district court of Knox county holds two terms of court each year, one beginning in February and one in August. The suit was continued at the August term, 1915, and also at the February term, 1916; the first continuance being charged to the defendants other than the defendant Wood and the second to plaintiff. At the August term, 1916, the following order was made in the case by the district court of Knox county:

"On this the 14th day of August, A. D. 1916, the above cause being regularly called in its order for trial, the defendants appeared by their respective attorneys, and the defendant Jno. Wood by his attorney demanded a trial upon the cross-action filed herein by the other defendants, the other defendants announced ready for trial upon the cause, but suggested to the court that, in the absence of the plaintiff, their cause was a conditional cross-action, asking for judgment over against the said Jno. Wood only in the event the plaintiff recovered judgment against them, and that, unless plaintiff prosecuted his cause against them, they could not urge their cross-action, and, upon suggestion of counsel, the court is of the opinion that said cause should be dismissed for want of prosecution.

"It is therefore considered, adjudged, and decreed by the court that this cause be and the same is hereby dismissed, both as to plaintiff C. W. Hickman's suit against the defendants M. F. Swain, G. P. Gibner, C. C. Tucker, A. L. Lea, J. W. Smith, G. D. McCarty, R. E. Butler,

and W. B. Williams, and as to said defendants' cross-action against Jno. Wood, and that the defendants do have and recover of and from the plaintiff C. W. Hickman all costs in this behalf incurred, for which let execution issue.

"It is further considered, adjudged, and decreed by the court that the officers of this court do have and recover of and from both the plaintiff and defendants all costs by them respectfully incurred herein, for which they may have their execution."

After the adjournment of the term during which said order of court was entered, plaintiff filed his motion asking that the order of dismissal be set aside and vacated, and that the cause be tried upon its merits. The defendants Swain, Smith, and Lea filed a reply to that motion, in which they denied the grounds alleged as a basis therefor and prayed that it be overruled, and the same was overruled on March 19, 1917. From that order plaintiff has prosecuted this writ of error.

The order last mentioned contains recitals of the appearances of the defendants Swain, Smith, Lea and Woods, all of whom announced ready to be heard on the motion. Prior to the hearing of said motion, the court, at the instance of the plaintiff, dismissed plaintiff's motion for reinstatement of the case as to the defendants Gibner, Tucker, Butler, and Williams for want of service on them of notice of the motion.

[1] The writ of error bond filed by the plaintiff was made payable to all of the defendants except the defendant Farmer and those as to whom the motion to reinstate the case was dismissed by plaintiff in the trial court, namely, Gibner, Williams, Tucker, and Butler; and appellees Swain, Lea, and Smith, who are the only defendants that have filed briefs in this court, have filed a motion to dismiss the writ of error on the ground that Farmer was not made a beneficiary in the writ of error bond and was not served with citation on the application for the writ of error, it being alleged that Farmer was a material and necessary party to the suit whose rights would be materially affected by the disposition of the suit on its merits. One of the contentions advanced by appellant in reply to that motion is that the order of dismissal, entered at the August term, 1916, did not have the effect to dispose of the case as to Farmer, since, although the inference might be drawn from preliminary recitals in the order that the court intended to dismiss as to all parties, yet, in the decree of dismissal proper, the name of the defendant Farmer was omitted, while the names of other defendants were given. We sustain this contention. In *Fitzgerald v. Evans*, 53 Tex. 461, it is said that a final judgment should contain:

"(1) The facts judicially ascertained, with the manner of ascertaining them entered of record. (2) The recorded declaration of the court,

pronouncing the legal consequences of the facts thus judicially ascertained."

In *Texas Land & Loan Co. v. Winter*, 93 Tex. 560, 57 S. W. 39, our Supreme Court construed the legal effect of an order of the court reading as follows: "Exceptions of defendants to plaintiff's petition sustained. Plaintiff excepts"—and used the following language:

"The entry made was nothing more than the recorded expression of the ruling of the court sustaining the exceptions. If the dismissal of the case should have logically followed from the ruling made, it was nevertheless essential to the finality of the action of the court that it should have declared such consequence by the judgment pronounced. It is not sufficient to constitute a final judgment that the court make a ruling which should logically lead to a final disposition of the cause, but the consequence of the ruling to the parties must be also declared."

[2, 3] To the same effect, see *Eastham v. Sallis*, 60 Tex. 576; *McAnally v. Haynie*, 17 Tex. Civ. App. 521, 42 S. W. 1049; *Wilson v. Sparks*, 9 Tex. 621; *Benge v. Sledge*, 62 Tex. Civ. App. 301, 132 S. W. 873. And as the dismissal of the motion to reinstate as against Gibner, Tucker, Butler, and Williams was in legal effect a dismissal of plaintiff's original suit against them, it was not necessary to make them payees in the writ of error bond. *Finley v. Jackson*, 43 S. W. 41.

Accordingly, the motion to dismiss the writ of error is overruled.

It follows from the conclusion just stated that the order entered at the August term, dismissing as to certain of the defendants, was not a dismissal as to the defendant Farmer, but was interlocutory only as to him. We conclude further that it was not a dismissal of the plaintiff's cause of action as against Wood, since it does not purport to so declare. It does specifically decree a dismissal of the cross-action against Wood filed by the other defendants.

[4] It appears that no citation upon plaintiff's petition was ever served upon defendant Wood requiring him to answer plaintiff's suit, but, as noted already, he appeared by an attorney and filed an answer to the cross-action. That constituted an appearance for all purposes, and it was not necessary for plaintiff to serve with citation as a predicate for a recovery against him. *Sullivan v. Doyle*, 108 Tex. 368, 194 S. W. 186; *A., T. & S. F. Ry. Co. v. Stevens* (Sup.) 206 S. W. 921.

The only question then remaining is whether or not the court erred in refusing to vacate the order of dismissal as to defendants other than Farmer and Wood. The trial judge filed the following findings of fact and conclusions of law upon which he predicated his judgment refusing to reinstate the suit:

"The court finds that this case was filed in the district court of Knox county on the 2d day of August, A. D. 1915. At the first term



of said court after said suit was filed, this cause was continued on application of defendants, same being August term, A. D. 1915. At the next term of court, February term, A. D. 1916, this cause was continued on the application of plaintiff. At the following term, which convened on August 14, 1916, when this cause was called for trial, the plaintiff failed to appear either in person or by attorney, and all of the defendants appeared by attorney, and demanded trial, whereupon the court dismissed said cause for want of prosecution. During the pendency of this suit in Knox county, there had been a number of communications between the attorney for defendants and attorney for plaintiff, in which communication the attorney for plaintiff had been informed by attorney for defendant that the Knox county terms of district court convened in February and August, and that the attorney for plaintiff had personal knowledge of the terms of court of Knox county. And at the August term, 1916, of court, the attorney for plaintiff overlooked the time when the court would convene, and thought at that time that the court convened in September instead of August.

"The court further finds that the judgment dismissing this cause at the August term, 1916, was intended to be a dismissal as to all the parties defendants, and a final judgment disposing of this matter.

"The court further finds the plaintiff made no motion to reinstate this cause at the term of court that it was dismissed, and the present term of court is the next succeeding term after this cause was dismissed.

#### "Conclusions of Law.

"I find as a matter of law that the defendants M. F. Swain, J. W. Smith, and A. L. Lea had been finally dismissed from this cause, also J. A. Wood had been finally dismissed from this cause, and the court had lost jurisdiction as to them.

"I further find as a matter of law that the judgment of dismissal was a final judgment as to all the parties as to this suit."

The statement of facts contains a letter written by plaintiff's attorney to the attorney representing some of the defendants dated in August, 1915, showing that the writer then knew that the district court of Knox county held a term of court beginning in August of that year. From other correspondence between the attorney for the plaintiff and the attorney for some of the defendants, it conclusively appears that plaintiff's attorney also knew that a term of the court convened in February, 1916. But upon the hearing of the motion to vacate the order of dismissal, the affidavit of the attorney for the plaintiff was introduced in evidence, and contained the following, the truth of which was not controverted by any attorney:

"Early in July, 1916, affiant, the aforesaid Berne, examined the statutes of this state to determine on what day the then approaching term of this court convened, and, after examining the same prescribing the terms of this court, said Berne calculated that this court would convene

about the middle of September, 1916. And said Berne remained under that belief until the middle of September, as hereinafter set out. The statutes of this state prescribe that the summer term, 1916, of this court, should begin on the sixth Monday after the first Monday in July, which day of convening fell on August 14, 1916, instead of the middle of September, as calculated and believed by affiant, as aforesaid.

"Affiant is unable to determine how he made the mistake in aforesaid calculation, but is under the impression that it arose from his calculating the sixth Monday after the first Monday in August, instead of figuring after the first Monday in July as prescribed by the statute."

The proof further showed without controversy that, up to the date of the order of dismissal, plaintiff's attorney had exercised proper diligence in preparation for the trial of the cause, and that he was ready and willing to try it at the August term, 1915, and also at the August term, 1916, and that but for the mistake made by him, indicated by the quotation just made from his affidavit, he would have been present for trial and would then have duly tried the same.

The motion for reinstatement was replete with allegations showing that plaintiff had a meritorious suit against all of the defendants, and upon the hearing of the motion to reinstate the case those allegations were supported by proof.

[5] The motion to vacate the order of dismissal is in the nature of a bill in equity, and as said by our Supreme Court in the case of *Brownson v. Reynolds*, 77 Tex. 256, 13 S. W. 986, which was likewise a suit to set aside a judgment rendered at a former term of court:

"It is also a fixed rule that a court of equity will not interfere to set aside a judgment and grant a new trial except upon a showing of strict diligence in the presentation of the cause, and upon proof that after doing all that such diligence required to be done he had been deprived by fraud, accident, mistake, or other uncontrollable circumstance of the opportunity of properly presenting his case upon the trial."

And in the course of the same opinion the court quoted with approval the following from *Vardeman v. Edwards*, 21 Tex. 737:

"In general, where it would have been proper for a court of law to have granted a new trial, if the application had been made while the court had the power to do so, the court of chancery will afford its aid and grant it, if the application be made upon grounds arising after the court of law ceased to have power to act. \* \* \* And, in general, the court will be governed by the same principles in passing upon the merits of the application by which the court of law would have been governed."

However, the findings of fact by the trial judge contains no finding that plaintiff's attorney was guilty of negligence in failing to appear in court when the case was called for trial. The findings contain the statement

that such failure was due to the fact that the attorney overlooked the time when the court would convene and was under the impression that the term convened in September instead of August. And the court's conclusions of law indicate that this action in overruling the plaintiff's application was predicated upon the conclusion reached that the judgment of dismissal was final as to all parties to the suit, and therefore the court had lost jurisdiction over the defendants.

[8] In the absence of any finding by the trial judge that the mistake made by plaintiff's counsel in believing that the regular term of court convened in September, rather than in August, 1916, was due to his negligence, and in view of the uncontradicted proof offered explaining how the mistake occurred, and the further proof of diligence on his part in the preparation of his case for trial, and of a meritorious cause of action, we are of the opinion that the trial court erred in his refusal to set aside and vacate the order of dismissal theretofore entered. *Springer v. Gillisple*, 56 S. W. 369; *Robinson v. Collier*, 53 Tex. Civ. App. 285, 115 S. W. 915; *Scottish Union Ins. Co. v. Tomkies*, 28 Tex. Civ. App. 157, 66 S. W. 1109; *Sedberry v. Jones*, 42 Tex. 10; *H. & T. C. Ry. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808; *Dowell v. Winters*, 20 Tex. 793; 23 Cyc. 938; *Farmers' Mutual Fire Ins. Co. v. Reynolds*, 52 Vt. 405; *County of Buena Vista v. Ry. Co.*, 49 Iowa, 657; *Soper v. Manning*, 158 Mass. 381, 33 N. E. 516; *Freeman on Judgments* (4th Ed.) 167; *Allen v. Smith*, 20 Johns. (N. Y.) 477; *Barto v. Sioux City Electric Co.*, 119 Iowa, 179, 93 N. W. 268; *Hall v. McCan*, 62 Or. 556, 126 Pac. 5; *Hanthorn v. Oliver*, 32 Or. 57, 51 Pac. 440, 67 Am. St. Rep. 518.

The Texas cases cited above were not suits to vacate judgments rendered at former terms of court, as were many of those cited from other jurisdictions, but involved the merits of motions for new trials made at the terms of court during which the judgments appealed from were rendered, and in those cases the judgments were reversed because the failure to appear at the trial was due to mistakes of counsel or litigants not amounting to a failure to exercise diligence to appear when the cases were called for trial.

But in the case of *Vardeman v. Edwards*, 21 Tex. 739, which, like the present case, was a suit to set aside a judgment rendered at a former term of court, the following rule was announced by Justice Wheeler:

"The principles which govern the granting of new trials, upon application by petition after the term, are the same in our practice as those which govern similar applications made during the term. We have no bills of review, strictly and technically speaking (*Mussina v. Moore*, 18 Tex. 7, 8); nor original bills in chancery, for the granting of new trials at law; for hav-

ing no court of chancery, as distinct from a court of law, we have no occasion to resort to the modes of proceeding, or adopt the practice of the court of chancery. The application, whether made before or after the term, is addressed to the same court, having cognizance of both legal and equitable causes; and there can be no reason why it should not be governed by precisely the same principles in the one case as the other; only with this qualification, that as the rule of law requires that the application be made during the term at which the verdict is rendered, if this be not done, the party must show an equitable excuse to entitle him to a hearing of his application after the term."

And the announcement of that rule was quoted with approval in *Bryorly v. Clark*, 48 Tex. 345.

For the reasons indicated, the judgment of the court denying plaintiff's motion to set aside the order of dismissal is reversed, and the cause is remanded, with instructions to the trial court to vacate said order of dismissal and to reinstate the case on the docket for trial as to all the parties except defendants Gibner, Tucker, Butler, and Williams, as to whom plaintiff's suit has been dismissed, as shown above.

## DICKEY v. GULF, T. & W. RY. CO.

(No. 8923.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Nov. 23, 1918. Rehearing Denied  
Jan. 25, 1919.)

### 1. RAILROADS ⇐282(10)—INJURY TO CHILD ON LOCOMOTIVE—JURY QUESTION.

In action for injuries to an eight year old boy while on a locomotive in charge of a hostler, failure of the court to present issue of defendant's alleged negligence in knowingly consenting to the presence of the boy upon the locomotive was held error.

### 2. APPEAL AND ERROR ⇐748(1)—REVIEW—ASSIGNMENT NOT IN ACCORDANCE WITH RULES.

Assignments of error unquestionably in violation of rules for briefing will not be considered.

Appeal from District Court, Baylor County; J. H. Milam, Judge.

Action by William Dickey against the Gulf, Texas & Western Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

D. A. Holman, of Seymour, for appellant.  
J. A. Wheat, of Seymour, E. B. Ritchie, of Mineral Wells, and Ben B. Cain, of Dallas, for appellee.

DUNKLIN, J. This is the second appeal of this case. The former appeal was disposed

of by our Supreme Court in an opinion appearing in 108 Tex. 126, and 187 S. W. 184, to which we refer for a more extended statement of the issues and facts than we deem necessary to make here.

Briefly, the suit was by William Dickey against the Gulf, Texas & Western Railway Company to recover for the loss of services and for the care and treatment of plaintiff's son, Maryland Dickey, eight years of age, resulting from scalds received while at play in the cab of one of defendant's locomotives; and, from a judgment in favor of the defendant, plaintiff has appealed.

The proof showed that the boy was injured in the manner alleged, and that Ed Moss, who was employed by the defendant as hostler, was in charge of the engine and was engaged in coaling it at the time of the injury. The engine was equipped with what is termed an "injector," by means of which the boiler of the engine was filled with water from the engine tank. A sprinkling hose was also connected with the injector through the medium of a valve. In order to sprinkle the coal before shoveling it, the valve between the injector and the hose would be opened, thus allowing water from the boiler to be thrown upon the coal. Just before the boy's injury, Moss had used the hose for sprinkling the coal. He then shoveled more coal into the engine tender, and, after doing that, he proceeded to fill the engine boiler with water by turning on the injector. At that time, the valve connecting the injector and the hose was open, and scalding water, mixed with a great volume of steam, was emitted from the hose, which was lying on the floor of the cab, and severely scalded the boy, Maryland Dickey, who together with his stepbrother, Floyd Bradley, about 14 years of age, were then at play in the cab of the engine.

One of the issues of actionable negligence presented in plaintiff's petition was the failure of Moss to see that the valve between the injector and hose was closed before the injector was put in operation on the immediate occasion of the injury. Another issue was that he was negligent in failing to prevent injury to the boy after he discovered that the water and steam was escaping from the hose and the peril the boy was then in by reason thereof.

Upon special issues submitted, the jury found, in effect, that after using the hose the first time Moss closed the valve connecting it with the injector; that, in turning on the injector again without taking the precaution to ascertain whether or not the valve was then open, he was not guilty of negligence; and that he used ordinary care to prevent injury to the boy after discovering his peril. Those were the only issues of negligence on the part of Moss submitted in

the court's charge as a basis for a recovery by plaintiff.

But the jury further found that the engine was an unsafe and dangerous place for a child of tender years; that Maryland Dickey was a child of tender years and so lacking in judgment and discretion as not to appreciate or realize that the place was dangerous to him; and that Moss allowed him to remain on the engine without ordering him to leave. And there was ample evidence to support those findings. It shows without controversy that, before Moss sprinkled the coal in the first instance, the child was in the cab of the engine; that Moss knew of his presence and made no objection thereto, but impliedly assented for him to remain. Those facts were alleged in plaintiff's petition as actionable negligence entitling plaintiff to a recovery, and error has been assigned to the refusal of the court to submit plaintiff's requested special issue presenting that allegation of negligence.

Appellee urges the decisions in such cases as *S. A. & A. P. Ry. Co. v. Morgan*, 92 Tex. 98, 46 S. W. 28, *Dobbins v. Ry. Co.*, 91 Tex. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856, and *Ry. Co. v. Edwards*, 90 Tex. 65, 36 S. W. 430, 32 L. R. A. 825, to support its contention that, as the child was a trespasser upon the engine, it owed no duty to him except the duty to exercise ordinary care to avoid injury to him while on the engine. In those cases the general rule was announced that the owner of dangerous machinery or other dangerous instrumentalities used on his own premises owes no duty to a mere trespasser except the duty to exercise ordinary care to avoid injury to him after he has entered upon the premises and his presence has been discovered; yet in none of those cases was there any evidence to show that the entry of the trespasser upon the premises was with the knowledge, consent, or invitation of the defendant company.

[1] But in *N. Tex. Construction Co. v. Bostick*, 98 Tex. 239, 83 S. W. 12, *Stamford Oil Mill Co. v. Barnes*, 103 Tex. 409, 128 S. W. 375, 31 L. R. A. (N. S.) 1218, *Ann. Cas.* 1913A, 111, *St. L. S. W. Ry. Co. v. Davis*, 110 S. W. 939, and other authorities which might be cited, the rule is announced, in substance, that the owner of dangerous premises, under circumstances such as shown in the present suit, may be held guilty of negligence in permitting the presence thereon of a child of tender years, lacking in discretion to appreciate the danger, when such child is there with the knowledge and consent of the owner of the premises, and hence impliedly by his invitation. Those decisions, we think, are of controlling effect upon the question now under discussion, and the failure of the court to present the issue of defendant's alleged negligence in knowingly consenting to the

presence of the child upon the cab of the engine was error for which the judgment must be reversed.

[2] The assignment just discussed is not strictly in accordance with the rules for briefing, but we have reached the conclusion that it is sufficient to merit consideration, notwithstanding the objections thereto by the appellee. *C. R. I. & G. Ry. Co. v. Pemberton*, 108 Tex. 463, 161 S. W. 2, 168 S. W. 126. But several other assignments contained in appellant's brief are clearly subject to appellee's objections thereto, because they are unquestionably in violation of such rules, and therefore they will not be considered.

For the reasons indicated, the judgment is reversed, and the cause remanded.

**S. F. BOWSER & CO. v. CAIN AUTO CO.**  
et al. (No. 1473.)

(Court of Civil Appeals of Texas. Amarillo.  
Feb. 12, 1919. Rehearing Denied  
March 28, 1919.)

**LANDLORD AND TENANT**  $\Leftrightarrow$  246(1)—**LANDLORD'S LIEN—GASOLINE STATION AS PART OF "BUILDING"—STATUTE.**

Lien for rent due lessor of building from lessee selling automobile supplies, oil, etc., held to attach to gasoline filling station, consisting of buried tank, etc., installed in vacant space between sidewalk and curbing of street on which building abutted, "building," as used in Rev. St. 1911, art. 5490, creating landlord's lien, including land within inclosure belonging to building and appropriate to its use, even though particular space was part of street.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Building.]

Appeal from Potter County Court; T. W. McBride, Judge.

Suit by the Cain Auto Company and others against S. F. Bowser & Co. From judgment for plaintiffs, defendant appeals. Affirmed.

Y. W. Holmes and W. J. Baird, both of Plainview, for appellant.

Kinder & Russell, of Plainview, and Kimbrough, Underwood & Jackson, of Amarillo, for appellees.

BOYCE, J. Appellee Woldert leased to the Cain Auto Company a certain lot in the city of Plainview, on which was situated a brick building. This building was in the business portion of the city, and extended up to and fronted on a cement sidewalk 12 feet wide, running in front thereof. There was a space of unoccupied ground about 4 feet wide between the sidewalk and the curbing of the paved street in front of the

building. The lessee was engaged in selling automobile supplies, accessories, oil, gasoline, etc., and installed an automobile filling station in the vacant space or parking between the sidewalk and the curbing of the street. This filling station consisted of a buried tank to receive the gasoline and a pump, with the usual attachments above ground to discharge the gasoline from the tank into automobiles receiving it. There was an electric light on the pump stand, the wiring of which ran down through the pump and under the cement sidewalk to a connection with the electric wiring of the building. The awning of the building extended some 8 feet over the sidewalk, and the front of the building opened directly onto the sidewalk. The question on this appeal is whether the statutory landlord's lien for rent due on the rented premises attaches to this filling station located as stated.

The statute (article 5490) provides for a lien in favor of "all persons leasing or renting any residence, storehouse or other building, \* \* \* upon all the property of the tenant in such residence, storehouse or other building." So that it will be seen that the concrete question for decision is whether the said property, situated as we have described it, may properly be said to be in said building within the meaning of the statute. That it is not literally in the building, if by the term "building" is meant only the structure itself, is clear. The term "building," however, in the law of conveyancing, is given a broader meaning. It seems to be settled that a conveyance or lease of building includes as a part thereof, under such description, the land under the building and that within the curtilage, yard, or inclosure belonging to the building and appropriate to its use. *Wade v. Odel*, 21 Tex. Civ. App. 656, 54 S. W. 788; *R. C. L. vol. 16*, pp. 710, 711; *Ann. Cas. 1914B*, 1239, note; *Doyle v. Lord*, 64 N. Y. 432, 21 Am. Rep. 629; *Ogden v. Jennings*, 62 N. Y. 526; *Pottkamp v. Buss*, 3 Cal. Unrep. Cas. 694, 31 Pac. 1121, 1167; *Devlin on Deeds* (3d Ed.) §§ 1200, 1201. In the case of *Cassiano v. Ursuline Academy*, 64 Tex. 673, the Supreme Court construed the word "building," as used in article 8, § 2, of the Constitution, in relation to taxation, to include, not only the structure, but the lands used in connection therewith. We think, therefore, that under these authorities a lease of the building would include this space described in front of the building; it would in law be a part of the building itself. If this be true, then we think the filling station may be properly said to be in the building. *York v. Carlisle*, 19 Tex. Civ. App. 269, 46 S. W. 257; *Nash v. Webber*, 204 Mass. 419, 90 N. E. 873; *Trenor v. Jackson*, 46 How. Prac. 389, 393. In the case of *York v. Carlisle*, supra, the

Court of Civil Appeals for the Third District, where residence property was leased, held that the residence does not consist solely of the buildings occupied by the family, but other buildings and grounds used in connection therewith, and that property of the tenant situated upon the premises was to be considered as being "in the residence."

The fact that this space was a part of the street does not, we think, make any difference. The owner of the abutting property owns the fee to the center of the street, and the right of any private use that might be made of this vacant space not inconsistent with the easement in favor of the public would be in such owner. Cyc. vol. 37, p. 206; Elliott on Roads and Streets, § 690.

We think the judgment should be affirmed.

**FOSCUE et al. v. PROVIDENT NAT. BANK OF WACO. (No. 6046.)**

(Court of Civil Appeals of Texas. Austin.  
Feb. 12, 1919. Rehearing Denied  
March 26, 1919.)

**1. BANKS AND BANKING —129—DEPOSIT BY BUYER TO PAY SELLER'S DEBTS.**

Where a business was sold under agreement whereby the buyer deposited in a bank the purchase price, to be paid out to creditors of the seller on checks signed by both buyer and seller, no part of the deposit was garnishable as belonging to the seller until such creditors as he had approved by signing checks jointly with the buyer had been paid.

**2. ASSIGNMENTS FOR BENEFIT OF CREDITORS —4—WHAT CONSTITUTES—SALE OF BUSINESS—DEPOSIT IN BANK FOR SELLER'S CREDITORS.**

Agreement whereby purchaser deposited purchase price in a bank, deposit to be paid to approved creditors of vendor on checks signed by both, did not amount to an assignment for benefit of vendor's creditors.

Appeal from McLennan County Court; James P. Alexander, Judge.

Suit by G. B. Foscue and others against Asa Jenkins and the Provident National Bank of Waco, as garnishee. From judgment in favor of the garnishee, plaintiffs appeal. Affirmed.

W. B. Carrington and W. L. Eason, both of Waco, for appellants.

Sleeper, Boynton & Kendall and R. O. Stotter, all of Waco, for appellee.

**Findings of Fact.**

JENKINS, J. Asa Jenkins was engaged in the quick tire service business in Waco, Tex. About September 1, 1917, he sold this business to F. A. Denison for \$900, to be

paid as follows: In order to avoid the consequences of the Bulk Sales Law (Acts 31st Leg. c. 27), where notice is not given to creditors as therein provided, Denison agreed to deposit in appellee's bank \$900, out of which he was to pay the creditors of Jenkins. In order that Jenkins might pass upon the question as to whether parties claiming to be his creditors were such in fact, and in order to keep this deposit separate from Denison's current account with the bank, it was agreed that this deposit should be made in the name of Denison & Jenkins, and that the same should not be paid out by the bank, except upon checks signed by both Denison and Jenkins. To this the bank assented, and the entire amount was afterwards paid out by the bank to creditors of Jenkins on checks signed by both Denison and Jenkins. None of these payments were made until after the bank had been served with the writ of garnishment.

Appellants obtained a valid judgment against Jenkins for \$257.06, with interest and costs, from which no appeal was taken, and which was unsatisfied at the time of the trial of this case.

A writ of garnishment was sued out in the case of appellants v. Jenkins, and served on the bank. The bank answered that it did not have any funds in its possession belonging to Jenkins at the time said writ was served upon it. This answer was contested by appellants. The bank at said time had in its possession the \$900 above referred to. The court found that this money did not belong to Jenkins, and rendered judgment for appellee.

**Opinion.**

[1] The facts as hereinbefore stated are undisputed. We think that the finding of the trial court upon these facts is a correct conclusion of law. No part of the money deposited by Denison belonged to Jenkins until such of his creditors whose claims he approved had been paid; his approval to be evidenced by his signing the checks jointly with Denison. Until such payments had been made, the money remained the property of Denison.

[2] Appellants' contention is that the agreement between Jenkins, Denison, and the bank did not amount to an assignment for the benefit of Jenkins' creditors, for the reason that they were not parties to such agreement, and had not accepted the benefits thereof prior to the service of the writ of garnishment. The proposition is correct. But the question of an assignment by Jenkins for the benefit of his creditors is not in this case. Jenkins did not undertake to make an assignment for the benefit of his creditors, and he could not have assigned that which was not his. He simply agreed that Denison might pay the purchase price

of the business which he sold, by paying such of his creditors as he approved, the balance, if any, to be paid to him. These payments were to be paid, and were paid, by Denison out of his own money, and until such payments were made Denison owed Jenkins nothing. The money was deposited by Denison for this purpose, as evidence of his good faith in promising to pay such debts. All of the \$900 having been consumed in paying Jenkins' creditors, in accordance with terms of the agreement, no part of same ever became the property of Jenkins.

Finding no error of record, the judgment of the trial court is affirmed.

Affirmed.

**FT. WORTH & R. G. RY. CO. v. BRYANT.\***  
(No. 8941.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Dec. 14, 1918. Rehearing Denied  
Jan. 18, 1919.)

**1. DAMAGES — §51—HUMILIATION—OBSCENE LANGUAGE HEARD BY ANOTHER.**

Plaintiff is not entitled to damages against a railroad company for humiliation suffered by the use of obscene, vulgar, and profane language by men in the station agent's office, adjoining the waiting room, where the evidence shows that he was familiar with such language, was in the habit of swearing himself, and any feelings of humiliation suffered were caused solely by the fact that his minor daughter heard such language.

**2. TRIAL — §131(3)—MISCONDUCT OF COUNSEL — ARGUMENT—OVERRULING OBJECTION.**

Where the argument of counsel was improper because on a matter of fact not in issue and not submitted to the jury, but was not objected to upon that ground, and was supported by some evidence and was not objectionable upon the ground stated, overruling the objection was not error.

Appeal from District Court, Erath County;  
J. B. Keith, Judge.

Action by O. C. Bryant, for himself and on behalf of his minor child, against the Ft. Worth & Rio Grande Railway Company. From judgment for plaintiffs, defendant appeals. Reformed and affirmed.

Hickman & Bateman, of Dublin, and Theodore Mack, of Ft. Worth, for appellant.

R. L. Thompson, of Austin, and J. A. Johnson, of Stephenville, for appellee.

**DUNKLIN, J.** The Ft. Worth & Rio Grande Railway Company has appealed from a judgment in favor of O. C. Bryant, in his own behalf and as next friend for his minor child, ten years of age, for damages proximately caused by the negligence of the defendant

in permitting the use of obscene and profane language by parties present in defendant's passenger depot in the town of Proctor while plaintiff and his child were there awaiting the arrival of a train upon which they later traveled to their home.

The proof showed that plaintiff and his child went to the station at about 1:30 o'clock on the morning of December 18, 1916, to take passage for their home in Stephenville, and that they waited there for the train about 25 minutes, that the night was cold, that after remaining in the waiting room a very short while plaintiff left it, and he and his child stood on the outside of the room by reason of obscene, vulgar, and profane language used by men who were in the station agent's office, adjoining the waiting room, with the agent, and who were intoxicated. Plaintiff left the room because he was unwilling for his child to hear such language, although she heard some of it before leaving.

It was alleged in plaintiff's petition that his daughter suffered humiliation in consequence of hearing the language used, and that, as a result of exposure to cold on the outside of the room, she was made ill and sustained physical suffering.

In answer to special issues, the jury sustained those allegations, and awarded damages therefor in the sum of \$500. And after a careful review of the testimony we feel that we are unable to say that those findings have no sufficient support in the evidence as insisted in one of the assignments. And we are of the opinion, further, that the evidence was sufficient to support the jury's finding sustaining the allegation of negligence upon which the suit was predicated.

By other findings the jury also sustained plaintiff's allegations to the effect that he himself was also humiliated by the language complained of and allowed him damages therefor in the sum of \$150.

[1] We sustain the assignment addressed to this finding, because plaintiff's own testimony shows that he was familiar with such language, was in the habit of swearing himself, and that any feelings of humiliation suffered by him were caused solely by the fact that his child heard such language and he believed it would cause her mental suffering. *Telegraph Co. v. Cooper*, 71 Tex. 512, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; 8 *Ruling Case Law*, p. 515.

[2] In his closing argument to the jury, counsel for plaintiff stated that the failure of defendant to have its depot lighted and warmed on the occasion in controversy was a penal offense under the laws of this state, and an assignment of error is predicated upon such remarks, to the use of which objection was made by defendant's counsel at the time and overruled by the court. The ground

of objection was that such failure was not made an issue by the pleadings and evidence, and that the remarks complained of were highly prejudicial to the defendant.

We find from the record that the failure to light and warm the waiting room, and that the room was cold, was expressly alleged in plaintiff's petition, and the allegation was supported by plaintiff's testimony. It is true that such failure by the defendant was not submitted to the jury in any of the issues, but that was not urged as a ground of the objection. Furthermore, according to plaintiff's testimony, he would have left the room and exposed his child to the cold, even though the room had been warm, because he was unwilling for his child to hear the objectionable language referred to; but that fact was not urged as a ground of the objection to the remarks of plaintiff's counsel.

While the argument was improper for the reasons just noted, yet, in view of the failure of defendant's counsel to point out those reasons to the trial judge in his objection, we think the assignment now under discussion should be overruled.

For the reasons noted, the judgment is so reformed as to eliminate therefrom the recovery by plaintiff in his own right for \$150; but in all other respects it is affirmed. Costs of appeal are taxed against appellee, O. C. Bryant.

Reformed and affirmed.

# BAKER et ux. v. SLAUGHTER & MOOREHEAD. (No. 6035.)

(Court of Civil Appeals of Texas. Austin.  
Feb. 5, 1919. Rehearing Denied  
March 19, 1919.)

## PARTNERSHIP — 213(1) — ACTION ON CONTRACT—PLEADING.

A petition, in action for broker's commissions for procuring a purchaser for real estate, brought by a partnership, was not demurrable, as alleging a contract made by an individual plaintiff, where petition in fact alleged a contract with a partnership, notwithstanding an immaterial allegation that defendant had listed his land with one of partners.

Appeal from McLennan County Court;  
Jas. P. Alexander, Judge.

Action by Slaughter & Moorehead against J. T. Baker and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

Cross & Rogers, of Waco, for appellants.  
Tirey & Tirey, of Waco, for appellees.

JENKINS, J. Appellees are real estate brokers. They alleged that appellants requested them to procure a purchaser for cer-

tain lands which they owned, and agreed to pay them, in case said property was traded or exchanged for other property, 2½ per cent, for such portion as was traded, and 5 per cent, for such portion of said land as was to be paid for in money in excess of any trade. That in pursuance of such contract they procured a purchaser for said land. \$10,280 of the purchase price was paid in other lands, and \$7,960 was paid in money, by reason of which they were entitled to a commission of \$655.

Appellants, in addition to general demurrer and general denial, alleged that the appellees did not represent them in the transaction in which the exchange of land was effected, and that they never agreed to pay them any commission on such transaction.

The case was submitted to a jury upon the following special issues:

"(1) Did the defendants authorize the plaintiffs, Slaughter & Moorehead, on or about June, 1918, to secure a person who would purchase or trade for the land in question?" To which the jury answered, "Yes."

"(2) Did the defendants agree to pay the plaintiff a commission of 2½ per cent. on trade, and 5 per cent. on cash sale, if plaintiffs would secure a person who would purchase or trade for their land?" To which the jury answered, "Yes."

"(3) Were the plaintiffs or either of them the procuring cause of the exchange of lands between the defendants and F. Will Vahrenkamp? That is, did the plaintiffs or either of them bring about the exchange of lands between the defendants and Vahrenkamp?" To which the jury answered, "Yes."

The testimony is sufficient to sustain the findings of the jury.

Appellants' first assignment of error is that the court erred in overruling their general demurrer, for the reason that appellees' petition shows that the suit was brought by Slaughter & Moorehead, a partnership, upon a contract made and entered into by O. D. Slaughter, individually.

The court did not err in overruling the demurrer. It is true that the petition alleges that some two years prior to the sale, appellant J. T. Baker had listed his land with O. D. Slaughter, but it does not allege any contract with Slaughter further than this allegation. The petition does allege a contract with Slaughter & Moorehead. The allegation as to O. D. Slaughter was immaterial, and this suit was not brought upon any contract with Slaughter.

The only remaining assignment of error is that the court erred in refusing to peremptorily instruct a verdict for appellant. The statement and argument under this assignment show that it is in effect the same as the first assignment, and that the ground for such requested charge was that there was a variance between allegation and the proof,

in that plaintiffs brought suit as a partnership on a contract made with one of the partners prior to the creation of such partnership, and that the testimony showed a contract with the partnership and not with Slaughter individually.

Finding no error of record, the judgment of the trial court is affirmed.

Affirmed.

**PROVIDENCE-WASHINGTON INS. CO. v. OWENS. (No. 9026.)**

(Court of Civil Appeals of Texas. Ft. Worth. Feb. 15, 1919.)

**1. JUDGMENT  $\Leftrightarrow$  951(1) — RES ADJUDICATA — BURDEN OF PROOF—MATTER DETERMINED.**

Where a verdict was general and fails to show upon which count in complaint recovery was awarded, burden is upon one in a subsequent suit to show by evidence that recovery was upon count on which he bases a plea of res adjudicata.

**2. JUDGMENT  $\Leftrightarrow$  622(2) — RES ADJUDICATA — MATTER PROPER FOR SET-OFF.**

It was not necessary for an assured, in an action by insurer, to assert his right to a rebate, and he could subsequently sue therefor, where the only issue in the first suit was the amount of the premium.

Appeal from District Court, Tarrant County; Bruce Young, Judge.

Action by Thomas B. Owens against the Providence-Washington Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 207 S. W. 666.

Thompson, Knight, Baker & Harris, of Dallas, for appellant.

R. M. Rowland and Lassiter & Harrison, all of Ft. Worth, for appellee.

**DUNKLIN, J.** The Providence-Washington Insurance Company has appealed from a judgment in favor of Thomas B. Owens for return premiums, claimed by plaintiff to be owing to him under and by virtue of the terms of a certain insurance policy covering risks of loss and damage on land and sea to cotton shipments from American ports to Europe and other foreign countries.

The policy covered shipments of cotton made by Owens during the season of 1914-1915, and contained, among others, the following stipulations:

"To cover all cotton in the United States purchased by assured or for their account, attaching from the moment the cotton becomes the property of the assured or legally at their risk, provided, however, that no cotton shall be covered hereunder prior to actual delivery to the assured or their agents, unless specifically iden-

tified by marks and numbers or other designation in possession of the assured or mailed to the assured prior to loss.

"Held covered, at a premium to be arranged, in case of deviation or change of voyage or transfer to other steamers, provided notice be given to the assurers as soon as known to the assured. \* \* \*

"The assured are authorized to issue certificates in duplicate and countersign the same, covering shipments insured hereunder, subject to the terms and conditions of this policy, and making loss, if any, payable to the holder thereof, provided, however, that memoranda of such certificates shall be mailed to L. A. Wight & Co., New York, N. Y., on the day of issue, and it is hereby agreed that the amounts and values applicable to this policy, and that said certificates shall represent and take the place of the original policy and convey all the rights of the assured (for the purpose of collecting any loss or claim) as fully as if the property were covered by a special policy direct to the holder of the certificate. \* \* \*

"This policy also covers the risk of country damage on shipments insured hereunder to Europe, Japan, China, India or Manila, subject to settlement at destination, in accordance with customs and usages of the port of destination, unless otherwise specified in certificate, but no claim for loss or damage to cotton picked or reconditioned in the United States nor for any cost or expense in respect of such picking or reconditioning shall be recoverable hereunder. \* \* \*

"In case the aggregate payments in respect of claims for country damage on shipments to Europe, Japan, India, China, and Manila do not exceed one-fourth per cent. on the total sum insured against country damage on such shipments, and provided that the policy has not been canceled by the assured prior to 31st August, 1915, to return the difference between the equivalent of said one-fourth per cent. and the aggregate amount of claim so paid, such return to be payable only after the expiration of four months from the date of last shipment and after the settlement of all outstanding country damage claims."

The respective rates of premiums charged for shipment to different foreign countries were stipulated in a rate sheet attached to and made a part of the policy, also the names of certain ships upon which the shipments might be made. It was also stipulated that shipments might be made on "other approved steamers." Following the names of different ports to which shipments might be made the rate sheet contained the following stipulation:

"To add—1/16% for shipments to Dunkirk, Barcelona, Malaga, Ferrol, Lisbon and Marseilles.

"1/4% for shipments to Italian ports, or to Oporto, Christiana, Bergen, Malmø, Gothenburg or Copenhagen.

"1/8% for transshipment at any of the above named ports or in the United Kingdom. Shipments to other continental ports subject to such additional rates as may be advised."



The statement of facts contains a written agreement made by the parties upon the trial of the case, from which it appears that during the season covered by the policy the total amount of insurance issued was \$2,480,086, and including in that amount a cargo of cotton shipped in the steamship Dacia of the value of \$764,946.

This suit was for a balance of \$1,912.36 with interest thereon as a balance due plaintiff for return premiums under and by virtue of the stipulation in the policy for return premiums, and in the agreement of counsel the defendant admitted liability in that amount, unless the plaintiff was barred from a recovery under and by virtue of a judgment rendered in the United States District Court for the Southern District of New York on July 7, 1916, in the case of Providence-Washington Insurance Company against Tom B. Owens, for the sum of \$22,948.38, plus \$72.74 interest. Accordingly, the only question presented upon this appeal is whether or not defendant's plea of res adjudicata should have been sustained.

We shall not undertake to set out in full the pleadings in the former suit. It is sufficient to state only the substance of the issues presented. Attached to plaintiff's complaint was a copy of the insurance policy, with its accompanying riders made a part thereof, including rate sheets, etc. It was alleged that by the terms of the policy it was agreed between the parties thereto that premiums upon all shipments of cotton upon approved steamers between ports, specified in the riders attached to the policy, were to be computed according to rates therein stipulated, and that premiums to be charged for shipments upon steamers not approved by the insurance company, or between ports not specified, should be fixed by agreement between the company and Owens. According to further allegations in that complaint Owens issued insurance certificates upon 11,000 bales of cotton, which he shipped on the steamship Dacia from Galveston, Tex., with Bremen, Germany, as the port of destination, but the destination was later changed to Rotterdam, Holland. The amount of insurance indicated by said certificates was \$764,946. Said certificates were then negotiated by Owens to a purchaser or lienholder, for value, and became a valid and binding obligation upon the insurance company.

It was further alleged that when the company's insurance brokers in New York were notified of the issuance of the certificates of insurance on that cargo, the president of the company immediately wired Owens that the company would not approve the Dacia for a trans-Atlantic shipment, but, through a desire to assist it could arrange for insurance not to exceed \$75,000, at a rate which the president of the company believed would be satisfactory to Owens. The telegram further

stated that if Owens should insist on the shipment going forward upon the Dacia, he would be charged a premium of 50 per cent. of the value of the cargo over and above \$75,000.

According to further allegations in the complaint the Dacia had formerly belonged to a corporation organized under the laws of Germany, and was registered as a German ship, flying the German flag. Between December 1, 1914, and January 1, 1915, it was purchased by a citizen of the United States and transferred to the American registry, flying the American flag, the purchase and transfer occurring subsequently to August 15, 1914, and during the existence of the war between the empire of Germany on the one side and Great Britain and France on the other. The name of the steamship was intended to be changed to Martha, but the change was never effected.

It was further alleged that during the period covered by the policy the port of Rotterdam was not a port mentioned in any of the riders attached to the policy, and the Dacia was not a ship approved by the insurance company, or included in the lists of ships specially mentioned therein, and therefore the rate of premium for such insurance was not covered by the policy, but was to be determined by mutual agreement between Owens and the company.

It was further alleged that after receipt of the telegram above mentioned, Owens made no reply thereto, and that by thereafter forwarding the shipment to Rotterdam upon the Dacia he impliedly bound himself for the payment of the 50 per cent. premium demanded in the telegram from the company.

It was further alleged that during the voyage of the ship she was seized by a French man-of-war and taken as a prize of war to the port of Brest in France.

It was further alleged in the complaint that by reason of the premises, already stated, Owens became liable to the company for the sum of \$382,473 as premiums on the Dacia shipment, the same being 50 per cent. of the entire value of the cargo. In another count in the complaint it was alleged that Owens was bound by an implied obligation to pay a reasonable premium upon the Dacia cargo, which was also alleged to be 50 per cent. of the value of the cargo, in the absence of any written agreement for such insurance; in other words, this count was upon a quantum meruit.

In the answer filed by Owens to said suit in the federal court in New York he admitted the issuance of the policy of insurance as alleged in the company's complaint. He also admitted the shipment of the cotton on the Dacia from Galveston; that he received the telegram alleged in plaintiff's complaint; that after the receipt of the telegram he continued the loading of the cotton at Galves

ton, and changed the destination of the cargo from Bremen to Rotterdam, and made the certificates of insurance conform to that change. He admitted further that the ship was seized and taken as a prize by a French man-of-war. But it was further alleged that it was agreed between the agents for the parties to the insurance contract that the premiums to be paid for insurance should be computed in conformity with the uniform standard conditions, terms, and rates adopted by the various insurance companies, including the plaintiff; that during the month of September, 1914, those companies sent to the brokers generally, and to the brokers acting for Owens, a printed schedule of rates on cotton shipments substantially in the form of that attached to the policy; and that those companies, as well as the plaintiff company, did issue during the months of December, 1914, and January, 1915, insurance on shipments of cotton to Bremen at a rate varying from  $2\frac{1}{4}$  per cent. to 3 per cent. on approved direct steamers that were not regular liners; that those companies also gave general notice that shipments to Rotterdam might be included in the schedule above referred to, at a rate of  $\frac{1}{4}$  of 1 per cent. above the rates named in the schedule for shipments to Liverpool; and that plaintiff company sent a copy of such notice to Owens.

It was further alleged that prior to the sale of the Dacia by its German owners it had been approved by those companies as a first-class liner, and that it was a custom with those companies, and also the plaintiff company, that when such a vessel was sold to an individual owner and became a tramp vessel she automatically became an approved tramp, and included within the class of approved, direct steamers between ports named in the schedule of rates on cotton shipments attached to the policy, and by reason of the premises Owens was entitled to issue the insurance certificate on the Dacia cargo at a premium rate not exceeding 3 per cent. to Bremen, or to Rotterdam, at a rate of  $\frac{1}{4}$  of 1 per cent. in excess of the rate of premium on shipments to Liverpool, aggregating  $1\frac{1}{16}$  per cent., and that the same constituted a reasonable and fair rate of premium.

It was further alleged that Owens declined to accede to the demand of the company for 50 per cent. premium by reason of his contention that such demand was in violation of the terms of the contract of insurance.

[1] Upon the trial of the case in the federal court of New York before a jury the insurance company recovered a judgment against Owens for the sum of \$22,948.38, which judgment became final. The amount so allowed was equivalent to 3 per cent. premium on the Dacia cargo, which was not a rate specified in the rate sheet attached to the policy. And appellant insists that it appears from such a verdict that the recovery in the former suit was upon the count in its

complaint in which a judgment was sought upon a quantum meruit, and that it was not upon the count in which a recovery was sought upon the contract of insurance in connection with the correspondence between the parties relative to the shipment upon the Dacia, and that therefore the stipulation in the insurance contract for a return of premiums paid thereunder, and upon which the present suit is based, has no application. That contention cannot be sustained, since the verdict and judgment in the former suit is general and fails to show upon which count in the complaint the recovery was awarded, and since in the present suit no evidence was offered by the insurance company to show which one of those counts was in fact sustained. The only evidence offered to sustain the defense of res adjudicata was the pleadings filed in the former suit with exhibits consisting of the policy and schedules, rate sheets, etc., constituting parts of the contract of insurance, attached, and the verdict and judgment. The burden was upon the company in the present suit to sustain its plea of res adjudicata, and, as said in 15 R. C. L. p. 950, § 454:

"Where there are two or more issues in a case, and all are decided in favor of the same litigant, the court may rest its decision on them jointly, in which event the decision of one is no less necessary or material than the decision of the other issue, and the judgment is treated as conclusive upon both. Not infrequently, however, the court in rendering judgment leaves it ambiguous and uncertain as to which of several issues was the one determined in arriving at the decision of the case; and, while the authorities are not harmonious, the weight of authority is to the effect that a judgment which may have resulted from a determination of either one or more separate issues does not constitute an adjudication as to either, where it is not shown upon which it was in fact based. Under this view it must clearly appear from the record in the former cause, or by proof by competent evidence consistent therewith, that the matter as to which the rule of res adjudicata is invoked as a bar was, in fact, necessarily adjudicated in the former action; and a plea of res adjudicata is insufficient, unless it appears that the matters stated in the complaint, and alleged to have been unavailingly set up as a defense in a former action, were positively decided in such former action against the present plaintiff. Therefore a party desiring to avail himself of the judgment as conclusive evidence upon some particular fact must show affirmatively that it went upon that fact, or else the question is open for a new contention."

See, also, 23 Cyc. 1534.

Furthermore, in the company's complaint, filed in the former suit, it was expressly conceded that the insurance certificates issued upon the Dacia cargo were valid and binding upon it while in the hands of innocent purchasers, and the same admission is made by the company in the present suit. We fail to

perceive how any purchaser of those certificates would stand in a better position than Owens himself if the insurance policy is to govern its validity since they contained the following stipulation:

"This certificate is issued subject to the terms and conditions of the policy; and represents and takes the place of the policy, and conveys all the rights of the original policy holder (for the purpose of collecting any loss or claim), as fully as if the property were covered by a special policy direct to the holder of this certificate, and free from any liability for unpaid premiums."

If the issuance of the certificates of insurance was authorized by the terms of the written contract of insurance, then the stipulation for rebate to Owens of premiums paid for the insurance applies, regardless of the rate of premiums.

[2] From the foregoing it appears that the only issue involved in the former suit was the amount of premium due by Owens to the insurance company. The demand for rebate premium asserted in the present suit could have been urged by way of cross-action in that suit, but that was not done. Neither was that issue necessarily involved in the demand asserted by the company in the former suit. In the case of *Phillipowski v. Spenser*, 63 Tex. 604, our Supreme Court announced the following:

"As a general rule, a former judgment will not be a bar to further litigation, unless the same vital point was put directly in issue and determined, or was fairly within the scope of the pleadings. 6 *Wait's Act. & Def.* 785, and cases there cited.

"A judgment or decree is not conclusive as to collateral questions, nor of any matter to be inferred by argument from the judgment. 6 *Wait's Act. & Def.* 785, and authorities cited. It is also there said: 'The rule, as sometimes stated, is that a judgment is not technically conclusive of any matter, if the matter is not such that it had of necessity to be determined before the judgment could have been given.'"

And in 23 *Cyc.* p. 1204, the following is said:

"A matter is not in issue in the suit which was neither pleaded nor brought into contest therein, although within the general scope of the litigation, and although it might have determined the judgment if it had been set up and tried."

To the same effect are the following authorities: *Manning v. Green*, 56 Tex. Civ. App. 579, 121 S. W. 721; *Berger v. Kirby*, 135 S. W. 1122; *Bank & Trust Co. v. Rice*, 185 S. W. 1047. In 23 *Cyc.* p. 1202, the following is said:

"As a general rule, where a defendant has an independent claim against plaintiff, such as might be either the basis of a separate action or might be pleaded as a set-off or counterclaim, he is not obliged to plead it in plaintiff's

action, although he is at liberty to do so; and if he omits to set it up in that action, this will not preclude him from afterwards suing plaintiff upon it."

Even though Owens could by cross-action have asserted in the former suit the claim presented in the present suit, yet, under the authorities above cited, which we believe announced the correct rule, we are of the opinion that the judgment in the former suit is not a bar to plaintiff's recovery in the present suit, since the claim in the present suit is a cause of action separate and distinct from the demand for premiums asserted by plaintiff in the former suit which was the only issue involved.

For the reasons noted all assignments of error are overruled, and the judgment is affirmed.

### THOMASON v. HAM et ux. (No. 8952.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Jan. 18, 1919. Rehearing Denied  
March 8, 1919.)

#### 1. PLEADING $\S$ 104(2)—PLEA OF PRIVILEGE—DENIALS—VENUE.

In a suit to cancel a mineral lease, allegations in defendant's plea of privilege under *Vernon's Ann. Civ. St. Supp.* 1918, art. 1903, to be sued in his own county, that none of the statutory exceptions, *Rev. St.* 1911, arts. 1830, or 2308, as to exclusive venue in one's county, existed, and that the suit was not concerning land or to quiet title thereto, held to show no intention to deny plaintiffs' allegations as to defendant's acquisition from the plaintiffs of the mineral lease alleged.

#### 2. PLEADING $\S$ 8(9)—PLEA OF PRIVILEGE—CONCLUSIONS OF LAW.

Whether or not a suit to cancel a mineral lease is one coming within *Rev. St.* 1911, art. 1830, subd. 14, providing for venue of suits concerning land, is a legal question, and defendant's allegation in his plea of privilege (*Vernon's Ann. Civ. St. Supp.* 1918, art. 1903) that it was not such a suit is a mere conclusion of law.

#### 3. PLEADING $\S$ 101 — PLEA OF PRIVILEGE—EXCEPTIONS—VENUE.

Where plaintiffs in a suit to cancel a mineral lease alleged that defendant lived in a county other than where the suit was instituted, no plea of privilege under *Vernon's Ann. Civ. St. Supp.* 1918, art. 1903, was necessary for defendant to invoke his statutory privilege as to being sued in his own county, since this could be done by special exception to plaintiffs' petition.

#### 4. PLEADING $\S$ 104(2)—PLEA OF PRIVILEGE—DENIAL OF FACTS.

*Vernon's Ann. Civ. St. Supp.* 1918, art. 1906, relative to denial under oath of existence of the exceptions to exclusive venue in the county of one's residence, requires denial of

facts, and not denials involving mere conclusions of law drawn from an interpretation of plaintiff's petition.

**5. VENUE §=5(4)—SUIT TO CANCEL—MINERAL LEASE.**

A suit to cancel a mineral lease, which conveyed to the defendant plaintiffs' mineral rights in the land, the purpose of which was to recover an interest in land and to quiet the title, was within Rev. St. 1911, art. 1830, and had its venue in the county where the land is situated.

Appeal from District Court, Stephens County; Joe Burkett, Judge.

Suit by M. F. Ham and wife against G. J. Thomason. From a judgment for plaintiffs, defendant appeals. Affirmed.

G. W. Thomason, of Haskell, for appellant.

W. C. Veale, of Breckenridge, for appellees.

DUNKLIN, J. M. F. Ham and wife instituted this suit against G. J. Thomason in the district court of Stephens county to cancel what is commonly designated as a mineral lease on certain lands in Stephens county, and also one tract of land situated in Throckmorton county. According to the allegations in the petition, the lease was, in fact, a conveyance to the defendant by the plaintiffs of all the coal, oil, gas, and other minerals located in the land. As a consideration for that conveyance the defendant agreed to begin immediately drilling and mining operations on said lands for the purpose of extracting therefrom said minerals and to prosecute such development work with reasonable diligence, and that obligation was breached by the defendant, and he afterwards wholly abandoned his contract. It was alleged that the instrument so executed had been recorded in the deed records of Stephens county, and that such record cast a cloud upon plaintiffs' title which they sought to have removed. It was further alleged that defendant was claiming title under that instrument. In the petition it was alleged that the defendant resided in Wichita county.

Defendant filed a plea of privilege that he resided in Wichita county, and invoked his statutory privilege to be sued in that county and in no other. That plea contained further allegations as follows:

"That none of the exceptions to exclusive venue in the county of one's residence mentioned in article 1850 (1194) or article 2308 (1565), R. S. of Texas, exist in this cause, that this is not a suit involving a crime, offenses, or trespass, a fraud or a suit concerning land, or damages thereto, suit to remove incumbrance or quiet title or a contract in writing to be performed in Stephens county, Tex., and does not come within any of the exceptions provided by law in such cases authorizing this suit to be

brought or maintained in the county of Stephens, state of Texas, or elsewhere outside of the said county of Wichita."

The plea was duly verified by the defendant in compliance with the statute. That plea was heard by the trial court and overruled, and from that order the defendant has prosecuted this appeal.

It appears from the record that no controverting plea was filed by the plaintiffs in reply to the plea of privilege, nor was any evidence offered upon the hearing of the plea either to sustain or controvert the allegations therein contained. Article 1903 of the Revised Statutes, enacted in 1917 (Acts 35th Leg. c. 176 [Vernon's Ann. Civ. St. Supp. 1918, art. 1903]), reads as follows:

"A plea of privilege to be sued in the county of one's residence shall be sufficient, if it be in writing and sworn to, and shall state that the party claiming such privilege was not, at the institution of such suit, nor at the time of the service of such process thereon, nor at the time of filing such plea, a resident of the county in which such suit was instituted and shall state the county of his residence at the time of such plea, and that none of the exceptions to the exclusive venue in the county of one's residence mentioned in article 1830 or article 2308 of the Revised Statutes exist in said cause; and such plea of privilege when filed shall be prima facie proof of the defendant's right to change of venue. If, however, the plaintiff desires to controvert the plea of privilege, he shall file a controverting plea under oath, setting out specifically the fact or facts relied upon to confer venue of such cause on the court where the cause is pending. Upon the filing of such controverting plea the judge or the justice of the peace shall note on same a time for a hearing on the plea of privilege; provided, however, that the hearing \* \* \* shall not be had until a copy of such controverting plea, including a copy of such notation thereon, shall have been served on each defendant, or his attorney, for at least ten full days exclusive of the day of service and day of hearing. If the parties agree upon a date for such hearing it shall not be necessary to serve the copy above provided for. Either party may appeal from the judgment sustaining or overruling the plea of privilege, and if the judgment is one sustaining the plea of privilege and an appeal is taken, such appeal shall suspend the transfer of the venue and a trial of the cause pending the final determination of such appeal."

It will be observed that in the plea of privilege filed article 1850 of the Statutes, instead of article 1830, is invoked. Aside from the question whether or not that error, if it be a mere clerical error, would deprive the defendant of the right to avail himself of the provision of the article quoted above, and for the sake of argument, treating the plea as though article 1830, instead of article 1850, had been invoked, we conclude that the court did not err in overruling the plea.

[1] We believe it clear from the allegations contained in the plea of privilege that the statement to the effect that none of the statutory exceptions to exclusive venue in the county of defendant's residence existed was qualified and explained by the further allegation that the suit was not "a suit concerning land," or "to remove incumbrances or quiet title" thereto. In other words, we think it clear from the allegations in the plea of privilege that the defendant did not intend to deny the truth of the allegations in plaintiffs' petition to the effect that he had acquired from the plaintiffs the mineral lease alleged in consideration of the alleged contract on his part, which had been breached, and that such lease had been placed of record in the deed records of Stephens county, where the land was located. It appears from the allegations of the plea of privilege that, according to the defendant's legal interpretation of the plaintiffs' petition, the suit was not a suit concerning land nor to remove any incumbrances thereon, or to quiet title thereto, and for that reason alone it did not come within the provisions of subdivision 14 of article 1830 of the Revised Statutes, which reads as follows:

"Suits for the recovery of lands or damages thereto, suits to remove incumbrances upon the title to land, suits to quiet the title to land, and suits to prevent or stay waste on lands, must be brought in the county in which the land, or a part thereof, may lie."

[2, 3] Whether or not the suit as instituted by the plaintiffs was one coming within the provisions of that subdivision of the statute was a legal question, and not a question of fact, and the defendant's allegation that it was not such a suit was a mere conclusion of law, and not an allegation of fact. And as plaintiffs themselves had alleged that defendant resided in Wichita county, and not in Stephens county, where the suit was instituted, no plea of privilege was necessary in order for the defendant to invoke his general statutory privilege to be sued in the county of his residence; for that could have been done by a special exception to the plaintiffs' petition, as is well settled by the decisions of this state. Assuming, as we do, that defendant, in verifying his plea, testified conscientiously, we must conclude that he did not intend to swear that the nature of the cause of action was different from what plaintiffs' petition showed it to be, but that he merely intended to swear to the nature of the cause of action asserted therein according to his legal construction of the instrument. From the fact that the defendant is prosecuting this appeal it is self-evident that he does not deny the allegations in plaintiffs' petition that he acquired the mineral lease therein alleged, and that he is claiming some interest thereunder;

otherwise it would be immaterial to him what judgment might be rendered even on the merits of the case, for he would have no interest whatever in the suit to be affected by a judgment in plaintiffs' favor.

[4] Article 1908 of the Statutes, relating to the denial under oath of existence of any of the exceptions to exclusive venue in the county of one's residence, had in view a denial of facts, and not denials involving mere conclusions of law drawn from an interpretation of plaintiffs' petition.

[5] The conveyance by plaintiffs to the defendant of all their mineral rights in the land was a conveyance of an interest in the property itself (see *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S. W. 717, L. R. A. 1917F, 989), and, the purpose of the suit being to recover that apparent interest and to quiet the title created by the record of that instrument, fixed the venue of the suit in Stephens county, where the land was situated (*Thomson v. Locke*, 66 Tex. 383, 1 S. W. 112).

For the reasons indicated, the judgment is affirmed.

McENTIRE et ux. v. THOMASON.  
(No. 8953.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 1, 1919. Rehearing Denied  
March 8, 1919.)

1. LIMITATION OF ACTIONS  $\Leftrightarrow$  100(10)—FRAUD—DISCOVERY.

Suit to cancel oil lease on the ground of fraud was barred by limitations, where the false representations and the fraudulent acts relied upon were well known to plaintiffs, or could have been ascertained by the exercise of the slightest diligence more than two years before the action was commenced.

2. MINES AND MINERALS  $\Leftrightarrow$  58—OIL LEASE—MUTUALITY.

Oil lease, giving lessee right to at any time surrender lease and be relieved from obligations thereunder remaining unfulfilled at such time, where lessors in consideration of lease received a large amount of stock of company to which lease was assigned, was not void for want of mutuality.

3. MINES AND MINERALS  $\Leftrightarrow$  58—OIL LEASE—FRAUD—EVIDENCE.

In action to cancel oil lease executed by husband and wife, on the ground that wife was induced to sign and acknowledge deed by assurances that lessee merely wanted her signature and acknowledgment in order to assist him in obtaining leases on other lands, held that evidence tended to support allegation.

4. MINES AND MINERALS  $\Leftrightarrow$  56—OIL LEASE—"INTEREST IN LAND."

An oil lease is a conveyance of an interest in land.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest.]

**5. DEEDS §56(2)—INTENTION—DELIVERY.**

In order to render a deed of conveyance of land effective, it must be delivered into the control of the grantee with the intent of the grantor that it shall become operative as a conveyance.

**6. HOMESTEAD §117 — VALIDITY OF OIL LEASE — HOMESTEAD RIGHTS — SIGNATURE AND ACKNOWLEDGMENT OF WIFE.**

Where oil lease executed by husband and wife, covering their homestead, was signed and acknowledged by the wife merely for the purpose of enabling lessee to secure other leases, and without intent on her part to convey her rights in the homestead, and lessee had notice thereof, the lease was inoperative as a conveyance of an interest in the homestead, in view of Rev. St. arts. 1115, 6802, and 6805.

**7. QUIETING TITLE §7(2)—CLOUD ON TITLE — OIL LEASE.**

A recorded oil lease is a cloud on the title of the land covered thereby.

Appeal from District Court, Stephens County; Joe Burkett, Judge.

Suit by S. J. McEntire and wife against G. J. Thomason. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

W. C. Veale, of Breckenridge, and Theodore Mack, of Ft. Worth, for appellants.

G. J. Thomason, pro se.

CONNER, C. J. On May 15, 1917, S. J. McEntire and wife instituted this suit against G. J. Thomason to cancel an oil lease and remove cloud of title upon their homestead, described in the petition. The case seems to have been tried and disposed of in the trial court upon issues of fraud presented in plaintiffs' petition as a ground for cancellation and the defense thereto of the statute of limitation.

The lease bears date of August 18, 1909. The plaintiffs alleged that its execution had been procured by means of the fraudulent representations set up in the petition, but after the introduction of the testimony the court concluded that the undisputed evidence showed that the frauds alleged were known to the plaintiffs more than two years prior to the institution of the suit, and that therefore the cause of action was barred by the two-year statute of limitation pleaded by the defense, and accordingly peremptorily instructed the jury to return a verdict for the defendant. The plaintiffs have appealed from the judgment against them which followed the peremptory instruction.

[1, 2] A careful consideration of the evidence, which it will serve no useful purpose to set out, leads us to the conclusion that the court correctly held that the false representations and fraudulent acts, relied upon and set forth in plaintiffs' petition were well

known to the plaintiffs, or could have been ascertained by the exercise of the slightest diligence more than two years prior to the institution of the suit, and that, therefore, in so far as the plaintiffs' suit was based upon fraud and fraudulent representations, the action was barred by the two-year statute of limitation. *Bass v. James*, 83 Tex. 110, 18 S. W. 336; *Coleman v. Ebeling*, 138 S. W. 199. To this view, however, appellants answer that the lease contract was unilateral and void, and that therefore no limitation applied, but we have been unable to concur in such construction of the lease. The provision of the lease contract relied upon as showing its want of mutuality reads as follows:

"It is further agreed that second parties (G. J. Thomason, lessee) and heirs assigns may at any time hereafter surrender up this grant and be relieved from any part of the contract heretofore entered into that may at that time remain unfulfilled, then and thereafter this grant shall be null and void and no longer binding on either party."

The lease contract, in effect, provided as a part of the consideration therefor for the delivery to the lessors, S. J. McEntire and wife, of 1,600 shares of capital stock of the Diamond Coal, Oil & Gas Company, to which the lease in question was to be transferred, and the evidence was without dispute that appellee delivered the number of shares of stock mentioned, and that the same were received by appellants. While it is alleged that this stock was of no value, we are not satisfied with the sufficiency of the proof to establish that fact. It certainly appears that appellants received the stock and did not in their pleadings proffer its surrender or return. Under such circumstances we are not prepared to hold the contract in question void for want of mutuality. See 9 Cyc. p. 334; *Pierce Fordyce Oil Association v. Woodrum*, 188 S. W. 245; *Knott v. Thomas*, 180 S. W. 1114; *Texas Seed & Floral Co. v. Chicago Set & Seed Co.*, 187 S. W. 747.

[3] There is a phase of the case, however, that seems not to have been emphasized below or here which we think requires a reversal of the judgment. In addition to the plaintiffs' allegations of fraudulent representations and of fraudulent acts made the basis of their prayer for a cancellation of the lease, it was alleged, in substance, in a separate count of the petition, that at the time of the execution of the lease Mrs. McEntire was unwilling to sign or acknowledge it, and only did so after having been assured by the defendant Thomason "that he only desired to have the paper signed and acknowledged by Mrs. McEntire in order to assist him in obtaining leases on other lands." Wherefore it was charged that the instrument was never delivered as a contract bind-

ing upon the plaintiffs. We think the evidence tended to support the issue thus presented. Mrs. McEntire and one or more members of the family so testified in effect, and the officer who took the acknowledgment testified, among other things, as follows:

"I took the acknowledgment of Mr. McEntire and his wife some time in August, 1909, when they executed a lease contract, and I remember the circumstance. Mr. Thomason met me there at Crystal Falls and asked me to come and go with him to take that acknowledgment. Mrs. McEntire was not willing to sign the acknowledgment. I reported that fact to the defendant, Mr. Thomason. Mr. Thomason told her that it was just to enable them \* \* \* that he wanted that lease as it would enable them to get other leases around in the neighborhood, and it would not be binding upon them, and he stated that if they became dissatisfied he would get her a release."

It is undisputed that the lease in controversy covered the homestead of appellants which had been continuously occupied before and after the execution of the lease. It further appears that the lease had been duly recorded on the deed records of Stephens county, and which, therefore, constitutes a cloud upon the title of plaintiffs' homestead.

[4, 5] It seems to be no longer an open question with us that a lease of the character of the one under consideration is a conveyance of an interest in lands. See *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S. W. 717, L. R. A. 1917F, 989; *Pierce Fordyce Oil Association v. Woodrum*, 188 S. W. 245. And it is statutory that the homestead of the family cannot be conveyed by the owner, if a married man, without the consent of the wife, such consent to be evidenced by her separate acknowledgment, taken in the manner pointed out in Revised Statutes, arts. 6802, 6806, which specifically require that she willingly sign the instrument for the purposes and consideration expressed therein, etc. See article 1115, Revised Statutes; *De West v. Barthelow*, 136 S. W. 86; *Durham v. Luce*, 140 S. W. 850; *Bethel v. Booth*, 115 Ky. 145, 72 S. W. 803; *Tiemann v. Cobb*, 35 Tex. Civ. App. 289, 80 S. W. 250; *Norton v. Davis*, 83 Tex. 32, 18 S. W. 430. And it was expressly decided in the case of *Southern Oil Co. v. Colquitt* (writ of error refused) 28 Tex. Civ. App. 292, 69 S. W. 169, that a husband alone could not give a lease authorizing the lessee to bore for and extract oil and gas from the homestead and erect machinery and lay pipes thereon, etc. It is also a familiar rule, well established by the decisions, that in order to render a deed of conveyance of land effective it must be delivered into the control of the grantee with the intent of the grantor that it shall become operative as a conveyance. See cases cited in 6

Cyc. Digest of Texas Reports, p. 200, col. 2.

[6, 7] We need not stop to discuss the circumstances under which a married woman would not be heard to question the sufficiency and legal effect of an acknowledgment made by her in due form, when such acknowledgment is spread upon the records and the land or title purporting to be conveyed has been purchased by another without notice of the feme covert's want of consent, for in the case before us the controversy is between the original parties. There has been no intervening rights of an innocent third party. On the contrary, the lease or conveyance in question is held by the original grantee therein, who is yet asserting rights thereunder. If, therefore, the lease in question was signed and acknowledged by Mrs. McEntire for the mere purpose of enabling Thomason, the grantee, to secure other leases, and without intent on her part to thereby convey any rights in her homestead, and Thomason had notice of such fact, then the lease was wholly inoperative as a conveyance of any interest in appellants' homestead, and its record upon the deed records constitutes a cloud upon their title thereto. And it is conceded, as indeed it must be, that in so far as the action may be construed as one to remove the cloud from the title, there is no law of limitation having application that will bar appellants' rights.

We accordingly conclude that the court erred in giving the peremptory instruction, and thus excluding the issue made by the pleadings and evidence last discussed.

The judgment is reversed, and the cause remanded.

#### CHAMBERS et al. v. CONSOLIDATED GARAGE CO. (No. 918.)

(Court of Civil Appeals of Texas. El Paso. March 13, 1919. Rehearing Denied April 3, 1919.)

#### 1. CONTRACTS ⇐101(1)—ENFORCEMENT—WHAT LAW GOVERNS.

A contract valid under the *lex loci* is valid and enforceable elsewhere, subject to the well-established exception that it will not be enforced in a jurisdiction where it contravenes the settled policy of the forum.

#### 2. ESTOPPEL ⇐75—BONA FIDE PURCHASERS.

It is settled policy of Texas that enforcement against innocent purchasers for value of secret undisclosed liens upon and reservation of titles to personalty, possession of which has been voluntarily surrendered and the possessor clothed with an apparent full and unincumbered title, shall not be had.

#### 3. SALES ⇐451—NECESSITY FOR REGISTRATION—WHAT LAW GOVERNS.

A conditional sale of an automobile in California, where it was not necessary to register

the instrument, upon removal of the automobile to Texas by the purchaser, is void as against a bona fide purchaser for value in Texas, unless registered.

**Appeal from District Court, El Paso County; Ballard Coldwell, Judge.**

Sequestration proceedings by the Consolidated Garage Company against F. H. Nichols, in which Ray Chambers filed a claimant's oath and bond. From a judgment for plaintiff, the claimant appeals. Reversed and rendered.

**Hudspeth & Harper and Judkins & Murphy, all of El Paso, for appellant.**

**Louis J. O'Neal, of San Jose, Cal., and H. Potash and Beall, Kemp & Nagle, all of El Paso, for appellees.**

#### Statement of Case.

HIGGINS, J. Appellees' motion to strike out the statement of facts upon the ground that the same was not approved by the trial court is sustained. *Pace v. Price*, 45 S. W. 203. The case was tried without the aid of a jury, and findings of fact and conclusions of law filed by the court. A condensed statement of the material facts as disclosed by appellees' pleading and the findings is as follows:

The Consolidated Garage Company is incorporated under the laws of California, with its principal place of business in San Jose, Santa Clara county, Cal. Appellant Chambers is a resident of El Paso county, Tex. On July 6, 1917, appellee owned and was in possession of a certain automobile of the value of \$1,700. On the date mentioned appellee and F. H. Nichols, at San Jose, Cal., entered into a written contract, by the terms whereof Nichols agreed to purchase the car from the company for the sum of \$1,670; \$600 being paid in cash and the balance to be paid in monthly installments of \$90 each; the deferred payments to bear interest from date. Nichols agreed not to sell or dispose of the automobile, nor take the same out of the state of California, nor permit the same to be removed from his possession, attached, levied upon, nor create any liens against same. Nichols was to pay all taxes against the property. The contract provided that title should remain in the company until all payments were made and all of the conditions contained in the contract fully complied with, and that upon the performance of all of said conditions and terms by Nichols the company would execute to him a bill of sale to the property. The contract was to be performed wholly within the state of California. The automobile was removed from Santa Clara county, Cal., by Nichols without the knowledge or consent of the company, and without any negligence on the latter's part. The company

used due diligence to collect the amount due upon the contract, and exercised due diligence in trying to locate the car after it had been taken from San Jose and the state of California. The car was finally located in El Paso, Tex., where it had been brought by Nichols, and immediately upon ascertaining its location the company brought suit in the district court of El Paso county against Nichols, and sequestered the car. The contract was not filed for record in California, nor in any county in Texas. The car was purchased in El Paso county, Tex., by Chambers from Nichols for a valuable consideration, and without notice of any defect in Nichols' title. When the car was sequestered in the suit against Nichols, Chambers filed a claimant's oath and bond, and possession was surrendered to him. Under the laws of California the contract between the company and Nichols was a conditional sale, and title to the automobile did not pass from the company to Nichols, and under the laws of California it was not necessary to file or register the contract, and under the laws of that state any subsequent purchaser from Nichols, paying a valuable consideration without notice, would not get any better title than Nichols had; the contract, under the laws of that state, being not a mortgage, but a conditional sale, the title remaining in the company. The amount due by Nichols under the contract is \$1,060, with interest.

The trial court's conclusion of law was that Chambers in his purchase of the automobile from Nichols acquired no greater title than Nichols had; that the contract between the company and Nichols was a conditional sale, and, Nichols having defaulted, the company became entitled to the possession of the automobile. Judgment was rendered against Chambers and the sureties upon his bond for the value of the automobile, with interest.

#### Opinion.

This case differs in no material respect from *Willys-Overland Co. v. Chapman*, 206 S. W. 978, recently decided by this court in an opinion by Justice Walthall.

The question was there maturely considered, and the conclusion reached, that under the authorities in this state Chambers is protected as a bona fide purchaser for value.

[1-3] That case recognizes the rule that a contract valid under the *lex loci* is valid and enforceable elsewhere, subject to the well-established exception that it will not be enforced in a jurisdiction where such contract contravenes the settled policy of the forum. In such case the law of the forum governing its own citizens in making contracts and asserting rights ordinarily applies. *Weider v. Maddox*, 66 Tex. 372, 1



S. W. 168, 58 Am. Rep. 617; *Fowler v. Bell*, 90 Tex. 150, 37 S. W. 1058, 39 L. R. A. 254, 59 Am. St. Rep. 788. In our opinion the settled policy of Texas jurisprudence has sternly frowned upon and set its face against the enforcement, against innocent purchasers for value, of secret undisclosed liens upon and reservations of title to personalty, the possession of which has been voluntarily surrendered and the possessor clothed with apparent full and unincumbered title. If appellee and Nichols had been citizens of Texas and the transaction between them had transpired here, it is clear that Chambers would be protected. Shall the courts of Texas recognize and extend to citizens of California rights which are denied to its own citizens and which prejudice the interests of innocent citizens of Texas? Appellee voluntarily surrendered possession of the car to Nichols, and placed him in a position to perpetrate upon appellee the fraud which he did in fact perpetrate. Under the law of California the citizens of that state may be thus defrauded, but not so in Texas. The opinion of this court reached in the Chapman Case is that the law of this state governing the conduct of its own citizens in transactions of this nature is to be applied rather than the California law.

Upon this view it follows that the judgment must be reversed and here rendered for appellants. It is so ordered.

#### KNIGHT et al. v. OLDHAM et al. (No. 893.)

(Court of Civil Appeals of Texas. El Paso. March 6, 1919. Rehearing Denied April 3, 1919.)

#### 1. WATERS AND WATER COURSES §256, 257 (1) — IRRIGATION — SUPPLY — RATES — AUTHORITY OF STATE BOARD OF ENGINEERS.

State board of water engineers, by *Vernon's Sayles' Ann. Civ. St. 1914, art. 5002f* (Acts 33d Leg. p. 358, § 60), has power and authority to determine the amount of irrigation water necessary for lands, and to fix the rates to be charged for delivery.

#### 2. STATUTES §46—VALIDITY OF PROVISIONS —IRRIGATION—STATE BOARD OF WATER ENGINEERS.

Acts 33d Leg. p. 358, as amended by Acts 35th Leg. 4th Called Sess. p. 129, empowering board of water engineers to determine the amount of irrigation water necessary for land, and to fix the rates to be charged for delivery, is not so lacking in mutuality of remedies, and does not so completely fail to make estoppel by judgment of the board mutual, as to be inoperative and without force.

#### 3. APPEAL AND ERROR §1107—DISPOSITION —REMAND FOR TRIAL—AMENDMENT OF STATUTES.

Though the statutes under which plaintiffs sought relief were not enforceable at the time suit was tried, they having been amended pending appeal, so as to be enforceable, the case must be remanded for trial.

#### 4. WATERS AND WATER COURSES §256—IRRIGATION—STATE BOARD OF WATER ENGINEERS — CONTROL OF PRIVATELY OWNED WATERS.

Irrigation company, not organized under Acts 33d Leg. p. 358, § 54 (*Vernon's Sayles' Ann. Civ. St. 1914, art. 5002f*), which privately acquired and owned its waters, lands, ditches, canals, etc., without invoking power of condemnation provided for in statute, held in view of articles 5011i, 5011m, not subject to control of state board of water engineers, under article 5002f, so that, if purchasers from the company had any rights against its successors, it was by virtue of their contracts, enforceable only by the courts.

Appeal from District Court, Pecos County; Jas. Cornell, Judge.

Application by Joseph G. Knight and others to the State Board of Water Engineers, opposed by James W. Oldham and others. From the decision of the board, Oldham and others appealed to the district court, which tried the case de novo, and from decree that the board was without authority to act, and dismissing the cause, applicants appeal. Affirmed.

Burges & Burges, of El Paso, and R. D. Blaydes, of Ft. Stockton, for appellants.

Harkless & Histed, of Kansas City, Mo., Blanks, Collins & Jackson, of San Angelo, and W. A. Hadden, of Ft. Stockton, for appellees.

HARPER, C. J. This action originated in an application by J. G. Knight and 60 others, who are owners of and are farming certain irrigated lands, to the state board of water engineers, in which they prayed that said board determine the amount of water controlled by appellees, the amount necessary for a proper irrigation of their lands, and that a proper rate or charge for delivery be determined and declared for water used and to be used by them, as provided by the law creating said board.

For answer the defendants interposed the following defenses, in addition to some others not pertinent here: (a) That the waters, which they were selling and distributing to the complainants through their irrigation projects, come from springs located upon lands owned by them in the nature of private property, and that the only rights the complainants had to such waters were measured and controlled by their several water contracts with the Ft. Stockton Irrigated Lands Company, which Oldham & Burget, in purchasing the properties of the corporation,

had agreed to protect and perform: (b) that neither the Ft. Stockton Irrigated Lands Company nor Oldham & Burget had ever engaged in business as a public service corporation or association, were not in fact serving the public in any particular, and had never availed themselves of any of the rights and privileges conferred upon public service corporations or institutions by the state of Texas or under its law; (c) that they controlled and owned the riparian lands bordering on or tributary to the springs which fed their system, and that all such water originated and disappeared on their own premises.

The state board of water engineers assumed jurisdiction of the controversy, measured the waters, valued the properties, and fixed the service rates. The defendants appealed to the district court of Pecos county, Tex., where they pleaded the same defenses as those urged before the state board of water engineers, to which Knight and associates interposed a general denial.

The cause was tried de novo under the statute, and upon final hearing the court entered its decree in effect that board of water engineers was without authority to determine the amount of water necessary and to fix the rates to be charged for delivery, and it was further decreed that for that reason the conclusions and findings of the board appealed from be set aside and held for naught, and the cause dismissed, from which judgment the applicants have appealed.

The trial court filed findings of facts and conclusions of law. The appellant does not attack or controvert the findings of fact, but simply asserts that the trial court erred in concluding as a matter of law that the act of the Legislature under which the board of water engineers acted is inoperative because (1) it vests in the board power to regulate rates, if at all, only by implication and vaguely; (2) that the law is so lacking in mutuality of remedies, and so completely fails to make estoppel by judgment of the board mutual, as to be inoperative and without force. The conclusions of law complained of are not so definite a statement of the reason for the holding that the court would not take jurisdiction of the action as that recited in the decree entered. The reasons complained of amount to a holding that the legislative act invoked does not grant the power to the board to inquire into and fix the amount of water to be distributed and the charge to be made for its delivery in any case, and the effect of the judgment is to hold that the board was not empowered to act in this case because of its peculiar facts.

[1] In answer to the first criticism by the trial court of the irrigation laws, we think that, in proper cases, the power is clearly and definitely given in article 5002f, Vernon's Sayles' Statutes of Texas (section 60 of chapter 171, General Laws, Acts 33d Leg. p. 358):

"If any person entitled to receive or use water from any canal, ditch, flume, lateral, dam, reservoir or lake, or from any conserved or store supply, shall present to the board his petition in writing, showing that the person, association of persons, corporation or irrigation district, owning or controlling such water has a supply of water not contracted to others and available for his use, and fail or refuse to supply such water to him, or that the price or rental demanded therefor is not reasonable and just or is discriminatory, and that the complainant is entitled to receive or use such water and is willing and able to pay a just and reasonable price therefor; and shall accompany such petition with a deposit of twenty-five dollars, it shall be the duty of the board to make a preliminary investigation of, such complaint and determine whether there is probable ground therefor. If said board shall determine that no probable ground exists for such complaint, same shall be dismissed, and the deposit may, at the discretion of the board, be returned to the complainant or paid into the state treasury."

[2] The answer to the second is that the law as it then stood was possibly amenable to the criticism, for the reason that it gave water users the right to apply to the board to adjust the matters complained of here, but made no provision for the delivering company to do so in any event, not even in case the rate fixed by the board should in after years, by reason of changed conditions making it more expensive to deliver water, become oppressive; but if, for that reason, the statute should then have been held to be inoperative, since the trial of the case, it has been so amended as to cure this defect. Gen. Laws 35th Leg. 4th Called Sess. 1918, p. 129. So this board and the courts are now clothed with full and definite power to make the inquiry as to corporations or associations of persons, etc., to which the statutes apply, and to determine the questions, subject to appeal, as to all those entitled to it.

[3] For our views upon these questions, stated at greater length, see *Toyah Valley Irrigation Co. v. Winston*, 174 S. W. 877. It follows that, though the statutes may not have been enforceable at the time this suit was tried, since they are now so amended as to be made enforceable, it must be remanded for trial, unless the appellee, for any reason urged by it here, is not subject to be regulated by these statutes.

#### Findings of Fact.

(1) The Ft. Stockton Irrigated Lands Company was organized and procured a charter from the state of Texas in 1899; their charter being based upon section 23, art. 1121, R. S. 1911, and authorizing the construction, maintenance, and operation of dams, reservoirs, lakes, wells, canals, flumes, laterals, and other necessary appurtenances for the purpose of irrigation, navigation, milling, mining, stock-raising, and city waterworks.

(2) Upon their organization and incorporation, the Ft. Stockton Irrigated Lands Company acquired a good and perfect fee-simple title to the land upon which is located what is known as the main Comanche spring, the government spring, and other springs at the head of and forming Comanche creek, lying immediately adjacent to the town of Ft. Stockton, in Pecos county, Tex.

(3) Said Comanche creek has its head and source at the springs aforesaid. From such head it originally flowed in its own natural channel for a number of miles, to a point or place where it formed a marsh and apparently sank into the ground, and the water did not again rise to the surface, and the natural flow did not at any time or at any season of the year extend beyond the place where the water sank into the earth, but at times when the natural flow of the stream was augmented by rainwater the flow extended beyond such place where the water ordinarily sank into the ground, and continued to flow beyond such place until the rainwater had been carried away.

(4) The Ft. Stockton Irrigated Lands Company, at about the time it acquired the springs before mentioned, likewise acquired a good and perfect title to all lands lying upon and being riparian to and having lateral contact with such stream to a point beyond the place where the stream ordinarily sinks into the ground.

(5) At about the same time the Ft. Stockton Irrigated Lands Company, deeming the lands riparian to the stream not to be adaptable to irrigation, acquired a quantity of level land, not tributary nor adjacent to such stream, nor having lateral contact with it, and not being riparian to it, to the north of said stream, and likewise a quantity of land lying to the south of it, and subdivided the land to the north into 10-acre tracts for purposes of sale to irrigation farmers, and designated the same block 1, and later likewise subdivided the land they had acquired to the south of the stream into 10-acre tracts, with a view of selling same to irrigation farmers, and designated such land block 2.

(6) The Ft. Stockton Irrigated Lands Company constructed canals, laterals, and ditches to convey the water to, and to irrigate, all the subdivisions of both blocks 1 and 2.

(7) All of the defendants herein purchased subdivisions of such blocks 1 and 2 for the purpose of irrigating the same from the Ft. Stockton Irrigated Lands Company, all of them having purchased lands that were never riparian in nature, and each of the defendants entered into a contract with the Ft. Stockton Irrigated Lands Company, entitling him to the use of an acre foot of water per annum, or so much of said acre foot of water per annum as might be necessary to properly irrigate the lands purchased, at an agreed price of \$1.50 per acre per annum.

(8) The Ft. Stockton Irrigated Lands Com-

pany acquired all of the lands herein spoken of as a result of private negotiations and dealings, and did not resort, nor attempt to resort, to condemnation proceedings in the acquisition of any of such lands.

(9) The Ft. Stockton Irrigated Lands Company located all of its ditches, reservoirs, canals, laterals, and all improvements of whatsoever nature placed upon the land by them, upon lands acquired by them by private purchases as aforesaid.

(10) The Comanche creek is supplied mainly by the main Comanche spring and the government spring hereinbefore spoken of, which together furnish approximately 40,000,000 gallons of water every 24 hours; this supply being constant, and not varying with the seasons, nor because of weather conditions.

(11) Near the springs upon the lands so acquired by the Ft. Stockton Irrigated Lands Company, near the original channel of Comanche creek, and near the canals and ditches constructed by the Ft. Stockton Irrigated Lands Company, at three distinct places, water emerges from the ground upon lands not owned by the Ft. Stockton Irrigated Lands Company and flows into and mingles with the other waters of the Comanche creek; one of such places being immediately in front of the old Rooney store, one of them upon property belonging to the Catholic Church, and for many, many years, 40 or more, enclosed by a fence, and one of them in a public street near the county jail in Ft. Stockton, Tex.

(12) In 1913 there was a foreclosure sale at which Oldham & Burget, a firm composed of James W. Oldham and William B. Burget, became the purchasers of all the tangible property then owned by the Ft. Stockton Irrigated Lands Company, but there was no transfer to them, nor attempted transfer, of any stock or charter or corporate rights of the old corporation, and no subsequent charter was applied for by them, nor granted to them, nor to any one for them; but at such foreclosure sale, and as a result of such foreclosure sale, there was expressly conveyed to them all the lands which the Ft. Stockton Irrigated Lands Company had not previously sold to irrigation farmers, including the lands upon which all the above-mentioned springs are located, together with the entire irrigation plant and all the company's water contracts with irrigation farmers, including those held by the defendants Knight et al.

(13) Subsequent to the rendition of the judgment or order of the water commissioners, and to the appeal therefrom, Oldham & Burget disposed of all of their rights to W. A. Hadden, of Pecos county, Tex., trustee for himself and others, but neither said trustee nor any of his associates ever became parties to this proceeding in any manner.

All the above facts were established by

documentary evidence and by the testimony of a witness deemed by the court to be thoroughly credible, and were not controverted nor disputed; and the court thereupon announced to counsel that he would not hear testimony bearing upon any other finding or conclusion of the board of water commissioners, nor upon any other phase of the case, nor upon any other issue of fact.

For convenience the appellees are referred to as though they were in fact a corporation, but we are not holding that they are in the same position in law, in all respects, as if they were a corporation, but only so as the successors of this corporation, under the facts of the instant case.

[4] Starting with the uncontroverted facts that the corporation was the owner of its water, and all the lands to which it undertakes to deliver it, at the time it was incorporated, it will, of course, be conceded that so long as it maintained that status it could use both without interference from this board; and this must be true until it so changes its position relative to such waters and lands as to bring it within the purview of the legislative act creating the board. The corporation was organized in 1899, under section 23 of article 1121, R. S. 1911, and by its charter authorized to "construct, maintain and operate \* \* \* canals \* \* \* and other necessary appurtenances for irrigation," and the act invoked in this case, creating the board and granting its powers, was passed in 1913. Acts 33d Leg. c. 171, p. 358. Section 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4991) reads:

*"Certain Waters Declared State Property.*—The unappropriated waters of the ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays or arms of the Gulf of Mexico, collections of still water, and of the storm, flood or rain waters of every river or natural stream, canon, ravine, depression or water shed, within the state of Texas, the title to which has not already passed from the state, are hereby declared to be the property of the state, and the right to the use thereof may be acquired by appropriation in the manner and for the uses and purposes hereinafter provided."

But a casual glance will reveal that primarily this act did not apply to the waters of this spring, the title to which, found by the trial court, had theretofore passed from the state. Is appellee subject to the rate-making powers of this board, because it is now engaged in business of a public character as urged by appellants? This could not be a test in this case, because this board only has jurisdiction over irrigation enterprises over which it is given the power of control by the provisions of the act creating it. Ladd v. S. C. P. M. Co., 53 Tex. 188. Section 60, art. 5002f, Vernon's Sayles, above quoted,

provides that the board shall act upon the application of a person entitled to the use of the water. Under the facts in this case, the appellants are not entitled to the waters, because they are public, for they are not such, because privately owned, and are not declared to be such by section 1, above quoted.

Article 5002 of this act authorizes the formation of corporations, article 5002a provides that all such corporations shall have full power and authority to make contracts for the sale of permanent water rights, etc., and article 5002b designates that all persons who own or hold a possessory right or title to land adjoining or contiguous to any dam, canal, ditch, or flume maintained under the provisions of this act, and who shall have secured a right to use of water in said canal, ditch, etc., shall be entitled to be supplied from such canal.

Bearing in mind that the act under discussion treats of public waters as designated in the act—"unappropriated waters, the title to which had not passed from the state"—and that corporations may be chartered under its provisions to carry out the purposes of the act, to wit, a proper and equitable distribution of the waters designated, and bearing in mind that the appellee was not organized under the act, and noting that its waters, lands, ditches, canals, etc., are privately owned, and without invoking the power of condemnation of lands for ditches, etc., provided for in the act, it seems clear that it is not subject to the control of this board; so, if these applicants have any rights which are being denied, then it must be by virtue of their contracts, which can only be enforced by the courts, and not in any wise by the board of water engineers created by the act.

It would seem that the above conclusion is emphasized by the provisions of sections 97 and 98 of the act (Vernon's Sayles' Ann. Civ. St. 1914, arts 5011f, 5011m). Nothing in this act contained shall be held or construed as a recognition of any riparian right in the owner of any lands the title to which shall have passed out of the state subsequent to the 1st day of July, 1895. This is the date upon which the first act went into effect, which first declared certain waters to be public. Section 98. Nothing in this act contained shall be held or construed to alter, affect, impair, increase, destroy, validate, or invalidate any existing or vested rights existing at the date when this act shall go into effect. By these sections the Legislature clearly indicated that it did not intend to make the act applicable to corporations or persons which had secured vested rights and entered into contracts such as in this case, and we think did not do so either by implication or in fact. The court did not, therefore, err in dismissing the cause for want of jurisdiction.

Affirmed.

**ABILENE STEAM LAUNDRY CO. v. CARTER.** (No. 8935.)\*

(Court of Civil Appeals of Texas. Ft. Worth. Dec. 14, 1918. On Rehearing, Jan. 25, 1919.)

**1. DIVORCE ⇨168—VALIDITY OF DECREE—COLLATERAL ATTACK.**

In personal injury action where defendant filed no plea challenging plaintiff's right to prosecute the action without joinder of her former husband, a merely collateral attack upon the divorce decree, without showing what testimony was offered in the divorce suit to show plaintiff's residence, will not support an assignment that the evidence shows that the divorce decree is null and void, especially since in any event recovery for wife's injuries is made her separate property by Vernon's Ann. Civ. St. Supp. 1918, art. 4621a.

**2. MASTER AND SERVANT ⇨276(2)—INJURY TO SERVANT—EVIDENCE—CAUSE OF INJURY.**

In an action by a servant against a master for injuries caused by an explosion, evidence held sufficient to support the jury's finding that the explosion caused plaintiff's injury.

**3. MASTER AND SERVANT ⇨330(3)—INJURY TO SERVANT—NEGLIGENCE OF EMPLOYE—LIABILITY OF MASTER.**

In an action by a servant for injury from explosion, evidence held sufficient to show that the employé whose negligence caused the explosion was acting within the scope of his employment.

**4. TRIAL ⇨129—MISCONDUCT OF COUNSEL.**

In servant's action for injuries, argument of plaintiff's counsel that there had been irregular things done in connection with case as shown by the record, which the speaker would not be guilty of, for the whole of defendant's plant, was justified by defendant's witness' testimony on cross-examination in regard to a statement required of her by the master after the accident in which she testified her answers were suggested, though in part contradicted by her other testimony.

**5. MASTER AND SERVANT ⇨269—INJURY TO SERVANT—EXPLOSION.**

In an action by a servant for injury from explosion, the testimony of another servant, tending to support defendant's theory that plaintiff received no shock, for the reason that witness did not, although closer to the explosion, was erroneously excluded.

**6. APPEAL AND ERROR ⇨1058(3)—EXCLUSION OF EVIDENCE—HARMLESS ERROR.**

Erroneous exclusion of testimony of witness that he felt no shock from an explosion is harmless, where eleven other witnesses testified to same effect.

On Rehearing.

**7. MASTER AND SERVANT ⇨278(14)—KNOWLEDGE OF MANAGER—EVIDENCE.**

In an action for injuries from the explosion of a tumbler while being used to dry clothes cleaned with gasoline, evidence held to sustain

a finding that the manager of the defendant's laundry who was present daily knew of such use of the tumbler that exploded, notwithstanding the contrary testimony of two of defendant's servants.

Appeal from District Court, Taylor County; Joe Burkett, Judge.

Action by Bessie Carter against the Abilene Steam Laundry Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mahaffey & Fulwiler and J. M. Wagstaff, all of Abilene, for appellant.

Ben L. Cox, of Abilene, for appellee.

DUNKLIN, J. Bessie Carter recovered a judgment against the Abilene Steam Laundry Company for damages resulting from alleged personal injuries sustained by her by reason of an explosion which occurred in the laundry of the defendant while she was engaged as its employé, and from that judgment the defendant has prosecuted this appeal.

One of the equipments of the laundry consisted of what is called a "tumbler," which was constructed of iron, and into which clothes were placed for the purpose of being dried after the tumbler was heated. This tumbler was not ventilated, but it was equipped with a door. On the occasion in controversy, Will Hanks, one of defendant's employés, after he had cleaned some garments in an adjoining room by the use of gasoline, brought them into the main room of the building, where the tumbler was installed, and placed them in the tumbler for the purpose of drying them. He left the door open for a short time to allow the escape of gas which might evaporate from the clothing, and then closed the door. Shortly after he had done that, the tumbler exploded as a result of the accumulation of gas therein from the gasoline left in the garments.

At the time of the explosion, Bessie Carter was working at what was called the "mangler," which was stationed a short distance from the tumbler, and in her petition she alleged that by reason of the explosion she was seriously injured, and she claimed damages upon the further allegation that such injuries were the proximate result of negligence on the part of Will Hanks in placing the garments in the tumbler saturated with gasoline, under the circumstances, that such negligence of Hanks was legally chargeable to the defendant as his master, and that the defendant was liable to plaintiff for such damages by reason thereof.

[1] Bessie Carter had been married, but prior to the accident she had recovered a judgment of divorce from her husband in the district court of Taylor county, where the laundry was located. Upon the trial

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Writ of error refused March 19, 1919.

of the case and upon cross-examination of plaintiff, defendant's counsel sought to impeach the validity of the divorce decree by proof that plaintiff had not resided in Taylor county for six months next preceding the filing of the suit for divorce. The purpose of the counsel in so doing was to show that plaintiff's former husband was a necessary party to the suit and that she could not maintain the same without joining him as coplaintiff with her. Upon such cross-examination, plaintiff stated that after her marriage she and her husband made their home in Potter county for a brief period; that she and her husband separated in that county; and that she then removed to Taylor county, where she had formerly lived and where she has ever since resided. According to her testimony, her return to Taylor county was about five months prior to the institution of the suit for divorce and less than six months, the period of residence required by our statutes as a necessary showing to establish a right to a decree of divorce by the district court of Taylor county in which the suit was instituted. But the defendant in the present suit filed no plea challenging the right of plaintiff to prosecute this suit without the joinder of her former husband, the attack upon the decree being merely a collateral attack, and no attempt was made to show just what the testimony was which was offered in the suit for divorce to show that plaintiff had resided in Taylor county for six months next preceding the date of the filing of the suit. Under such circumstances, we think it too clear for argument that there is no merit in the assignment now presented that the evidence showed that the divorce decree was null and void and therefore plaintiff could not maintain the suit without the joinder of her husband as coplaintiff. And it may be added that at all events the recovery is made the separate property of plaintiff by virtue of article 4621a, Vernon's Texas Civil Statutes Supplement 1918.

[2] It is insisted that there is no support in the evidence for the finding by the jury, in answer to special issues, that plaintiff was injured by reason of the explosion; the contention being made that the uncontradicted proof was that the force of the explosion went in a direction other than the position occupied by the plaintiff at the time, and therefore she could not have been injured. According to uncontroverted proof, the force from the explosion was sufficient to break about 81 window panes in the building. Eleven of the employes working in the building at the time, who were at various distances and in various directions from the tumbler, testified that they sustained no injuries from the explosion and did not feel the force of it. One of those witnesses was on a direct line between the plaintiff and the

tumbler, but according to her testimony she was in a stooping position removing garments from a basket, while according to the testimony of plaintiff herself she was in a standing position, and, according to all of the proof, the principal force of the explosion was in an upward direction. There was no proof that any one sustained any injuries by reason of the explosion except the plaintiff and Will Hanks. The proof showed that after the explosion plaintiff was carried to her home, and a physician was called to attend her, who testified, in substance, that upon that occasion he found bruises on her neck, the small of her back near the spinal column, and on her hip and on her shoulder. He further testified that there was a swollen spot near the center of her back which covered an area of about  $2\frac{1}{2}$  or  $3\frac{1}{2}$  inches; that he made several visits to her thereafter, and she suffered from convulsions which could not be controlled except by the use of morphine; that her nervous system was seriously impaired; and that in his opinion those conditions were permanent. The testimony of the physician as to plaintiff's injuries was corroborated by that of other witnesses who attended her in her illness.

According to other testimony introduced, plaintiff was free of such injuries prior to the explosion. Plaintiff testified that she heard the explosion, but she did not remember anything that occurred for some time after the accident.

The proof showed that there was an iron bar immediately in the rear of plaintiff just before the explosion, against which she could have fallen if she had been knocked against it by the force of the explosion, and upon that theory plaintiff sought to sustain the contention that she was injured in that manner, and we, after mature consideration, have reached the conclusion that the evidence was sufficient to support a finding by the jury sustaining that contention, notwithstanding other evidence cited by appellant tending strongly to refute that contention.

[3] We are of the opinion further that the evidence was sufficient to show that, in using the tumbler in the main room of the laundry, Will Hanks was acting within the scope of his employment, and that therefore the rule of respondeat superior would be applicable against the defendant. It is true, as contended in appellant's brief, that the evidence showed without controversy that Hanks had been employed to work in an adjoining room, where he used another tumbler in drying clothes he had cleaned with gasoline, and that the tumbler he there used was perforated in such a manner as to allow the gases which formed from the gasoline to escape. But there was evidence further to show that that tumbler had been out of order, and by reason thereof Hanks, who was still expected to continue in such work, had been using

the tumbler which exploded for drying the clothes which he had cleaned with gasoline, and that such use had been with the knowledge of defendant's manager who was authorized to control his services and who made no objection to such use of the tumbler.

[4] Another assignment is presented to the remarks by counsel for plaintiff, in his closing argument to the jury, to the effect that there had been a lot of irregular things done in connection with the case, as shown by the record, which the speaker would not be guilty of for the whole laundry plant; that, if the speaker could not get a verdict honestly, then he did not want one at all. A bill of exception was taken to the argument, which the trial court refused to withdraw from the jury.

Mary Carter, one of defendant's witnesses, after giving testimony on direct examination of a damaging character to plaintiff's case, further testified on cross-examination that after the explosion she was questioned by a representative of the defendant company concerning the matters which she had already detailed in her testimony, and that after answering those questions she was put back to work. She further testified as follows:

"I guess my job depends on the way I answer those questions; the way I testify in this suit here, I guess my job depends on that."

And on redirect examination by counsel for defendant, she further testified that the representative who so questioned her after the accident wrote down her answers to the questions at the time, and that he made suggestions to the witness as to what she should say in those answers. She further testified, however, that she volunteered all her answers to the questions without any suggestions from the representative who interrogated her. But notwithstanding the apparent contradiction, counsel for plaintiff was warranted in commenting upon that portion of the testimony favorable to his side of the case. We have found no other testimony in the record which would have warranted the argument, and therefore must presume that it had reference to the testimony referred to, which we are unable to say did not warrant the argument.

[5, 6] Complaint is made of the exclusion of the testimony of the witness Ben Lee McDonald, offered by the defendant, to the effect that at the time of the explosion he was working about 25 or 30 feet in a southeasterly direction from the tumbler which exploded, and that he felt no effect of the explosion. This testimony, we think, was clearly admissible as tending to support the defendant's theory that plaintiff sustained no

shock from the explosion; yet such error will not of itself require a reversal of the judgment, in view of the fact, as stated in appellant's brief, that eleven other witnesses, working in various directions and at various distances from the tumbler in the same room, testified that they felt no force whatever from the explosion. Under such circumstances, it is not reasonably probable that the testimony of the additional witness Ben Lee McDonald would have influenced the jury to render a finding that plaintiff was not injured by the explosion. See Rule 62a (149 S. W. x); Wells Fargo & Co. v. Benjamin, 165 S. W. 120; and other decisions cited in Harris' Court Rules, pp. 55-58.

For the reasons indicated, all assignments of error are overruled, and the judgment is affirmed.

#### On Rehearing.

Appellant earnestly insists that we were in error in concluding that the evidence was sufficient to support the jury's finding to the effect that, prior to the explosion, Hanks had been using the tumbler in question for drying clothes which he had already cleaned with gasoline, with the knowledge of defendant's manager, who had authority to control his services, and who made no objection to such use of the tumbler.

[7] As pointed out in appellee's brief, plaintiff testified, in substance, that the tumbler, in the room where Hanks was regularly employed to clean clothes by using gasoline, had been out of repair for several weeks, during which time Hanks had been using the tumbler which exploded, and during such use Mr. Boone, who was superintendent and manager, "was around in the building off and on all during the day, unless he just stepped out, and he left just before closing time." That testimony, in connection with the testimony of Will Hanks to the effect that the defendant did a great deal of dry cleaning, that he (Hanks) complained to Mr. Boone once or twice about his tumbler being out of order, that Mr. Boone said he would have it fixed but did not do so, and that Mr. Boone had never made any complaint to him about his using the tumbler which exploded, we think was sufficient to sustain the finding referred to, notwithstanding the further testimony of Hanks and Boone that the latter did not know anything about such use of the tumbler in question prior to the accident.

We deem it unnecessary to discuss further other questions presented in the motion for rehearing, as we cannot add anything to what we have already said upon them in our original opinion.

The motion for rehearing is overruled.

**TEXAS HARVESTER CO. v. WILSON-WHALEY CO. (No. 8896.)**

(Court of Civil Appeals of Texas. Ft. Worth. June 22, 1918. On Rehearing, March 15, 1919.)

**1. LIMITATION OF ACTIONS §28(1) — TWO YEARS' STATUTE—FRAUD.**

An action for fraud and deceit is subject to the bar of limitations of two years under Vernon's Sayles' Ann. Civ. St. 1914, art. 5687, subd. 4.

**2. LIMITATION OF ACTIONS §197(2)—FRAUD—CONCEALMENT—SUFFICIENCY OF EVIDENCE.**

Evidence held sufficient to sustain plaintiff's plea that defendant concealed fraud in sale of machines until within two years of suit brought, by further misrepresentations and that plaintiff was not negligent in being misled by such representations.

**3. LIMITATION OF ACTIONS §104(1)—STATUTE OF LIMITATIONS — FRAUD — CONCEALMENT.**

Cause of action for fraud of buyer of peanut threshers was not barred by the two-year statute of limitations, Vernon's Sayles' Ann. Civ. St. 1914, art. 5687, subd. 4, where falsity of original representations of seller's agent was concealed by further misrepresentations, whose falsity was not discovered until within two years of suit brought.

**4. FRAUD §59(3)—DAMAGES.**

Measure of damages recoverable by buyer of peanut threshers from seller for fraud and deceit was difference between the amount paid and the value received.

**5. FRAUD §85—RIGHTS OF BUYER—WAIVER OF GUARANTIES.**

Right of buyer to recover damages for fraud and misrepresentations was not waived because, before purchased machines were shipped to buyer, seller notified it that shipments would not be made unless buyer would waive all guaranties, condition to which buyer agreed and accepted machines.

**6. FRAUD §85—RIGHTS OF BUYER—RETENTION OF PROPERTY.**

Buyer of machines did not waive its right to recover damages for fraud from seller by electing to retain machines after discovery of fraud and to claim damages, evidence showing that in so retaining machines buyer had no intention to waive its claim for damages.

**7. APPEAL AND ERROR §742(1)—PROPOSITION NOT GERMANE TO ASSIGNMENT.**

A proposition not germane to the assignment of error does not merit consideration.

**8. FRAUD §35—WAIVER BY RENEWAL OF NOTES.**

Buyer of machines under misrepresentations did not waive its right to recover damages for fraud from seller by its renewal of purchase-money notes after discovering fact that machines had been misrepresented by seller's agents; buyer having had no intention of waiving its claim for damages.

**9. INTEREST §39(4)—EXCESSIVE ALLOWANCE—TIME OF PAYMENTS.**

In buyer's suit against seller for fraud, where considerable portion of sum paid by buyer for repairs was expended during summer of 1915, and some installments of price were paid as late as 1916, trial court improperly allowed buyer interest from January 1, 1915, on all sums paid seller on price, and also on all sums paid out for repairs.

**10. JUDGMENT §314—JURISDICTION TO CORRECT — EXPIRATION OF TERM — AMOUNT AWARDED.**

After adjournment of term during which judgment was rendered, trial judge lost all jurisdiction to correct error in allowing excessive interest.

**On Rehearing.**

**11. FRAUD §20—RELIANCE ON REPRESENTATIONS—NEGLIGENCE.**

Where peanut threshers were sold under misrepresentations, and, after machines in hands of buyer's customers did not work satisfactorily, seller's agent told buyer that it was on account of wet season, rank vines, and inexperienced operators, seller cannot insist, when sued for damages from the original fraud, that buyer was guilty of negligence in being deceived by subsequent fraudulent representations.

**12. APPEAL AND ERROR §1033(8)—FAVORABLE ERROR.**

If trial court gave seller of machines, sued by buyer for damages from fraud, credit for what buyer received from farmers who bought machines from it, seller cannot complain; it having profited to that extent.

**13. APPEAL AND ERROR §932(1)—PRESUMPTIONS FAVORING COURT BELOW—BUYER'S ACTION FOR DAMAGES.**

On seller's appeal, in buyer's action for damages for fraud, Court of Civil Appeals must presume that seller was given credit for land, which buyer received in part payment for one of the machines, at the agreed value of the land, and that the same was its market value.

**14. COSTS §234 — APPEAL — REDUCTION OF JUDGMENT.**

Where amount of recovery by plaintiff appellee in trial court has been reduced by judgment in Court of Civil Appeals, costs of appeal will be taxed against appellee.

Appeal from District Court, Comanche County; J. H. Arnald, Judge.

Suit by the Wilson-Whaley Company against the Texas Harvester Company. From judgment for plaintiff, defendant appeals. Reformed and affirmed.

Cockrell, Gray, McBride & Odonnell, of Dallas, and Callaway & Callaway, of Comanche, for appellant.

A. E. Hampton, of De Leon, H. N. Goodson, of Comanche, and Theodore Mack and David B. Trammell, both of Ft. Worth, for appellee.



## Opinion.

DUNKLIN, J. The Wilson-Whaley Company, a private corporation doing business in the town of De Leon, Comanche county, purchased from the Texas Harvester Company another private corporation seven Sterling peanut threshing machines. The Wilson-Whaley Company was conducting a mercantile business in the town of De Leon, and as a part of its business was engaged in selling farm machinery to farmers in that vicinity, and the threshing machines were purchased to supply its customers.

This suit was instituted by the Wilson-Whaley Company against the Texas Harvester Company to recover damages for alleged fraud and deceit practiced upon it through defendant's duly authorized agents, R. E. Harris and C. M. Fouts, in the sale of those machines; and from a judgment in plaintiff's favor the defendant has appealed.

The case was tried without a jury, and the trial judge filed findings of fact and conclusions of law, which are as follows, eliminating therefrom useless repetitions of such expressions as "I find that," but otherwise quoting the findings literally, to wit:

## Findings of Fact.

"The defendant, the Texas Harvester Company, is a corporation duly incorporated under the laws of the state of Texas; and at all the times alleged in the plaintiff's second amended petition, R. E. Harris and M. C. Fouts were the legal representatives and agents of said defendant corporation, with full power and authority from said corporation to perform the acts, and bind the defendant, as is alleged in the plaintiff's second amended petition.

"(2) On or about April 1, 1914, the plaintiff Wilson-Whaley Company was a private corporation, with its principal office in De Leon in Comanche county, Tex., and at such time continuously to this date was engaged as a general mercantile corporation.

"(3) On or about April 1, 1914, R. E. Harris and C. M. Fouts, as legal representatives and agents of the Texas Harvester Company with full authority, did induce the plaintiff, the Wilson-Whaley Company, to make a contract with the Texas Harvester Company for the purchase of Sterling peanut threshers, complete, which consisted of a separator, and engine and other attachments on one frame; and the representations of fact made by said agents to the plaintiff, and on which it relied, that induced it to enter into said contract, were as follows, to wit:

"(A) That Heebner & Sons were manufacturers, or controlled the manufacture of all the peanut threshers that were being sold in this section of the country, such as the Little Giant, Champion, and Sterling.

"(B) That the Sterling was the best peanut thresher that was being manufactured; that it classed a grade A1, and that it was a better and more durable peanut thresher than any other kind and make of peanut threshers; that it was a peanut thresher that had been thoroughly tried and tested, and was the very best peanut

thresher in workmanship, material, construction, and service that was being sold by any one; and that, if plaintiff would purchase the Sterling thresher, it would have the best peanut thresher that was on the market.

"(C) That defendant had bought out and controlled the output of the manufacturing business of Heebner & Sons, and the products that said business controlled; and that said defendant was going to discontinue the manufacture of all peanut threshers, except that of the Sterling, and would discontinue the manufacture of the Champion and Little Giant peanut threshers, and repairs for the same; and that, if plaintiff entered into the contract with defendant to handle the Sterling threshers, plaintiff would not only have the best thresher that was on the market, but would have the only one that would be sold in any of the peanut territory in the future, and that if plaintiff handled any other make of peanut thresher, and particularly the Little Giant, or the Champion, on account of the fact that all other makes of peanut threshers, and particularly the Little Giant and the Champion, were to be discontinued and not thereafter be manufactured, plaintiff would be unable to buy from any one extras and repairs for any other peanut thresher, except the Sterling, after the 1914 and 1915 peanut season.

"(D) That the Sterling peanut thresher would thresh from 400 to 600 bushels of peanuts per day.

"(E) That defendant would have stationed at De Leon, Tex., an expert operator to look after the proper operation of said machines.

"(F) That defendant guaranteed all of said threshers to be made of good material, and to do good work and to be first-class in point of construction, workmanship, and material.

"(G) That the defendant exhibited to plaintiff a catalogue showing cuts of said machine and the principle on which they were constructed and operated, and which cuts showed the operating principle of the shaker to be a motion and movement longitudinally with said machine.

"(4) Each and all of the representations set out in finding No. 3 was represented and stated to the plaintiff by the defendant as a statement and representation of fact.

"(5) The plaintiff was entirely ignorant and unskilled with reference to peanut threshers, and had no experience whatever relative thereto; and it acted solely and alone upon the representations of fact made to it by the defendant, as set out and stated in finding No. 3, supra; and but for each and all of said representations of fact the plaintiff would not have acted, and entered into said contract.

"(6) Each and all of the representations of fact set out in finding No. 3, supra, were each and all material representations of fact, inducing the contract on the part of the plaintiff, and but for a belief and reliance in each and every one of said representations the plaintiff would not have contracted.

"(7) Each and every one of the representations of fact alleged in the plaintiff's second amended petition, and set out in finding No. 3, supra, were made by the defendant to the plaintiff in Comanche county, Tex., and induced solely thereby, the defendant contracted and acted to its damage, in Comanche county, Tex.

"(8) Each and all of the representations of fact set out in finding No. 3, supra, were affirm-

atively false and fraudulent, at the time they were made in Comanche county, Tex.

"(9) The plaintiff, after the use of the diligence required by law, only discovered said fraud practiced on it, in the month of July, from July to November, A. D. 1915.

"(10) Induced solely and alone upon said representations of facts set out in finding No. 3, supra, and, relying thereon, the plaintiff, prior to May 15, 1914, contracted with the defendant for the purchase of seven Sterling peanut threshers and equipments complete; and, authorized by said defendant, the plaintiff made the same representations of fact to its customers, and prior to May 15, 1914, had sold by valid contracts said seven peanut threshers to its customers.

"(11) All of said contracts were complete and consummated contracts, induced by a belief and reliance on said representations of fact set out in finding No. 3, supra, and were complete and consummated and became valid and complete and binding contracts prior to May 15, 1914.

"(12) The defendant agreed to at its cost repair said machines, and authorized the plaintiff to have said repairs made at its cost, and also furnish at its cost certain extra trucks, belting, and repairs.

"(13) Acting under said representations and the contract made in reliance thereon, the plaintiff purchased from the defendant seven threshing outfits complete, consisting of separator and attachments and engines and equipments, mounted on one frame, and for which the plaintiff paid to the defendant the sum of \$3,365.61. On account of freight on said seven machines the plaintiff paid the sum of \$350. For extras and express the plaintiff paid \$242.02. For seven extra trucks the plaintiff paid \$190. For work and labor the plaintiff paid \$193.86. For extra belting the plaintiff paid \$147. For certain extras on the thresher sold to Johnson the plaintiff paid \$24. All of the items paid out by plaintiff on the accounts above stated aggregate the sum of \$4,512.49.

"Each and all of the items and expense above stated was divided and authorized by the defendant to the plaintiff, that the plaintiff should pay on account of the defendant, and that the defendant would make good to the plaintiff such expenditures.

"(14) The plaintiff has received, on account of the sale of said machines, the sum of \$2,023, and, except for said amount said machines, or any note or notes taken in payment therefor, are absolutely worthless and have no market value, and the consequent damage to the plaintiff is the sum of \$2,489.49, with interest thereon at 6 per cent. from January 1, 1915.

"(15) None of the representations of fact set out in finding No. 3, supra, existed at the time they were made, nor since; and the defendant failed in each and every instance so far as said representations of fact were concerned; and each and every one of said representations of fact were false and fraudulent; and each and every representation of fact, being false and fraudulent contributed to and resulted in damage to the plaintiff; and, unless the plaintiff had believed and relied on each and every one of said representations of fact, it would not have entered into said contract.

"(16) In order that there may be no misunder-

standing as to the machine and threshing outfits considered by the court in these findings of fact and for which damages are allowed, I will state that the respective machines and outfits of which Robbins, Smith, Collins, Northcutt, Alexander & Lock, and Johnsons, and Copelands became the purchasers (the Copeland machine, after having been taken back, was sold to Tolar) are the machines and outfits considered by the court in these findings of fact.

"(17) That it may more clearly appear the amount received by plaintiff from the respective purchasers thereof, I will say that I have considered and allowed the following: On the Robbins machine there was paid \$85. On the Walter Smith machine was paid \$100. On account of John Northcutt machine was paid \$468 (said amount being \$865 less \$197). On the Alexander & Lock machine was paid \$300. On the Copeland machine was paid \$85. On the J. J. Collins machine was paid about \$560. On the Tolar machine was paid \$465 (being all of the purchase price paid except \$200)—making a total receipt and payment on said machines of \$2,023.

"I have allowed the defendant credit for the above items aggregating the amount last above stated.

"(18) It is fair to state that after plaintiff's order was received by the defendant's agents in De Leon, Tex., and by them sent to the home office, the defendant declined to ship at once the threshing machines covered by said order, but instructed their agents to inform the plaintiff that goods would not be shipped unless warranty or guaranty was waived. The defendant's agents, Harris & Fouts, conveyed this information to J. B. Wilson, but not to any of the purchasers of any of the threshing machines to whom the same had already been sold as purchasers under the plaintiff company. The plaintiff was, however, informed that shipment of these machines, either to the plaintiff or its customers, would not be made unless warranty or guaranty was waived. Under these circumstances, and in order to secure the shipment of machines to plaintiff for the benefit of its customers to whom sales had already been made, by and through the assistance of Harris & Fouts, the defendant's agents, J. B. Wilson did sign a new order for machines, on which was indorsed the words, 'Guaranty waived.' It appears from the evidence that, while plaintiff's orders for the machines containing the warranty had been sent in on a former date, the machines were not shipped by the defendant company until the last order containing the waiver of guaranty had been received by the defendants. No consideration, however, was paid or accrued to the plaintiff for the signing of the waiver in question, and no retraction or withdrawal of the representations made by Harris & Fouts was made, either to the plaintiff or any of its customers who were purchasers of the machines from plaintiff by reason of the representations made by Harris & Fouts, who acted with the plaintiff in the sale of the machines in question to its customers.

"(19) On the trial of the case the plaintiff elected to rest its case on its action for fraud, and in making these findings of fact and conclusions of law subsequently made herein, I have not considered the warranty or guaranty as pleaded by the plaintiff, but have based this

judgment solely on the ground of the fraudulent statements and representations made by the defendant through its agents, Harris & Fouts."

#### Conclusions of Law.

"(1) The acts and representations of the defendant, the Texas Harvester Company, by its duly authorized agents, Fouts & Harris, as complained of in plaintiff's second amended petition, and as set out in finding of fact No. 8, constituted actionable fraud, and were committed in Comanche county, Tex.; and the venue of this case is properly laid in Comanche county, Tex., and this court has the right to try said cause, and accordingly I refuse to sustain the defendant's plea of privilege and overrule the same.

"(2) Each and all of the representations of fact made by the defendant's agents to the plaintiff in Comanche county, Tex., were material; and, acting and relying thereon, the plaintiff was induced to contract, to its damage.

"(3) The plaintiff, after due diligence, only discovered said fraud in from July to November, 1915; and therefore, this suit having been filed on March 3, 1917, the plaintiff's cause of action is not barred by the two-year statute of limitation.

"(4) As all of the representations of fact set out in finding of fact No. 8 above were material, and were solely relied upon and believed by the plaintiff, and the plaintiff was induced to contract thereby, and the same in each and every instance being false and fraudulent, the same constitutes actionable fraud, and the plaintiff is entitled to recover from the defendant the amount shown on account thereof in the findings of fact.

"(5) The plaintiff is entitled to recover of the defendant its actual damage, which is the sum of \$2,489.49, with interest thereon at 6 per cent. per annum, from January 1, 1915, up to the date of this trial (which was May 28, 1917), and which principal and interest to May 26, 1917, amount to the sum of \$2,849.15.

"(6) The defendant, the Texas Harvester Company, a corporation, is liable in actual damages to the Wilson-Whaley Company, a corporation, on account of the matters pleaded in the second amended petition of the plaintiff, and on account of the matters set out in the findings of fact, in the sum of \$2,849.15, with interest thereon from May 28, 1917, at 6 per cent. per annum, and all cost of this suit, and judgment will be entered accordingly."

Plaintiff alleged that on or about April 1, 1914, the peanut industry was in its infancy in the De Leon community and its officers and agents were inexperienced and unfamiliar with it, and were unable by personal investigation and examination of peanut threshers to determine their value or merits or demerits; and the defendant was familiar with such machinery and with the kind and character suited and adapted to threshing peanuts, and knew of plaintiff's inexperience and lack of such knowledge. Plaintiff further alleged the facts found by the trial judge set out above upon which the judgment was predicated in plaintiff's favor. The defendant by special exception presented the statute of limitation of two years to plain-

tiff's suit. The defendant also by general denial put in issue all the allegations of fact contained in plaintiff's pleadings. Furthermore, it specially pleaded that after the machines were first ordered by the plaintiff, but before they were shipped, the plaintiff was notified that the machines would not be shipped except with the understanding and agreement on the part of plaintiff that defendant would not guarantee them; that in reply to that notification the plaintiff agreed to such waiver; that but for such agreement the machines would not have been shipped; and that therefore plaintiff is in no position to complain of such alleged misrepresentations.

Many assignments of error are presented to the different findings of fact, but, after a careful examination of the record, we have concluded that all the findings of fact have ample support in the evidence, save and except that the evidence shows that two of the threshers were ordered during the latter part of the year 1914, and only five of the machines were contracted for prior to May 15, 1914. But this error in subdivision No. 10 of findings of fact is immaterial, in view of the further finding that the misrepresentations complained of induced the purchase of all the machines. Accordingly, all of appellant's assignments of error predicated upon the contention that certain findings pointed out in the assignments are contrary to the undisputed evidence or that they are without sufficient support in the evidence are overruled without undertaking to discuss those assignments separately.

[1] This suit was instituted on March 3, 1917, and, as noted above, was a suit for damages for the fraud and deceit practiced upon the plaintiff and found by the trial judge. It will be noted, further, that the contract for the sale of five of the threshing machines was entered into on or about April 1, 1914, more than two years prior to the institution of the suit. It is settled by the decisions of this state that such an action as this is subject to the bar of limitation of two years under and by virtue of subdivision 4, art. 5687, Vernon's Sayles' Tex. Civil Stats. See *Gordon v. Rhodes & Daniel*, 102 Tex. 300, 116 S. W. 40; *Howell v. Bank of Snyder*, 158 S. W. 574; *Bostick v. Heard*, 164 S. W. 36.

[2] In support of the contention that J. B. Wilson, president of the Wilson-Whaley Company, was informed of the defects in the machines complained of in this suit during the latter part of 1914, and during the earlier part of the year 1915 his testimony given on the trial is referred to. He testified as follows:

"Right here from the very beginning we had trouble with those Sterling peanut threshers. It was continuous trouble, practically every day, first one and then the other, sometimes all of them, was making complaint. The complaint

about the machines were that they just simply would not run and would not do the work, and would tear all to pieces you might say. \* \* \*

"I found, in addition to the machines running different to other machines by having this cross-motion, that it was built of very soft pine wood. It was put together with very small screws. They would stand from two to three hours' to a week's hard work, and would come all to pieces. That is, the separator and wood work that I am talking about. When I became convinced of these conditions as to the quality and workmanship of this Sterling thresher, I told Harris and Fouts that they were not even built after the pattern of a peanut thresher, and they admitted it to me, too. \* \* \*

"They began threshing peanuts about the 1st of October. I judge it was about the 1st of November or later when I went out and saw that they were not any account and not even built like a peanut thresher. It had been running over a month when I went out and made the investigation and come to that conclusion for myself. \* \* \*

"The Sterling never did do good work. I do not believe any of my customers ever did get an average of 100 bushels per day, or 150, anyway. There would be three days at a time that they would get less than 100 bushels. \* \* \*

"As a result of this connection with the Sterling peanut thresher our firm lost a number of customers. Our customers felt we ought to stand by them in place of the Texas Harvester Company. Those who owned machines thought so, and their friends thought so, and the result was they quit our firm. It is just a question of who did not quit trading with us. Our customers began quitting us when they began to thresh their peanuts in the fall of 1914. \* \* \*

Several of the purchasers of machines from the plaintiff were also introduced by the plaintiff, and testified, as did J. B. Wilson, president of the company, with respect to the failure of the machines to do satisfactory work, and that complaints were made by them to Wilson of that fact; such complaints being continuous from the time the machines were first used, beginning in the fall of 1914. Such proof was uncontroverted, and, standing alone and independent of any other issues, it would clearly establish the defense of a bar of the suit under the statute of limitation referred to above.

However, it was proven beyond controversy that plaintiff's president and general manager, J. B. Wilson, was ignorant of the construction and merits of peanut threshing machines generally, and that in contracting to purchase the machines in question he relied solely upon the representations made to him with respect thereto by defendant's agents, Harris and Fouts. He further testified as follows:

"Immediately after I began hearing complaints in the fall of 1914 as to the defects of the Sterling peanut thresher I sent for Fouts and Harris, and ask him to go out and look at them, which they did in a number of cases, and I asked them to send me an expert man who knew how to operate them, and after they came

and went out there they reported to me in every instance that that was an unusual season, that we had had excessive rains and had such heavy vines, and they said 'the machines had not a proper and fair test and said that the people who were operating them were brand new as to peanut threshers, and did not know how to operate them, and they said the reason the machines were not giving satisfaction is because of the weather and because of the men's inexperience who were operating them, and I believed them. Knowing that most of what they said were true, I believed what they said about it. I knew the vines were a little heavy, and I knew we had more rain that season than usually, and they especially impressed on me that it would be unfair and unjust and unreasonable with the test they had had to lay down on the machine and condemn it. I certainly did believe and rely on their statements. Furthermore, in the fall of 1914 I was very busy. I did not personally go out to more than one or two of these machines, and did not stay thereon an average of 30 minutes at a time. I was buying peanuts and hogs, and was very busy in other ways, and I knew nothing about peanut machines, and could not have been of any service or benefit to them had I gone and stayed, and I told these men that I wanted to get some one who knew how to operate the machines, and I called on Fouts and Harris to furnish me the expert man that they agreed to do, and they kept promising me that they would get one, and they got a man from Dublin one time and possibly one from Dallas one time to come out. I would not be positive how long these men stayed out there, but possibly one or two or three days. Those men made the same reports to me that Fouts and Harris did; that the machines had not had a proper and fair test; that the men who were operating them were inexperienced; that the weather conditions were bad; that if we could have a week or two of good weather that the machines would get up and run all right; that this was the only place that the machines were giving any trouble; and that nobody else was having any trouble. I believed what they said because I did not know of any one else having trouble and did not have time to investigate it. I believed and relied on those statements. In the spring they went out with me, and we went to every customer to whom we had sold machines, and made two or three places per day, and went to Smith's and Robbins' and to Glover's, and it took us two or three days to make these rounds, and I would tell him I had been talking to those people, and it was up to him to tell them what to do, and Fouts and Harris did the talking, and they told each and every customer that anything that was reasonable and right they would do, and said they were perfectly willing to put on separate trucks and make any adjustments necessary; that last season was a bad one; and they said if we could have an average season they would show them that they would do good work, and I believed them. In carrying out that agreement that these men made to customers as to furnishing repairs I had the customers to bring their machines in, and I ordered Heebner & Sons something like \$300 worth of extras through the Texas Harvester Company, and Cain and Short and Smith worked for months on those machines, repairing them. I then tried to resell

the machines and could not do it, and I put these three out that were turned back to me, and I put them out with Mr. Cain, who professed to be an expert with threshing machines, and he guaranteed me that he could do it, could run them, and I have related the success he had with them."

He further testified that he had been dealing with defendant company for several years, and had implicit confidence in any representations their agents made, and that he was not fully convinced of the deception that had been practiced upon him until some time during the months of July or August, 1915. C. M. Fouts, one of defendant's agents who sold the machines to the plaintiff, testified as follows:

"Of course we were anxious that Wilson-Whaley Company make good collections, and that the customers would be well satisfied, so that the company could collect and pay us what they owed us. These complaints came in, in the fall of 1914, pretty regular. We had complaints from the customers, and heard complaints from Wilson-Whaley Company. I told the customers their troubles were partly due to the inexperienced men that were running them, also heavy vines and wet peanuts. Some of them told me about the machines shaking to pieces. I do not know whether Robbins did or not. Some of them did. Some of them told me that the machines practically shook to pieces. Some of them told me that they had to catch the nuts in the tubs. When they told me that, I told them it was because of wet weather and heavy vines and inexperience, while we had a few that got along all right. Q. Did you tell them or not that you believed the machine was all right. A. I don't know that I said anything about it. I did tell them that I thought with a fair test the machines would prove satisfactory. Q. Did you suggest to give the machine a fair test under normal conditions, good weather and peanut crop conditions, and experienced operators before they began to kick about it? A. I told them that we had some in the territory that was giving satisfaction. They had experienced men, and, although they had lots of rain, too, still they would not try to thresh when it was too wet. I told the parties to keep the machines till the next fall and give them a fair test, and told them that the trouble was not in the machines. Yes; I told them that. No doubt but what I told Mr. Wilson that. I do not remember. There is no reason why I should not have told him that. In fact I did tell Wilson that from the complaints I had heard and from observation it was my belief that the fault was not in the machine at all; told him it was due to the inexperience of the operators and the wet peanuts, and if the machines had had a fair test they would have turned out all right. I told him it was all those things that shook the machine to pieces. Yes; I told Wilson that."

This proof was ample to support the plaintiff's plea, which was sustained by the trial court, and which was, in effect, that the defendant concealed the fraud and deceit in the sale of the machines until July or August in the year 1915 by further misrepresenta-

tions that the failure of the machines to do good work was not due to any defects therein, but was due to the inexperience of the operators and to weather conditions. The proof was sufficient to support the further plea and finding sustaining it that plaintiff was not guilty of negligence in being thus misled by such further misrepresentations.

In the case of *Texas & Pacific Railway Co. v. Gay*, 80 Tex. 608, 28 S. W. 614, 25 L. R. A. 52, our Supreme Court said:

"The rule in this state is that the fraudulent concealment of a plaintiff's cause of action takes the case out of the bar of statutes of limitation. *Munson v. Hallowell*, 26 Tex. 475 [84 Am. Dec. 582]; *Ripley v. Withee*, 27 Tex. 17; *Ransome v. Bearden*, 50 Tex. 127; *Calhoun v. Burton*, 64 Tex. 515; *Anding v. Perkins*, 29 Tex. 348; *Connolly v. Hammond*, 58 Tex. 17; *Brown v. Brown*, 61 Tex. 45. The limitation on this rule is, that a plaintiff cannot excuse his delay in instituting suit on the ground of fraudulent concealment of his cause of action, if his failure to discover it is attributable to his own neglect; and whether such neglect existed in a given case must be determined from the facts of that case."

In 17 Ruling Case Law, § 220, p. 862, the following was said:

"The mere failure of a party to disclose a fact is not necessarily a fraudulent concealment, except in those transactions which are in their very nature intrinsically fiduciary and involve a condition of absolute good faith; but it is only silence which is permitted, as any statement, word or act, which tends to the suppression of the truth renders the concealment fraudulent. In such cases, by adding to the original fraud affirmative efforts to divert or mislead or prevent discovery, a continuing character is given to the original act which deprives it of the protection of the statute until discovery."

In the case of *Larson v. McMillan*, 90 Wash. 626, 170 Pac. 324, the Supreme Court of Washington said:

"The law binds a party to the exercise of no more than 'ordinary care' and 'reasonable diligence,' and the wrongdoer cannot set up a lack of care or diligence when, by his concealment, he has lulled his victim to sleep upon his rights. The law intends that no one shall profit by his own fraud, or that the statute shall be seized upon as a means whereby a fraud is made successful and secure."

[3] Accordingly, appellant's assignments to the failure of the court to sustain its defense of the statute of limitation of two years are overruled.

[4] The true measure of plaintiff's damages was the amount of its losses resulting directly and proximately from the fraud practiced upon it, and that was the rule followed by the trial court. *George v. Hesse*, 100 Tex. 44, 93 S. W. 107, 8 L. R. A. (N. S.) 804, 123 Am. St. Rep. 772, 15 Ann. Cas. 456.

We are of the opinion, further that the evidence was sufficient to sustain the finding that the machines and all portions thereof

which were returned to the plaintiff by such purchasers are worthless, and that by reason of their worthlessness the notes given by the purchasers therefor to the plaintiff and uncollected are legally uncollectable, and therefore also worthless.

[5] As plaintiff's suit was for damages for fraud and deceit practiced in the sale of the machines, its right to recover damages for such fraud was not waived by the fact that before the machines were shipped to the plaintiff the defendant notified the plaintiff that such shipments would not be made except upon the condition that plaintiff would waive all guaranties of the machines, and that plaintiff agreed to that condition and accepted the machines under such an agreement. In 20 Cyc. p. 60, the following is said:

"Where the vendor positively misrepresents a material fact which is peculiarly within his own knowledge and of which the purchaser is ignorant, the fact that he refuses to give a warranty is not inconsistent with his liability for fraud, although it is proper to be considered by the jury in determining whether the purchaser relied on the misrepresentations and was deceived thereby."

[6] That rule was followed in *Cabaness v. Holland*, 19 Tex. Civ. App. 383, 47 S. W. 379, by the Court of Appeals of the Third District, in which a writ of error was denied by our Supreme Court. See, also, the following decisions which we construe as essentially to the same effect. *Rumeley Products Co. v. Moss*, 175 S. W. 1085; *Jones v. Montague*, 158 S. W. 1053, and other decisions therein cited. Nor was there any waiver of such right by the act of the plaintiff in electing to retain the machines after discovery of the fraud and to claim damages for such fraud; the evidence being sufficient to show that in so retaining the machines plaintiff had no intention of waiving its claim for damages for the deceit practiced. *Grabenheimer v. Blum*, 63 Tex. 369; *Kennedy v. Bender*, 104 Tex. 149, 135 S. W. 524; *Winters v. Coward*, 174 S. W. 940; *Hubbs v. Marshall*, 175 S. W. 716.

[7, 8] Under the fourteenth assignment of error complaint is made that by plaintiff's acceptance of the machines after its agreement to waive all guarantees of them it waived any right to claim damages for the alleged fraud and deceit, appellant submits a proposition in which it is insisted further that the plaintiff should be held to the same waiver by reason of its renewal of the purchase-money notes given for the machines after discovering the fact that they had been misrepresented to it by the defendant's agents Fouts and Harris.

That proposition is not germane to the assignment, and therefore does not merit consideration. Furthermore, under the authorities last cited, it is without merit.

[9] The trial court allowed plaintiff in-

terest from January 1, 1915, on all the sums paid to the defendant as a purchase price for the machines, and also on all sums paid out by the plaintiff for repairs on the machines. The proof shows without controversy that a considerable portion of the sums so paid out for repairs was expended during the summer of 1915, and that some of the installments of the purchase price of the machines were paid as late as during the year 1916.

By reason of such proof appellant insists that an excessive amount of interest was allowed, and we are of the opinion that this assignment should be sustained.

To meet the assignment appellant has filed a remittitur of all interest allowed from January 1, 1915, up to January 1, 1917, and has asked that the judgment be so reformed as to eliminate the interest so remitted, which will be done.

For the reasons indicated above, all other assignments of error are overruled, and the judgment of the trial court will be so reformed as to allow plaintiff damages in the sum of \$2,489.49, with interest thereon at the rate of 6 per cent. per annum from January 1, 1917, to date of trial in the lower court, to wit, May 28, 1917, amounting to the sum of \$60.98, making a total of the judgment which should have been rendered by the trial judge and which is here rendered in plaintiff's favor for the sum of \$2,550.42, with interest thereon from May 28, 1917, at the rate of 6 per cent. per annum.

[10] But no motion for new trial was filed in the lower court by the defendant calling the court's attention to the error in allowing such excessive interest. The proof being so conclusive, it is entirely unreasonable to suppose that the trial judge would have failed to correct the error, which apparently was an oversight. We find in the record a bill of exception to the allowance of such excessive interest, but the bill was not presented to the trial judge until after adjournment of the term of court during which the judgment was rendered, and hence after the trial judge had lost all jurisdiction to correct the error.

Under such circumstances the costs of appeal will be taxed against appellant rather than against appellee, as would otherwise have been done. *Haley v. Gatewood*, 74 Tex. 281, 12 S. W. 25; *Adams v. State*, 146 S. W. 1086; *Texas & Pacific Ry. Co. v. Graffeo*, 53 Tex. Civ. App. 569, 118 S. W. 873; *Blain v. Lowery*, 120 S. W. 247; *Davidson v. Wills*, 56 Tex. Civ. App. 548, 121 S. W. 540.

Reformed and affirmed.

CONNER, C. J., not sitting, serving on writ of error committee at Austin.

On Rehearing.

DUNKLIN, J. Appellant insists that in view of the testimony of plaintiff's president

and general manager, to the effect that about November 1, 1914, he discovered that the machines were of no value, it was conclusively shown that he did not exercise due diligence to discover the fraud practiced upon him in the sale of the machines prior to July, 1915, and that therefore the plea of limitation was conclusively established. As shown in the court's findings of fact, referred to already in our original opinion, appellee's manager was wholly unfamiliar with peanut threshers, and relied entirely upon the representations made to him by appellant's agents. The manager further testified that after reaching the conclusion that the machines were not as represented, he notified appellant's agents, who assured him that he was mistaken in that conclusion, and that the trouble complained of by the purchasers was not due to any fault in the machines, but to the wet season, rank vines, and inexperienced operators; that the purchasers in all other vicinities were having no trouble in operating such machines; that the machines were all right, and would be proven so upon having a thorough test; that it would be unjust, unreasonable, and unfair to appellant not to give them a fair trial; that appellee's manager was thereby induced to comply with the request so made; and that testimony of the manager was corroborated by the testimony of appellee's agents.

[11] The trial judge found that all of the representations made in order to induce appellee to purchase the machines were false and fraudulent. The additional representations and assurances, made to appellee's manager, and recited above, were substantially to the same effect, and were reasonably calculated to and did, induce appellee's manager to continue to rely upon the truth of the former representations, and appellant is in no position to insist now that appellee was guilty of negligence in being thus deceived by such fraudulent representations. *Kinannon & Gaines v. Independent Cotton Oil Co.*, 196 S. W. 878; *Labbe v. Corbett*, 69 Tex. 503, 6 S. W. 808; *Young v. Barcroft*, 168 S. W. 392.

[12, 13] We are of the opinion, further, that the evidence was sufficient to support the court's finding that the machines were worthless. While there is no specific finding of their value at the time they were sold, we think that the finding of the court was intended to have that effect, since all of the testimony relative to their value was to the effect that when first tested they proved to be worthless. If appellant was given credit for what appellee received from the farmers who bought the machines, as was done, appellant is in no position to complain, since it has profited to that extent. In the absence of any finding to the contrary, we must presume that appellant was given credit for the

and which appellee received in part payment for one of the machines at the agreed value of the land, and that the same was its market value.

[14] But we are of the opinion that we erred upon original hearing in taxing the cost of the appeal against the appellant, in view of the fact that, as pointed out in the motion for rehearing, the findings of fact, showing the method of computing the damages for which appellee was allowed a recovery, were not filed until after the term of court had adjourned, and hence too late for the appellant to call the court's attention to the error in estimating the damages pointed out in our original opinion. Accordingly, our former judgment will be so reformed as to tax the cost of the appeal against the appellee, in view of the fact that the amount of recovery in the trial court has been reduced by the judgment in this court, and with that correction the motion for rehearing is in all other respects overruled.

Appellant has also filed a motion for additional findings of fact. Some of the issues of fact stated in the motion were covered by the court's findings, filed below. All other material findings sought are stated in our conclusions above. In all other respects the motion for additional findings of fact is overruled.

#### KENNEDY v. KENNEDY et al. (No. 6017.)

(Court of Civil Appeals of Texas. Austin.

Feb. 26, 1919. Rehearing Denied

April 2, 1919.)

#### 1. APPEAL AND ERROR ~~60145~~, 547(2) — MATTERS REVIEWABLE—BILLS OF EXCEPTION.

Under Rev. St. 1911, arts. 2058, 2073, and Court Rules 53, 54, 55 (142 S. W. xxi), the appellate court will not review failure of trial court to file findings of fact and conclusions of law, unless such matter is raised by a bill of exception, or at least that it appears in the record, not merely that a request for findings and conclusions was made, but also that upon failure of trial court to comply with request, appellant excepted to such failure.

#### 2. TRIAL ~~6392~~(1) — FINDINGS — SUFFICIENCY—REQUESTS.

In an action involving title to property, where a husband claimed that he furnished the purchase price of land, and put it in the name of his wife to be held in trust for him, a finding that the land was the separate property of the wife at the time of her death was in effect a finding that the husband intended to make a gift to his wife, and was sufficient, in the absence of a request for more specific finding.

**3. APPEAL AND ERROR — 219(2)—FINDINGS OF FACT—SUFFICIENCY—DEFINITENESS.**

Where a party is dissatisfied with findings or conclusions as made because not sufficiently full and definite, he cannot complain unless he has made request for more specific finding.

**4. TRIAL — 395(5) — FINDINGS OF FACT — EVIDENCE.**

It is unnecessary for the court to state the evidence upon which it bases a finding of fact, nor the reasons therefor.

**5. TRUSTS — 86—RESULTING TRUSTS—HUSBAND AND WIFE—PRESUMPTION.**

Where land is purchased by a husband with his separate funds and the deed is taken in the name of his wife, a prima facie presumption arises that he intends to make a gift to his wife, but such presumption may be overcome by competent proof that husband's intention was not to make a gift.

**6. TRUSTS — 89(1) — RESULTING TRUST — EVIDENCE—HUSBAND AND WIFE.**

Where land is purchased by a husband with his separate funds and deed is taken in name of wife, court may disbelieve uncontradicted testimony of husband that he did not intend to make a gift of the land to his wife, and base its decision on the presumption that a gift was intended.

**7. APPEAL AND ERROR — 994(3)—CREDIBILITY OF WITNESSES.**

On a trial without a jury, it is the exclusive province of the trial court to pass upon the credibility of the witnesses and the weight to be given their testimony.

Appeal from District Court, Williamson County; Ireland Graves, Judge.

Suit by John A. Kennedy against A. B. Kennedy and others. From an adverse judgment, the named defendant appeals. Affirmed.

Lawhon & McNair, of Taylor, Wilcox & Graves, of Georgetown, and Brooks, Hart & Woodward, of Austin, for appellant.

White, Cartledge & Wilcox and Dickens & Dickens, all of Austin, for appellees.

BRADY, J. Jno. A. Kennedy brought this suit against A. B. Kennedy, Lee T. Kennedy, and others, for an accounting and partition of certain property, real and personal, which was alleged to be the community property of appellant, A. B. Kennedy, and his deceased wife, Maggie M. Kennedy. This appeal involves only the title to a 252-acre tract of land, all other issues having been settled or eliminated by agreement of the parties below.

This particular tract was claimed by appellant as his separate property, because it was alleged he bought and paid for said land with his separate funds, and while the deed was taken in the name of his wife, Maggie M. Kennedy, it was for the purpose

and intent of making it a homestead, and that the deed was taken for his own benefit, to be held in trust by his wife for him. Appellant claimed his homestead right and designated 200 acres out of said tract as a homestead, in the event the title to the land should not be awarded to him. He prayed for judgment, declaring the 252 acres to be his separate property, and in the alternative that it be adjudged to be community property.

Appellee, Lee T. Kennedy, claimed the 252-acre tract under a bequest in the will of his mother, Maggie M. Kennedy, which he alleged was at the time of her death her separate property, and that at the date of trial he owned the same by fee-simple title. He answered the pleadings of appellant, denying that the land was paid for out of the separate funds of appellant, but, if so paid for, that the conveyance was not made in trust for appellant, but as a gift to his mother, Maggie M. Kennedy. He further pleaded in the alternative that the property was the community property of A. B. Kennedy and Maggie M. Kennedy, and that in such event, under the will of his mother, he became the owner in fee simple of an undivided one-half of the land.

The case was tried before the court without a jury, and the court rendered judgment according to the agreement of the parties as to the personal property and all real estate, except the 252 acres, for which the court rendered judgment in favor of appellee, Lee T. Kennedy, subject to appellant's homestead right to 200 acres thereof. From this judgment A. B. Kennedy has appealed.

Appellant's first assignment of error complains at the trial court's failure to make and file his findings of fact and conclusions of law, as requested by appellant; and his propositions thereunder assert that such failure is reversible error, even though no bill of exception was taken, because it deprived appellant of a proper presentation of his appeal. The judgment recites that appellant in open court requested the court to prepare and file findings of fact and conclusions of law.

Appellees present counter propositions to the effect that this assignment cannot be considered, because no bill of exception is to be found in the record, complaining of the failure of the trial court to file conclusions, and, further, because the record contains a full statement of facts; and, it not appearing that appellant was probably prevented from properly presenting his case on appeal by reason of such failure, no reversible error is shown.

The further counter proposition is made that the undisputed evidence shows the 252-acre tract to have been devised to appellee Lee T. Kennedy, by the will of his mother,



Maggie M. Kennedy, it having been theretofore conveyed to her as grantee, the consideration being paid out of the separate funds of appellant, A. B. Kennedy; and that the law raised the presumption that appellant intended such conveyance as a gift to Maggie M. Kennedy; and that, the trial court having found that the 252 acres was the separate property of Maggie M. Kennedy at the date of her will, such finding necessarily included the finding that appellant's testimony that he did not intend such conveyance to operate as a gift was not true.

[1] We will first examine the question as to whether or not it was necessary for appellant to take a bill of exception to the failure of the trial court to file findings of fact and conclusions of law, as formally requested by appellant.

Appellant has cited in support of his proposition that a bill of exception was not necessary, the cases of *Railway Co. v. Bracken*, 180 S. W. 285, and *Mackey v. Armstrong*, 84 Tex. 159, 19 S. W. 463.

In the first case cited it does not affirmatively appear that the question was not presented by a bill of exception, and it does appear that there was no statement of facts in the record. The court did not discuss the question of the necessity for a bill of exception, and we think that it should not be assumed that there was no bill of exception raising the question. The substance of the holding in that case is that, there being no statement of facts in the record, the appellant was prevented from properly presenting its case on appeal under the state of the facts and the issues shown by the record, and constituted reversible error.

In the *Mackey* Case the question of the failure of the trial judge to file conclusions of fact and law did not seem to be involved.

Appellees rely upon articles 2058 and 2073, Revised Statutes, and several decisions, which will be hereafter cited.

Article 2058 provides as follows:

"Whenever, in the progress of a cause, either party is dissatisfied with any ruling, opinion or other action of the court, he may except thereto at the time the same is made or announced, and at his request time shall be given to embody such exception in a written bill."

Article 2073 provides that the parties to a suit shall be entitled to 30 days after adjournment of court in which to prepare and file a statement of facts and bills of exception, and to further time if granted by the trial judge.

The following authorities are cited by appellees in support of their claim that in virtue of these statutory provisions this court cannot consider the alleged error of the trial court in failing to file conclusions of fact and law, unless the error be presented by bill of exception. *Cotulla v. Goggan & Bros.*, 77 Tex. 32, 18 S. W. 742; *Landa v.*

*Heermann*, 85 Tex. 1, 19 S. W. 885; *Jacobs v. Nussbaum & Scharff*, 63 Tex. Civ. App. 520, 133 S. W. 485; *Haywood v. Scarborough*, 102 S. W. 469; *Insurance Co. v. O'Neal*, 14 Tex. Civ. App. 516, 38 S. W. 62; *Farmers' State Bank v. Farmer*, 157 S. W. 285; *Dunlap v. Broyles*, 141 S. W. 289; *Overton v. Colored Knights of Pythias*, 173 S. W. 472.

These authorities seem to support the contention of appellees. Some of these cases were decided under the old statute, requiring both bills of exception and conclusions of fact and law to be filed before adjournment of the term; whereas, under the present statute, the judge may file his conclusions at any time within 10 days after adjournment, and the parties are given at least 30 days after adjournment in which to file bills of exception.

In the case of *Jacobs v. Nussbaum*, 63 Tex. Civ. App. 520, 133 S. W. 485, Chief Justice Pleasants, speaking for the Court of Civil Appeals for the First District, fully discussed the question under the present statutes, and concluded that a bill of exception to the failure of the trial court to file his conclusions is as necessary now as it was under the old law.

In the case of *Overton v. Colored Knights of Pythias*, 173 S. W. 472, this court held that where there was no bill of exception shown in the record, and where the record failed to disclose that the request for conclusions was called to the attention of the trial court, the matter must be regarded as waived.

We believe the authorities cited sustain the contention that the error claimed must be raised by bill of exception, or at least that it must appear in the record, not merely that the request for findings and conclusions was made, but also that, upon failure of the trial court to comply with the request, the appellant has objected or excepted to such failure. It is clear that this is a matter that may be waived, and the mere request for findings and the subsequent failure of the judge to comply therewith does not present an objection or exception to his omission or failure; and we are of the opinion that the record must disclose, either by formal bill of exception or otherwise, that the appellant has seasonably complained of the trial court's failure or refusal; otherwise the matter may be regarded as waived, or the request withdrawn.

We find nothing in this record to show that appellant has saved any character of exception or objection to the court's omission or refusal to file conclusions, except in his assignments of error, and for this reason we think the assignment should not be considered.

Furthermore, it would seem that under rule 55 for the district courts (142 S. W.

xxi), the matter must be presented by bill of exception. This rule provides that—

"Rulings of the court upon applications for continuance, change of venue, and other incidental motions, and upon the admission or rejection of evidence, and upon other proceedings in the case not embraced in the two preceding rules, when sought to be complained of as erroneous, must be presented in a bill of exception, signed by the judge and filed by the clerk, or otherwise made according to the statute, and they will thereby become a part of the record of the cause, and not otherwise." (Italics ours).

The proceedings referred to in the two preceding rules, Nos. 53 and 54, do not relate to such matters as the preparation and filing of findings and conclusions; and we therefore think that rule 55 is applicable, and requires a bill of exception in order to present such claimed error.

[2] But if we be mistaken in the views above expressed, we think there is another ground upon which it must be held that this assignment cannot be sustained. The trial court in the judgment made a number of findings of fact, including the finding that at the date of the death of Maggie M. Kennedy she owned in her own right, and as her separate property and estate, the 252-acre tract in controversy; that the appellee, Lee T. Kennedy, was the owner and entitled to said land, subject to the homestead right of appellant, A. B. Kennedy, and that the latter was entitled to the rents and revenues from such tract since the death of Maggie M. Kennedy. It may be conceded that the portion of this finding that Maggie M. Kennedy owned the land in her own right, and as her separate property and estate, was a mixed question of law and fact, but we do not think this would affect the question. The findings made by the trial court in the judgment, which were followed up by judgment in favor of Lee T. Kennedy for the 252-acre tract, although not filed separately as findings and conclusions, were such in substance, and we consider a substantial compliance with the statute requiring the preparation and filing of conclusions upon request. It may be the trial court considered that he had already made sufficient findings in the judgment, and for that reason failed to separately file conclusions, as requested by appellant; and we think it would have been a substantial compliance with the statute had he, as his findings and conclusions, adopted and referred to those included in the judgment, in the absence of a request for more specific findings.

[3,4] It has been frequently held that where a party is dissatisfied with findings or conclusions as made, because not sufficiently full and definite, he cannot complain, unless he has made request for more specific findings. The request for conclusions was incorporated in the judgment, and this is the only place in the record where the demand

is shown. In that very judgment, itself, is found the finding that the property in controversy was the separate property of Maggie M. Kennedy. It was unnecessary for the court to state the evidence upon which he based this finding, nor the reasons therefor; and, if appellant desired a more specific and definite finding, and especially an express finding as to whether the trial court discredited and rejected the testimony of A. B. Kennedy as to his intention in having the deed made to Mrs. Kennedy, he should have requested it.

Being of the opinion that the findings made by the court, as incorporated in the judgment, were in substance a compliance with the statute, in the absence of exceptions or objection, we think appellant cannot now complain because same were not sufficiently definite or complete; nor can he complain that the findings were not made separately and apart from the judgment. To hold otherwise would be to subordinate substance and give undue regard to mere form and literalism; and under the following authorities we believe it must be held that appellant is now precluded from claiming that the trial court did not find the facts sufficiently or definitely upon this issue. *Tackaberry v. Natl. Bank*, 85 Tex. 488, 22 S. W. 151, 299; *Reed v. Brewer*, 90 Tex. 144, 37 S. W. 418; *Tex. Cent. R. Co. v. Fisher*, 18 Tex. Civ. App. 78, 48 S. W. 584; *Difflie v. Thompson*, 90 S. W. 198; *Caplen v. Cox*, 42 Tex. Civ. App. 297, 92 S. W. 1048; *Merriman v. Blalack*, 57 Tex. Civ. App. 270, 122 S. W. 403; *Capps v. City of Longview*, 122 S. W. 427; *Gainesville Water Co. v. City of Gainesville*, 57 Tex. Civ. App. 257, 122 S. W. 959; *Hatton v. Bodan Lbr. Co.*, 57 Tex. Civ. App. 478, 123 S. W. 164; *Connor v. Blaisdell Co.*, 60 S. W. 890; *Gladys City Oil Co. v. Right of Way Oil Co.*, 137 S. W. 171; *Jones v. Jones*, 146 S. W. 265.

Appellees also assert the proposition that where the record upon appeal contains a full statement of facts, the case should not be reversed for the failure of the trial court to file conclusions of law and fact; and cite authorities which seem to support the proposition.

We are not prepared, however, to apply this rule in this case. We are by no means certain that it does not appear that appellant was probably prevented from properly presenting his case on appeal by reason of the failure of the trial court to file conclusions of fact and law; and, had appellant saved an exception to such failure by a proper bill, or if the record showed that he seasonably objected to such failure, and if he had requested more specific findings, it may be that this case would have to be reversed. At all events, we are unwilling to place our decision upon the mere ground that the record contains a full statement of facts.

and that it does not appear that appellant was probably prevented from properly presenting his case on appeal by reason of the court's failure to file his conclusions.

For the reasons above indicated, the first assignment of error is overruled.

There is no second assignment of error in appellant's brief, but the third, fourth, and fifth assignments substantially present the propositions that the court erred in rendering judgment for Lee T. Kennedy and against appellant for the 252-acre tract of land, because the uncontradicted evidence shows that, while Maggie M. Kennedy was named as grantee in the deed, it further appears that the land was paid for by appellant out of his separate means, and that there was no intention on his part to make a gift to his wife, and under the facts the land became the separate property of appellant; and, if not his separate property, it became community property.

[5] It is conceded by appellant that where land is purchased by the husband with his separate funds, and the deed to the land is taken in the name of the wife, a prima facie presumption arises that he intended to make a gift of the land to his wife, and that because of such presumption the land would be held to be the separate property of the wife in the absence of evidence showing that such was not the intention of the husband. But it is claimed by appellant, and it may be conceded, that in such case the presumption may be overcome by competent proof, and where it is shown that the husband's intention was not to make a gift to the wife, the property will be held to be his separate property.

In both briefs the following authorities are cited in support of these propositions: *Parker v. Chance*, 11 Tex. 518; *Houston v. Curl*, 8 Tex. 242, 58 Am. Dec. 110; *Smith v. Strahan*, 16 Tex. 315, 67 Am. Dec. 622; s. c., 25 Tex. 103; *Higgins v. Johnson's Heirs*, 20 Tex. 389, 70 Am. Dec. 394; *Branch v. Makeig*, 9 Tex. Civ. App. 399, 28 S. W. 1050; *Kahn v. Kahn*, 94 Tex. 114, 58 S. W. 825.

[6, 7] Upon the trial, the appellant, A. B. Kennedy, testified that the land was paid for out of his separate funds, and there was no evidence to the contrary. There were circumstances strongly tending to support his testimony. Appellant, also, with equal positiveness, testified that he did not intend that the property should be a gift to his wife. It must be conceded that had the trial court accepted his testimony as establishing that there was no intention to make a gift, the land must have been held to have been the separate property of appellant. There are a few circumstances in the record tending to contradict his testimony on this point; but, in our view of the matter, it may be assumed that the testimony of appellant was uncontradicted, and yet it does not follow that the trial court was required to give such weight or credit to the testimony of appel-

lant as would overcome the presumption that it was the separate property of Mrs. Kennedy. Both counsel for appellant and for appellees agree that there is but one reasonable explanation for the judgment of the trial court, and that is that he found the fact to be against appellant with reference to his intention; and appellant asserts that the "only theory that can sustain the judgment is that the trial court arbitrarily found part of his testimony to be true (as to source of purchase money), and without cause disregarded his equally credible testimony (as to intention)."

It was the exclusive province of the trial court to pass upon the credibility of the witnesses and the weight to be given their testimony; and, if the trial court chose to accept his testimony as to the source of payment for the land, but disregarded it on the question of intention, it was his privilege. The record discloses that there were circumstances in evidence tending strongly to support his testimony that his means paid for the land, and nothing to show the contrary. Upon the question of intention, the only positive testimony was that of appellant to the effect that he did not intend to make a gift to his wife; but we think there were circumstances proven on the trial tending to contradict this evidence. Even if appellant's testimony stood unchallenged, the trial court had the right to reject it, if he did not believe the same. If he so contradicted, based upon the interest of the witness, or upon the fact that his wife was dead at the time of the trial and could not contradict his testimony, or from his manner of testifying, or upon any other proper consideration, this was within the sound discretion committed to him, and his decision is not to be disturbed without cause.

Our Supreme Court, in the case of *Railway v. Rannels*, 92 Tex. 307, 47 S. W. 972, states the law as follows:

"It is the province of the jury to pass upon the credibility of the witnesses, and they may disregard the testimony of a witness who has neither been impeached nor contradicted, if they believe his statements to be untrue from his manner of testifying, prejudice exhibited toward the opposite party, or his interest in the result of the litigation, or other things indicating that the evidence is not reliable."

In the case of *Jones v. Jones*, 146 S. W. 265, it is held that it is the privilege of the trial judge to disregard the uncontradicted evidence of a witness who is the only witness to the transaction, and that if a finding to such effect should be made, it would be binding upon the appellate court; and authorities are cited in support thereof.

Believing that the trial court, in his sound discretion, had the right to conclude, if he did so, that the presumption in favor of a gift to Mrs. Kennedy had not been overcome by other testimony, we cannot say that the

judgment was erroneous for this reason, even though the positive testimony of appellant was not contradicted by the direct testimony of any other witness. It follows that the third, fourth, and fifth assignments of error must be overruled.

The above are all the questions presented by the record, and, being of the opinion that no reversible error has been shown, the case is affirmed.

Affirmed.

THOMPSON et al. v. DODGE et al.  
(No. 6170.)

(Court of Civil Appeals of Texas. San Antonio.  
Feb. 19, 1919. Rehearing Denied  
March 26, 1919.)

1. CERTIORARI  $\Leftrightarrow$  62 — CONSOLIDATION OF WRITS.

The district court did not err in consolidating writs of certiorari to review orders of the county court appointing an administrator to collect inheritance tax, approving the contract between the administrator and the attorney for the estate, ordering sale of a small part of the land belonging to the estate to pay the attorney's retaining fee, etc.

2. APPEAL AND ERROR  $\Leftrightarrow$  761—BRIEFS—CITATION OF AUTHORITIES—RULE OF COURT.

The statement of the brief that authorities will be found "in argument under separate cover" is not in compliance with Rules of the Courts of Civil Appeals, No. 36 (142 S. W. xiii), requiring the authorities to be annexed to each proposition with its statement and at the end of it a reference simply to the authorities relied on, if any, in support of it, giving the order in which they should be cited.

3. APPEAL AND ERROR  $\Leftrightarrow$  742(3) — ASSIGNMENT OF ERROR — STATEMENT — RULES OF COURT.

Statement of assignment of error that the court erred in refusing to give a decision "upon the several demurrers set out in the several answers of defendants, filed in each of said causes," giving the numbers, "and in ruling that all such demurrers had been waived," is not in compliance with the rules of the Courts of Civil Appeals, being merely a reference to the record and other parts of the brief.

4. APPEAL AND ERROR  $\Leftrightarrow$  742(2) — ASSIGNMENTS ON DIFFERENT SUBJECTS—GROUPING—ABSENCE OF PROPOSITIONS OR STATEMENTS.

Assignments of error which are grouped, though they are on different subjects, none being followed by a proposition or a statement, will not be considered.

5. APPEAL AND ERROR  $\Leftrightarrow$  742(1) — ASSIGNMENTS OF ERROR — STATEMENT — INSUFFICIENCY.

Statement, supporting assignment of error, which vaguely referred to other parts of the voluminous brief and the record, did not com-

ply with the rules of the Courts of Civil Appeals as to such statements.

6. APPEAL AND ERROR  $\Leftrightarrow$  742(6) — ASSIGNMENTS OF ERROR—ABSENCE OF STATEMENT.

Assignments of error complaining that some undisclosed paragraph, from a given number to a given number, inclusive, found in a motion for the court to file conclusions of fact, had been ignored by the court, none of them being followed by a statement, cannot be considered.

7. TAXATION  $\Leftrightarrow$  859(1)—INHERITANCE TAXES—APPOINTMENT OF ADMINISTRATOR—STATUTES—CONSTITUTIONALITY.

Rev. St. arts. 7487-7502, providing for the collection of inheritance taxes, and appointment of an administrator for that purpose and to act generally, if no application for letters testamentary or of administration shall be made, are constitutional.

8. EXECUTORS AND ADMINISTRATORS  $\Leftrightarrow$  22(1) — APPOINTMENT TO COLLECT TAX AND FOR ALL PURPOSES.

Under Rev. St. arts. 7487-7502, providing for collection of inheritance taxes, the county judge has authority to appoint a permanent administrator of the estate of a decedent, who has authority to administer the estate, and, among other things, to collect the inheritance tax, and not merely a special administrator.

9. EXECUTORS AND ADMINISTRATORS  $\Leftrightarrow$  97 — ADMINISTRATOR TO COLLECT INHERITANCE TAX—CONTRACT WITH ATTORNEY—INVALIDITY.

Despite Rev. St. arts. 7487-7502, providing for collection of inheritance taxes and appointment of administrator for that purpose, and articles 8623, 3824, as to allowance of reasonable attorneys' fees to executors and administrators, county judge held unauthorized to approve contract between administrator to collect inheritance tax on estate of decedent in another state, and an attorney, which contract was fraudulent and unconscionable as calling for such payments to attorney by way of retainer and for services as would exploit estate for his benefit.

10. WILLS  $\Leftrightarrow$  245 — PROBATE — COMPLIANCE WITH STATUTE.

Where the requirements of Rev. St. art. 3276, in relation to application for probate of a foreign will, were met, the will was entitled to probate, and the county judge had no power or authority to deny it.

11. WILLS  $\Leftrightarrow$  245—PROBATE—RIGHT TO CONTEST—CREDITOR—"PERSON INTERESTED."

No one is entitled to contest probate of will of a resident of another state under Rev. St. art. 7875, except a "person interested" therein, that is, one who either absolutely or contingently is entitled to share in the estate, so that a creditor of testator is not included.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Person Interested.]

12. EXECUTORS AND ADMINISTRATORS  $\Leftrightarrow$ 324,  
367—ADMINISTRATOR'S SALE OF LAND—VOID  
CHARACTER—STATUTES.

Sale of decedent's land by administrator appointed to collect inheritance taxes pursuant to Rev. St. arts. 7487-7502, though approved by county judge, proceeds having been largely used to pay an attorney for the estate employed by contract void as unconscionable and in exploitation of the estate, *held void*; no attention having been paid to article 7494, requiring previous ascertainment of amount of tax, and the sale having been sought improperly under articles 3489, 3490.

13. EXECUTORS AND ADMINISTRATORS  $\Leftrightarrow$ 518  
(4)—FOREIGN DECEDENT—RIGHT OF EXECUTORS—STATUTE.

A party in Texas could not, unknown to executors under the will of an Iowa decedent, have the will of such decedent probated, and afterwards prohibit the executors from administering the estate in Texas because more than 20 days elapsed after the probate before they sought to qualify under Rev. St. art. 3278.

Appeal from District Court, Real County; Hon. R. H. Burney, Judge.

Writs of certiorari by D. D. Thompson and others against N. P. Dodge, Jr., and another. From a judgment for respondents in consolidated case, petitioners appeal. Affirmed.

C. L. Bass, of Houston, and E. F. Vanderbilt, of Leakey, for appellants.

W. D. Love, of Uvalde, and Denman, Franklin & McGown, of San Antonio, for appellees.

FLY, C. J. This appeal is from the judgment of the district court of Real county in a consolidated case, consisting of four certiorari cases from the county court, prosecuted by D. D. Thompson, county judge of Real county, C. L. Bass, B. F. O'Bryant, Mrs. Claudia Payne, J. D. Smith, and T. A. Youngblood, individually and as administrator of the estate of Grenville M. Dodge, deceased; the appellees being N. P. Dodge and Grenville D. Montgomery. The writs of certiorari were obtained to secure a review of the orders of the county court, appointing Youngblood administrator, approving a contract between Bass and Youngblood, ordering the sale of ten sections of land belonging to the Dodge estate and confirmation of the same, and an order refusing a probate of the will of G. M. Dodge, deceased, and to appoint the executors named in the will. The writs were consolidated and tried as one case, the same being withdrawn from the jury, and the court ordered that the will of G. M. Dodge be probated and N. P. Dodge and Grenville D. Montgomery be appointed executors; that the administration of the estate be set aside and the same be placed in the hands of the executors; that the contract between Bass and Youngblood be set aside as illegal, void, and opposed to public policy; and that the

order of the county court directing the sale of ten sections of land, together with the order approving the sale, be declared null and void and the same set aside.

The uncontroverted facts justify the following conclusions:

Grenville M. Dodge died on or about January 3, 1916, in the state of Iowa, leaving a will disposing of his property and appointing as trustees or executors, N. P. Dodge, Jr., and Frank S. Pusey, and providing that Grenville D. Montgomery should act if either of those named did not act. Pusey declined to act, and Montgomery and Dodge qualified after the will had been duly probated in Iowa. The testator left as a part of his estate 46,000 acres of land in Real county as well as lands in other counties of Texas. On April 17, 1917, upon the suggestion of E. P. Vanderbilt, county attorney of Real county, D. D. Thompson, county judge, appointed T. A. Youngblood temporary administrator of the Dodge estate, reciting in the order that Dodge had left a will which was probated in Iowa. No inventory or appraisal was filed by the temporary administrator. On May 7, 1917, the county judge, upon his own motion, according to his statement, appointed T. A. Youngblood permanent administrator of the Dodge estate, reciting that the appointment was made under the law relating to inheritance taxes; the bond of the administrator being placed at \$1,000. On that same day Youngblood presented to the court a written contract which he had entered into with C. L. Bass, in terms, as follows:

"State of Texas, County of Real.

"Know all men by these presents that:

"I. Whereas, the undersigned T. A. Youngblood has heretofore qualified as administrator of estate of Grenville M. Dodge, deceased, under appointment of the county judge of said county in administration proceedings on said estate in cause No. 11 in said court, as is evidenced by letters of administration on said estate heretofore issued to said T. A. Youngblood; and,

"II. Whereas it was necessary for said Youngblood to have services of an attorney to represent him in invoking the jurisdiction of said county court over said estate and in appointing said Youngblood, and by reason thereof said Youngblood employed C. L. Bass, an attorney at law, in making said jurisdiction of said county court; and,

"III. Whereas, in the order of said county court appointing said Youngblood, he is required to contract for services of an attorney at law to represent said administrator and his successors in all litigation and other matters relative to said estate, and it is recited that such contract shall become binding on said estate when reported by said administrator to and approved by said county court; and in pursuance of said requirement, said Youngblood has contracted with said C. L. Bass for his legal services in terms herein set forth.

"IV. The undersigned T. A. Youngblood as administrator of and on behalf of said estate

as first party and C. L. Bass as second party, by reason of the offer of first party to second party, as set out in the premises and the acceptance thereof by second party, have agreed upon the terms evidenced herein.

"A. In consideration of legal services heretofore and hereafter to be rendered by second party to first party and his successors in said administration proceedings in all litigation and other matters relative to said estate, there shall be paid to second party as and when any inventory and appraisement of value of said estate is approved by said county court, a sum of money, as a retainer, out of said estate equal to five per cent. (5%) of said appraised value.

"B. And further, there shall be paid to second party as and when second party may begin performing services for said estate in any contested legal proceedings in or out of any court wherein any matter of value is sought to be recovered either directly or indirectly, by or from said estate—a sum of money equal to ten per cent. (10%) of the valuation that is claimed for said estate in said contested legal proceeding.

"C. And in addition, there shall be paid to second party, if and when said estate prevails in said contested legal proceedings, a sum of money equal to said sum of money payable to second party under subparagraph B. of this paragraph IV.

"D. And for any other services of second party to said estate there shall be paid out of said estate to second party such sum or sums of money, in addition to that provided for in subparagraph A of this paragraph IV, as shall be reasonable, same to be payable as and when such service has been performed.

"E. And further, for the period during which payment to second party of any of said sums of money may be delayed, there shall be paid to second party out of said estate interest thereon at the rate of six per cent. (6%) per annum on any such sum.

"F. If after second party begins performing services of any kind for which second party may be entitled to compensation according to terms in paragraph IV hereof any one should contest in any court such compensation and fail to reduce same, there then shall become due and paid out of said estate to second party, all expenses necessarily incurred by second party in such contest, and a sum of money, equal to one-fourth ( $\frac{1}{4}$ ) of the amount of said compensation, to compensate second party for the time and labor of himself and others assisting second party in the contest, and for any delay in making payment to second party under terms of this paragraph V, there shall be added interest thereon at rate of six per cent. (6%) per annum.

"VI. T. A. Youngblood is not and shall not be in any wise personally obligated in any wise under the terms of this instrument.

"VII. As recited in paragraph III hereof, the terms of this instrument shall become binding upon said estate when this contract is reported to and approved by an order of said county court.

"In testimony whereof, witness the respective hands of first party and of second party on this 7th day of May, 1917, to two original copies hereof. T. A. Youngblood, as administrator of and on Behalf of said Estate of Grenville M.

Dodge, Deceased, First Party. C. L. Bass, Second Party."

The county judge, not only formally approved that contract, but recited that he was furthermore of the opinion that the terms are reasonable and are necessary for the protection of said estate. At no time did it appear that there were any debts due by the Dodge estate. Youngblood qualified as permanent administrator on May 7, 1917. On July 16, 1917, in vacation, the county judge appointed appraisers, and on same day a list of lands containing 46,000 acres, valued at \$250,000, was filed by two of the appraisers and approved by the county judge. On July 17, 1917, C. L. Bass filed for Youngblood an application for an order to institute suit to secure a construction of the will of Grenville M. Dodge, and on same date the order was granted by the county judge, D. D. Thompson. On October 1, 1917, Youngblood filed an application to sell ten sections of land situated in Real county, reciting that the sale was necessary to pay certain local claims against the estate, among the number inheritance taxes and a fee of \$12,500 due Bass, under the terms of the contract approved by the court, being 5 per cent. of the appraised value of the estate, and also incidental expenses of \$1,000 for procuring evidence and the construction of the will, and \$1,500 commissions for the administrator and \$500 for costs. The order was granted, and the land was sold and sale confirmed by the county court. Out of the proceeds, \$9,000 was paid to Bass and \$100 for costs. On September 15, 1917, N. P. Dodge, Jr., one of the executors under the will of G. M. Dodge, filed an application to probate the will, which application was contested by Youngblood, through his attorneys, C. L. Bass and Vanderbilt & Wright, on the ground of fraud. Probate of the will was denied. We conclude that the findings of fact of the trial judge are correct.

Appellants have filed in this court a brief containing 233 printed pages, presenting for consideration 188 assignments of error, although there cannot legitimately arise more than half a dozen issues. The material issues in the case will be considered and the views of this court thereon fully presented.

[1, 2] The first 75 assignments attack the jurisdiction of the district court and the writs of certiorari, as well as the order consolidating the matters presented by the writs of certiorari. There is no merit in any of the assignments. The writs of certiorari were properly prepared, the bonds were valid, and the court did not err in overruling the pleas to the jurisdiction of the district court. The court did not err in consolidating the different writs of error and trying all the issues at one time. No authority is offered in the brief for the proposition reiterated

again and again that it rendered the writs of certiorari invalid because each order of the county court was not specified. The statute (article 733, Rev. Stats.) says:

"Any person interested in the estate of a decedent or ward may have the proceedings of the county court revised and corrected at any time within two years after such proceedings were had."

Not only are no authorities offered to sustain the assignments mentioned, but there is not an authority cited anywhere in the brief. The statement that authorities will be found "in argument under separate cover" is not in compliance with Rule 36 (142 S. W. 111), which requires the authorities to be "annexed to each proposition, with its statement, and at the end of it, a reference simply to the authorities relied on, if any, in support of it," giving the order in which they should be cited.

[3] The eightieth assignment of error assails the action of the court in refusing to give a decision "upon the several demurrers set out in the several answers of defendants, filed in each of said causes, Nos. 58, 61, 62, 63 and 67, and in ruling that all such demurrers had been waived." What the demurrers were is not disclosed in the assignment. The statement is not in compliance with the rules, merely being a reference to the record and other parts of the brief. Nothing appears in the brief upon which to base any opinion as the claims of the assignment.

[4] Assignments of error from 81 to 110, inclusive, are grouped, although on different subjects, and none of them is followed by a proposition or a statement. They will not be considered.

[5] Assignment 111 complains that—

"The court erred in his conclusions of fact by failing to find upon paragraph 1 of defendants' motion for the court to find and file conclusions of fact and law."

What paragraph 1 referred to is not disclosed by assignment or statement. The latter utterly fails to comply with the rules as to such statements. Vague references to other parts of the voluminous brief and the record do not meet the requirements. The assignment is overruled.

[6] Assignments of error from 112 to 121, inclusive, are like unto assignment 111, each one complaining that some undisclosed paragraph from Nos. 2 to 16, inclusive, found in a motion for the court to file conclusions of fact, had been ignored by the court. None of them is followed by a statement, and they cannot be considered.

Assignments of error from 122 to 132 complain of the failure of the court to file conclusions of law on paragraphs in a motion, numbered from 1 to 16, inclusive. What the paragraphs consisted of is not disclosed in

assignments, and there are no statements as required by the rules.

[7, 8] It is provided in article 7491 that—

"If within three months after the death of a decedent leaving property subject to taxation under this chapter, no application for letters testamentary or of administration shall be made, it shall be the duty of the county court to appoint an administrator."

That law was amended in 1917, the amendment taking effect about June 20, 1917 (Acts 35th Leg. c. 116 [Vernon's Ann. Civ. St. Supp. 1918, art. 7491]), about six weeks after the county court made Youngblood permanent administrator. The amendment was approved by the Governor on March 30, 1917, becoming effective 90 days after adjournment on March 21, 1917. The administration in this case must perforce be considered under the old statute.

It has been heretofore held by this court, in this case, that the statute of 1907, articles 7487 to 7502, inclusive, which provide for the collection of inheritance taxes, is constitutional, and we adhere to that opinion, although a writ of error has been granted in the case by the Supreme Court. *Dodge v. Youngblood*, 202 S. W. 116. We have been informed that the writ was granted on the ground that the administration to collect an inheritance tax is a special, and not a general, administration of the estate. If only a special administration is intended, we fail to understand article 7500, which provides that "whenever any debts shall be proved against the estate" certain things shall be done. What would an administrator appointed to collect inheritance taxes and that alone have to do with debts against the estate? There are other acts required of the administrator consistent only with the exercise of the powers of a general administrator. In fact, the administrator appointed under the terms of article 7491 is put in the same class with the executor or trustee appointed by the will or the general administrator appointed under the general law of administration, and each one is clothed with the same powers. The general law must be referred to in order to carry out the administration, for no provision is made for the bond and affidavit of the administrator, which it would seem are absolutely necessary, and no method of procedure given in regard to conducting and winding up the estate. Evidently the Legislature contemplated an administration as directed by the general statute, and there can be no due administration of justice under the inheritance tax law without the aid of the general administration law. That the administration is one independent of general administration would be the strongest argument against the constitutionality of the law creating it, and

we see no reason in sustaining any such argument and destroying a salutary law.

[8] We are of opinion that the inheritance tax law is constitutional, as held in our former opinion, and that the county judge had the authority under the law to appoint a permanent administrator of the estate of decedent, and that he has the authority to administer the estate and, among other things, to collect the inheritance tax. If there were no debts due by the estate to any one, then the administration would be confined to the collection of the tax from the beneficiaries and the return of the property to them. No authority, however, was vested in the county judge to approve the contract between Bass and Youngblood, which was executed and approved before any service could have been performed by either Youngblood or Bass, and which by its terms allowed the exploitation of an estate of a deceased citizen of one of the states of the American Union. An analysis of that contract shows that it had been prepared and executed before the appointment of the administrator was made, because it appears that it was of the same date with the appointment and was at once approved by the county judge. The consideration for the contract is stated to be services of the attorney to represent Youngblood "in invoking the jurisdiction of said county court over said estate"; but the statute does not contemplate any such invocation, but makes it, under the old law, the duty of the county attorney to invoke such jurisdiction, and fixes a maximum fee of \$20 for the performance of such services. In fact, the law does not seem to contemplate that a citizen shall apply for administration or invoke the jurisdiction, but in the first instance the county judge is commanded to perform the duty on his own motion, and he recites in his order of appointment that he performed this duty on his own motion. Neither under the inheritance law nor the general law as to administrations was there any ground for the appointment of a temporary administrator. No provision is made in the inheritance tax law for a temporary administration, and it is clear that none is contemplated, and under the provisions of article 3297 a temporary administrator is appointed only "whenever it may appear to the county judge that the interest of an estate requires the immediate appointment," of such administrator. There was nothing in this case upon which to base such appointment, and, if there had been, the appointment did not take effect, because the person appointed had not qualified as required by law. Rev. Stats. art. 3299. It follows that Bass had not, up to the time the contract was approved, performed any service for the estate or any one else.

Under the terms of the contract, the estate was to pay for services to a citizen to

invoke the jurisdiction of a court for something not justified by any law brought to our notice, and the contract seeks to justify such services on the ground that it had been so nominated in the order of the county court appointing the administrator, which was made simultaneously with the approval of the contract. Youngblood testified that Bass had nothing to do with securing the temporary administration, and refused to advise him in any way until the contract was signed and approved, which was after the permanent administration was granted.

Not only was securing the appointment for Youngblood given as a consideration for the contract, but services "heretofore and hereafter to be rendered" by Bass were also to be paid for out of the Dodge estate, the sum to be 5 per cent. of the appraised value of the estate. The appraisers gave the total value of the estate as \$1,830,836.78, and the property in Texas was valued at \$250,000. Not only was a fee of \$12,500 provided for before any service was performed and before it was known that the estate would require legal services, but provision was made for 10 per cent. of any sum that might be sought to be recovered for the estate, so that, if the executors of the Dodge estate sought to recover the lands from the administrator, a fee of \$25,000 more would be taken from the estate. Thus a fee of \$37,500 was provided for, and yet that did not cover the demands of the attorney who obtained the contract, for it was further provided that, if the administrator prevailed in suits brought for the property, the attorney should get another 10 per cent. and further reasonable fees were provided "for any other services." Not only were these unconscionable fees provided for, but 6 per cent. interest was also provided for on delayed payments. The services for which these enormous fees were to be paid were not in the interest of the estate, but were against the estate and for the purpose of appropriating a large portion of it to the use and benefit of the attorney and depriving the estate of those sums.

No such contract has ever been known in the annals of Texas jurisprudence, and it finds no sanction in law, justice, or good conscience. The inheritance tax law makes no provision for employing an attorney and contracting to pay him for services in the future which may never be performed. The administration provided for in that law is primarily for the purpose of collecting an inheritance tax, and, as indicating the legislative mind on the subject, it is provided in the amendment to article 7491 that the person appointed by the comptroller to collect inheritance taxes shall have the power to appoint other persons to sue for and collect the same and shall pay them not exceeding 10 per cent. of the amount of the taxes collected. There is no warrant of authority in the gen-



eral administration law, if it applies to a case of this character, for all services for which compensation is contemplated are those already performed. The statute (article 3623) provides:

"Executors and administrators shall also be allowed all \* \* \* reasonable attorney's fees that may be necessarily incurred by them in the course of the administration."

In article 3624 it is provided:

"All such charges as are provided for in the preceding article shall be made in writing, showing specifically each item of expense and the date thereof and shall be verified by the affidavit of the executor or administrator, and filed with the clerk and entered upon the claim docket, and shall be acted upon by the court in like manner as other claims against the estate."

But in this case an agreement is made to pay an attorney thousands of dollars for services not performed and which probably would never be performed. The contract, as found by the trial court, "is unconscionable, provides for extortionate fees for services not already rendered, and was illegal, contrary to public policy, and void." The law contemplates that the claims of an administrator for attorney's fees must be presented to the court, and it must find that the services rendered were necessary and that a reasonable charge was made for them. In this instance the court has prejudged the matter of attorney's fees, or rather did not sit in judgment upon them at all, and could never pass upon the necessity or reasonableness of the fees.

The contract was fraudulent and void, in the face of justice, equity, and law, and a man who would deliberately enter into a contract to exploit an estate that he is under obligation to protect and maintain was utterly unfit to administer any estate, and it being apparent that the administration was not to conserve the interests of the estate or of the state of Texas, the trial court properly pronounced it null and void. The act of Youngblood in applying for and obtaining an order to sell property, not to pay debts nor to pay the inheritance tax, but to pay unearned attorney's fees claimed under a void contract and pay commissions and unnecessary costs, strengthens the view that the administration was not obtained for any legal purpose.

An administration forced upon an estate cannot be conceived to be legal without the administrator being sworn and required to give a bond. The bond required under the laws of Texas is one not less than double the estimated value of the estate, and yet, in keeping with other matters connected with this administration, the county judge required a bond of \$1,000 of the administrator in an estate valued at \$250,000. Whether

the oath was ever taken or the bond filed is not disclosed by the record in this case.

[10, 11] Upon what grounds the probate of the will of G. M. Dodge, deceased, was refused and the executors not appointed, does not appear from the record of the county court. Article 3276, Revised Statutes of Texas, provides:

"When application is made for the probate of a will which has been probated according to the laws of any of the United States or territories, or of any country out of the limits of the United States, a copy of such will and the probate thereof attested by the clerk of the court in which such will was admitted to probate, and the seal of the court annexed, if there be a seal, together with a certificate from the judge or presiding magistrate of such court, that the said attestation is in due form, may be filed and recorded in the court, and shall have the same force and effect as the original will, if probated in said court; provided, that the validity of such will may be contested in the same manner as the original might have been."

It is not pretended that the requirements of this law were not met by appellees in regard to the will of Grenville M. Dodge, deceased, and such compliance entitled the will to probate. The county judge, under such circumstances, had no power or authority to deny the probate, and then its validity might be attacked by one authorized to make such attack. Rev. Stats. art. 7375; Vidaurri Estate v. Bruni, 156 S. W. 315, writ of error refused; Dew v. Dew, 23 Tex. Civ. App. 676, 57 S. W. 926. No one is entitled to contest the probate of a will except a person interested therein, and in the cited case of Vidaurri v. Bruni this court held that by "person interested" is meant one who either absolutely or contingently is entitled to share therein, and this would exclude the creditor. If the administration had been properly and lawfully obtained, appellants had no authority to assail the will, because that was something with which they were not concerned. If the estate owed the state inheritance taxes, the disposition made in the will could not affect the claim of the state. No matter how much fraud or undue influence was used in procuring the will, the state was not interested. The facts indicate that no interest would be affected by a probate of the will except the interest of the administrator and his attorney in commissions and fees taken out of the estate.

[12] It follows that the sale of the 10 sections of land was illegal and void, and, instead of the proceeds, \$11,870, being used to pay the taxes, \$9,000 was given to the attorney, and the balance appropriated to pay commissions, costs, etc. No necessity was shown for the sale of the land. No claims had been proved against the estate; the whole object of the sale being, as fully appears from the application for the sale, to carry out the design of using the estate to

pay off unearned attorney's fees and commissions and unnecessary costs. The application to sell was made before the lands had been separately appraised and valued and the inheritance tax assessed as required by the statute. When the application was made, only \$18 was due for costs, and the administrator had \$90 belonging to the estate with which to pay the costs. The sale was utterly unjustifiable, not made for any legal purpose, and was null and void. There is no provision made in the inheritance tax law for the sale of land until it has been ascertained who are the legatees or heirs and the amount of the tax charged against the inheritance of each heir, and the sale must be of that portion of the estate. Article 7494. Evidently no attention was paid to that article, and the sale was sought under articles 3489 and 3490, the first of which authorizes an application to sell so much of the real estate belonging to the estate as shall be sufficient to pay local charges and claims against the estate. Article 3490 requires the written application to describe the land and to be accompanied by the affidavit of the administrator showing fully the charges against the estate, etc., of which there were none except the amount of unearned attorney's fees.

On September 15, 1917, before the land of the estate was sold, application was filed in the county court of Real county to probate the will of G. M. Dodge which had been probated in Iowa on January 15, 1916, and an authenticated copy of the will was filed and recorded in the court. Under the provisions of article 3289, when the foreign executor filed the will and made the necessary showing the administrator should have been cited and his letters revoked by the county judge. But such action was refused by the county judge and the unlawful administration continued. The county judge swore that he would not probate the will because he "did not want two administrations for the same property in the same county," not recognizing the requirement of the law that it was his duty to revoke the administration granted by him.

On July 16, 1917, application was made by the administrator for an order authorizing the institution of a suit to procure a construction of the will of G. M. Dodge, and the order was promptly granted, and afterwards one of the charges for which the land was to be sold was \$1,000 to construe the will. The record fails to show that the will was construed, and it would seem that it did not matter about its construction, as the lands belonging to the estate were sold when desired to pay attorney's fees, commissions, and costs. The will should have

been probated as required by statute, and the state could then have collected its inheritance taxes from the estate. The district court properly performed the duty that rested primarily on the county court, and probated the will.

[13] It is the contention of appellants that Youngblood had the will of G. M. Dodge probated on July 16, 1917, and, if that were true, the county judge should have granted letters to the executors, required the necessary bonds, and have removed Youngblood from the administration. All that was done by Youngblood was to file the will and have it recorded, which was done, it would seem, as a basis for a suit to construe the will. The county judge made no order probating the will or appointing an executor. Under the terms of article 3278, if the will was probated in July, 1917, as claimed by appellants, it was the duty of the court to grant letters testamentary to the executor or executors appointed by the will, and that was not done, and appellants are contending that executors to whom letters were not granted are prohibited from afterwards having themselves appointed and qualifying as executors because more than 20 days had elapsed after the probate before they sought to qualify. It would be a legal farce and a solemn travesty of justice to hold that a party in Texas could, unknown to executors under a foreign will, have the will of their testate probated and afterwards prohibit them from administering the estate because barred by limitation. Courts will not lend themselves to the perpetration of such injustice. The executors, ignorant of the attempted probate of the will of G. M. Dodge, being in a distant state, and not having received any appointment by the court, could scarcely be expected to qualify as executors in Texas. The district court had the authority to perform the duty, which should have been performed by the county court, and properly met the duty. Whether letters testamentary had been granted to Dodge and Montgomery in Iowa or not, they were appointed in the will, and that fact brought them within the purview of the statute. The record filed by Dodge to obtain a probate of the will, however, showed that he and Montgomery had qualified in Iowa as executors of the estate of Grenville M. Dodge, deceased.

Every material point that could arise in the case has been considered, despite the fact that some of them are not presented properly in the brief, and nine-tenths of the assignments of error are drawn and presented without reference to rules prescribed by the Supreme Court.

The judgment is affirmed.

**MERCHANTS' LIFE INS. CO. v. LATHROP.**  
(No. 942.)

(Court of Civil Appeals of Texas. El Paso.  
March 20, 1919.)

**INSURANCE** §=86, 198(1)—**MUTUAL BENEFIT INSURANCE—REORGANIZATION OF COMPANY—BREACH OF CONTRACT.**

Iowa life insurance association, conducted on mutual assessment plan, by its reorganization into legal reserve or level premium company, pursuant to right under one of its articles of incorporation and Code Sepp. Iowa 1912, § 1798b, a right conditional on change not affecting any membership dated prior to it, held to have breached contract with member, who became such prior to change, in respect of impairment of fund created for protection of certificate, and the member was entitled to recover sums theretofore paid by him with interest.

Appeal from Taylor County Court; E. M. Overshiner, Judge.

Action by Chester H. Lathrop against the Merchants' Life Insurance Company. From a judgment for plaintiff, defendant appeals. Judgment affirmed, less the amount remitted.

Cunningham & Oliver, of Abilene, and Locke & Locke, of Dallas, for appellant.  
Sayles & Sayles, of Abilene, for appellee.

**Statement of Case.**

HIGGINS, J. In 1896, appellant was incorporated under the laws of Iowa as a life insurance association, to be conducted upon a mutual assessment plan. On August 31, 1907, appellee Lathrop, at the age of 47, was admitted to membership, and a certificate of membership and of insurance in the sum of \$2,000, issued to him, payable to his wife, in the event of his death. The articles of incorporation and by-laws of the association were made a part of the contract. The articles of incorporation were indorsed upon the certificate, and pertinent portions thereof read:

Article III: "The business of this association shall be conducted upon the mutual assessment plan, secured by a reserve fund contributed by the members pro rata, according to the age at time of entry. All interest in the reserve fund, and the certificate of membership to be forfeited upon the failure of a member to pay his assessment as provided by in these articles of incorporation."

Article XIII: "The funds of the association shall be designated as follows: The benefit fund, the reserve fund, and the contingent fund. Each fund to be kept separate on the books of the association, and each fund shall be used only for the purposes herein provided. The benefit fund shall consist of the moneys collected for the payment of death losses, and shall be collected by pro rata assessments levied by the board of directors on each certificate of mem-

bership of the association. In providing funds for the purpose of promptly meeting all the claims against the association, the board of directors may from time to time determine and fix the amount deemed necessary therefor, the place at which, and the time at which or during which it shall become due and payable, and may regulate the method of collecting the same, and the board may in like manner provide funds in advance for the payment of any claims which may be anticipated during the three months next ensuing basing estimates therefor on the American Experience Tables of Mortality.

"The reserve fund shall consist of the interest accruing from all the funds of the association and the amount paid into said fund by each member of the association, which amount shall consist of the sum of fifty cents for each year of the age of the member, counted from the nearest birthday at the time such membership is applied for. Said amount may be paid in cash or secured by a note at 4 per cent. interest, payable on such terms as the board of directors may prescribe, and if not paid within thirty days after the same or any part thereof becomes due and payable shall be forfeited to the association, and the certificate of membership shall become null and void. This reserve fund shall be set apart as an emergency fund for the purpose of providing for the death losses in excess of one per cent. per annum of the membership of the association, and for the further purpose of advances for the payment of death losses when the benefit fund is exhausted, and for no other purpose."

Article XVII: "These articles of incorporation may be amended at any annual meeting of the association by a majority vote of the members present or voting by proxy. They may also be amended by a like vote at special meeting called by the board of directors for that purpose; but in the latter case thirty days' notice in writing must be given the members, which notice shall show the amendments or alterations proposed, and the mailing of such notice addressed to the member at his last known post office address shall be deemed a service thereof. But no proposed amendment to these articles of incorporation shall be considered at any special meeting unless the same shall have been on file in the office of the secretary for thirty days before such meeting. In no case, however, shall the change be made so as to affect any membership dated prior to such amendment or change."

In January, 1909, article 17, was amended so as to read as follows:

"These articles of incorporation may be amended at any annual meeting of the association by a majority vote of the members present or voting by proxy. They may also be amended by a like vote at special meetings called by the board of directors for that purpose; but in the latter case thirty days' notice in writing must be given the members, which notice shall show the amendments or alterations proposed, and the mailing of such notice to the member at his last known post office address shall be deemed a service thereof. But no proposed amendment to these articles of incorporation shall be considered at any special meeting un-

less the same shall have been on file in the office of the secretary for thirty days before such meeting. All certificates issued shall be governed by the articles of incorporation and by-laws now in force or which may be hereafter adopted."

At the time he received his certificate, Lathrop paid into the reserve fund the sum of \$23.50, and subsequently thereto, paid all assessments up to and including call No. 84, made in October, 1915. He refused to pay call No. 85, due January 1, 1916, and thereafter brought this suit upon the theory hereinafter indicated.

On February 9, 1915, said article 13 was amended by adding thereto the following:

"Provided that if the holder of any certificate shall substitute for his existing certificate any other form of certificate or policy which may be from time to time issued by this association, his contributions to the reserve fund and special reserve fund shall be applied to the payment of assessments or premiums on such substituted certificate or policy, in which event the amount aforesaid shall be paid over from such funds to the proper funds applicable for such purpose."

On February 10, 1915, amended and substituted articles of incorporation were adopted whereby the association was converted into a legal reserve or level premium company, with a capital stock of \$100,000 divided into shares of \$100 each. Pertinent portions of the amended articles of incorporation read:

Article III: "The purpose and intent of this amendment is to transform this corporation into a legal reserve and level premium insurance company, as provided by section 1798 (b) of the Supplement to the Code 1907 and its business shall be that of life insurance as a legal reserve or level premium company and it shall have and possess full power to transact and conduct every kind of life insurance provided for or permitted under chapters 1-6 and 8 of title 9 of the Code of Iowa of 1897, and all amendments thereto or hereafter adopted. And it shall be a continuation of the original corporation and retain all its original rights, powers, privileges and franchises so far as may be necessary to carry out all its contracts heretofore made with its members, including the issuance of certificates upon examination made at the time these articles become in force as such association, and this amendment shall not be construed to affect existing funds, rights or contracts excepting as in these articles expressly stated and these articles are and shall be construed as a substitution for the original articles, except in so far as the rights of existing members are concerned."

Article XII: "With the exception of carrying out the assessment contracts now outstanding, all business shall be conducted upon the level premium plan and the directors shall adopt such plan of insurance, forms of policies and tables of rates, etc., thereunder and not inconsistent with the law or the rights of existing members as they may deem proper."

Article XIII: "The board of directors shall

provide suitable contracts whereby the holders of any certificates desiring to change to any level premium policy issued by the company may do so without medical examination and upon such equitable and uniform terms as may be provided by such board."

Article XIV: "The holders of certificates of membership issued under the original and amended articles of incorporation and by-laws as the same existed prior to the adoption of these amended and substituted articles of incorporation shall in the aggregate annually be charged for mortuary purposes such proportion of the total losses of the company as the expected loss on such certificates at attained age bears to the expected loss on the total amount of risks according to the American Experience Table of Mortality, but in providing for the amount required for losses under such certificates the contributed amount then shall continue to be made upon the basis of the age of entry, in accordance with the provisions of the articles and by-laws aforesaid, and the assessments therefor shall be made quarterly in advance as provided therein."

Article XV: "If the holder of any certificate heretofore issued by the association shall exchange the same for any policy issued by this company, his previous contribution to the reserve and special reserve fund shall be applied to the payment of premiums on such substituted policy, in which even the proper amount less interest or other accumulations thereon shall be transferred from such fund of the association to that of the company."

Article XVI: "The rights, liabilities and entire method of procedure with reference to the outstanding assessment contracts of this company shall be governed by the original articles and by-laws and amendments thereto, forming a part of said assessment contracts and shall remain unaffected as to them, excepting so far as modified by these amended and substituted articles of incorporation and excepting that all contingent fund payments shall be paid over to the general fund of the company."

The board of directors immediately, subsequent to the amendment of the articles of incorporation, adopted the following resolution:

"Resolved: That by-laws heretofore adopted for the government of the association be amended for the government of the company under the amended articles of incorporation by the addition thereto of the following, namely:

"Section 1. That the rights, liabilities, and the entire method of procedure with reference to the outstanding assessments contracts of this corporation shall be governed by the original articles and by-laws forming a part of said assessment contracts, which shall remain unaffected as to them, excepting so far as necessarily modified by the amendments to the articles of incorporation of this corporation, by 'original articles and by-laws,' as used in this section being meant the articles of incorporation and by-laws of this corporation as the same existed prior to the adoption of the amendments, transforming it into a legal reserve company.

"Sec. 2. The by-laws of this corporation heretofore passed shall not govern the issuance of the legal reserve policies or contracts or the

procedure thereunder or relating thereto, nor shall said by-laws be or be construed as any part or portion of any contract of insurance hereafter written by this corporation upon the legal reserve or level premium plan."

Section 1798b of the Iowa Code, under which the appellant's articles of incorporation were amended, reads:

"Sec. 1798b. *Reincorporation as Legal Reserve Company—Stock Company.*—Any existing domestic assessment company or association or fraternal beneficiary society may, with the written consent of the auditor of state, upon a majority vote of its trustees or directors, amend its articles of incorporation and by-laws in such manner as to transform itself into a legal reserve or level premium company, and upon so doing and upon procuring from the auditor of state a certificate of authority, as prescribed by law, to transact business in this state as a legal reserve or level premium company, shall incur the obligations and enjoy the benefits thereof, the same as though originally thus incorporated, and such corporation, under its charter as thus amended, shall be a continuation of such original corporation, and the officers thereof shall serve through their respective terms as provided in the original charter, but their successors shall be elected and serve as in such amended articles provided; but such amendment or reincorporation shall not affect existing suits, rights or contracts. Any assessment company or fraternal beneficiary society reincorporated to transact life insurance business, shall value its assessment policies or certificates or benefit certificates as yearly renewable term policies according to the standard of valuation of life insurance policies prescribed by the laws of this state; provided that accident or health associations may take advantage of all the provisions of this section, in so far as applicable, and may thereupon transform themselves into stock companies. But no such company or association shall reorganize under the provisions of this section unless it shall have accumulated sufficient surplus to constitute a reinsurance reserve equal to the unearned premium on all outstanding policies or certificates, as prescribed by the statutes of this state relating thereto."

The amendments to appellant's articles of incorporation were made in the manner prescribed by the laws of Iowa.

Other facts material to a consideration of the question presented will be indicated in the opinion.

On January 27, 1916, Lathrop filed this suit seeking to recover the various sums which he had paid appellant with interest from date of payment. He recovered judgment as prayed for.

#### Opinion.

The suit was predicated upon the theory that appellant had breached its contract. The fundamental question presented is whether

er the reorganization of appellant and its acts in pursuance thereof constitute a breach of its contract. This, we think, must be answered in the affirmative. It is not to be doubted that, under the law of Iowa and article 17 of the articles of incorporation, as such articles existed in 1907, appellant had the reserved right to amend its charter and reorganize as a legal reserve or level premium company. But this right was conditional. Article 17 expressly stipulates:

"In no case, however, shall the change be made so as to affect any membership dated prior to such amendment or change."

Section 1798b of the Iowa Code provides:

"But such amendment, or reincorporation, shall not affect existing suits, rights, or contracts."

These limitations upon the right of amendment and reorganization have been disregarded so as to materially affect the membership and rights of Lathrop in the particular now indicated. The reserve fund was set apart in trust as an emergency fund for the purposes specified in article 17. It was to be used for no other purpose. The amended articles authorize a diversion of the fund to the reorganized company in payment of premiums, due the company by holders of certificates who exchange the same. On February 1, 1915, the reserve fund amounted to \$929,556.76. After the reorganization and up to April 1, 1916, 6,770 certificates of insurance had been surrendered and level premium policies issued in lieu thereof, and \$140,661.68 (approximately one-seventh) of the reserve fund of the association withdrawn and diverted to the assets of the reorganized company as credits on premiums due upon new policies issued by the reorganized company. It is manifest that this course of conduct seriously impairs the fund which was created for the protection of Lathrop's insurance certificate, and may ultimately render his contract worthless. It is regarded as such a breach of the contract as entitled appellee to sue for and recover the sums theretofore paid by him with interest.

*Ericson v. Supreme, etc.*, 105 Tex. 170, 146 S. W. 160; *Supreme Council, etc., v. Batte*, 34 Tex. Civ. App. 456, 79 S. W. 629; *Grand Lodge v. Stumpf*, 24 Tex. Civ. App. 309, 58 S. W. 840; *Black v. Supreme Council (C. C.)* 120 Fed. 590, affirmed 123 Fed. 650, 59 C. C. A. 414.

By miscalculation judgment was rendered for \$36.03 more than was proper. This is suggested for the first time in this court. Appellee in correction of the error has filed a remittitur in the amount indicated. The judgment is affirmed, less the amount remitted. Costs are taxed against appellant.

**MERCHANTS' LIFE INS. CO. v. HANKS.****SAME v. MOTZ.**

(Nos. 943-944.)

(Court of Civil Appeals of Texas. El Paso. March 20, 1919.)

Appeal from Taylor County Court; B. M. Overshiner, Judge.

Actions by Charles Motz, Jr., and Marshall Bernard Hanks, against the Merchants' Life Insurance Company. From judgments for plaintiffs, defendant appeals. Affirmed.

Cunningham & Oliver, of Abilene, and Locke & Locke, of Dallas, for appellants.

Sayles & Sayles, of Abilene, for appellees.

**HIGGINS, J.** These are companion cases to Merchants' Life Ins. Co. v. Chester H. Lathrop, 210 S. W. 593, this day decided. It is agreed by the parties that the facts are the same, and that the cases are governed by the same principles of law. In these cases there is no error in amount of the judgments. Upon the authority of the Lathrop Case, these cases are affirmed.

**QUARLES et al. v. EATON-BLEWETT CO.\***

(No. 8989.)

(Court of Civil Appeals of Texas. Ft. Worth. Dec. 7, 1918. Rehearing Denied Jan. 18, 1919.)

**1. FRAUDULENT CONVEYANCES §=159(1) — SUBSEQUENT CREDITORS—KNOWLEDGE OF GRANTEE.**

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 3967, a conveyance made with intent to defraud subsequent creditors may be held void, where grantee had knowledge at time of conveyance of fraudulent purpose of grantor.

**2. FRAUDULENT CONVEYANCES §=298(4) — SUBSEQUENT CREDITORS—PROOF OF FRAUD.**

While insolvency of a grantor at time of a conveyance or by reasons thereof is not in itself sufficient to render void said conveyance as to subsequent creditors, and while the creation of debts thereafter by the grantor is not sufficient to establish the fraudulent intent with which the conveyance was made, yet such facts and circumstances connected with entire transaction may constitute proof sufficient to show an intent to defraud subsequent creditors.

**3. FRAUDULENT CONVEYANCES §=298(4), 801 (4)—SUBSEQUENT CREDITORS—EVIDENCE.**

In action involving a conveyance of a farm and personal property, evidence held sufficient to justify finding that conveyance was executed by husband to wife with intent to defraud future creditors, and that such intent was shared by grantee, who had knowledge at time indebtedness was created that husband was purchasing goods on credit, and that he was insolvent.

**4. EVIDENCE §=230(4) — DECLARATIONS OF GRANTOR.**

Statements of grantor in absence of grantee that a conveyance of land and personalty was

intended as a will was not admissible in an action involving the rights of creditors.

**5. APPEAL AND ERROR §=1060(2)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In an action involving question whether conveyance was in fraud of creditors, admission in evidence of a declaration of grantor that conveyance was intended to take place of a will was harmless; character of instrument, so far as its recitals were concerned, not being in issue.

**6. FRAUDULENT CONVEYANCES §=286(4) — EVIDENCE—SUBSEQUENT CONDUCT OF PARTIES.**

In action involving question whether a conveyance from husband to wife was made to defraud subsequent creditors, evidence that prior to year of conveyance grantor was a close buyer, but that during said year he was a liberal buyer, was admissible both against husband and wife, who received benefit of such purchases and in some instances bought articles herself.

**7. INJUNCTION §=199—RELIEF TO DEFENDANT—STATUTORY PENALTY.**

In injunction suit, where such issue was not submitted to jury nor requested by either party, though defendant in its answer asked for penalty provided under Vernon's Sayles' Ann. Civ. St. 1914, art. 4667, held that court erred in allowing defendants 10 per cent. damages in way of statutory penalty.

Appeal from District Court, Erath County; J. B. Keith, Judge.

Suit by L. A. Quarles and another against the Eaton-Blewett Company. Judgment for defendant, and plaintiffs appeal. Reformed, and affirmed.

R. L. Thompson, of Stephenville, for appellants.

W. P. Gibbs, of Gordon, for appellee.

**BUCK, J.** This is an appeal from a judgment of the district court of Erath county, dissolving a temporary injunction theretofore granted upon the petition of Mrs. L. A. Quarles, joined pro forma by her husband, John Quarles. She alleged that she possessed in her own separate right, and was the owner and holder of the legal and equitable title to certain described real estate located in Erath county, consisting of some 319 acres, and of certain personal property consisting of cattle and horses. It was further alleged that she held title to said real estate by deeds, duly recorded in the office of the county clerk of Erath county, and that thereafter there was issued out of the district court of Erath county a certain order of sale in the case of Eaton-Blewett Company v. John Quarles, under a judgment in said cause against said John Quarles for the sum of \$892.47, and for a foreclosure of an attachment lien theretofore levied upon said real estate as the property of said John Quarles,

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Writ of error granted March 19, 1919.

said order of sale having been placed in the hands of the sheriff of Erath county, and that the sheriff had advertised said land for sale, and would proceed to sell it to satisfy the judgment against John Quarles, unless enjoined from so doing. A temporary injunction was granted, but upon a hearing upon the merits the same was dissolved, and plaintiff has appealed.

The salient facts are that John Quarles and his wife, Mrs. L. A. Quarles, had accumulated as the fruits of their joint labor and efforts during a period of some 35 years, about 1,000 acres of farm and pasture land in Erath county and near to the town of Gordon, and also certain live stock and other personal property. On January 25, 1915, John Quarles conveyed all of said land and personal property to his wife during her natural life, and the instrument further provided that at the death of Mrs. Quarles the estate should descend to and be divided among their five children named. The instrument recited as follows:

"Know all men by these presents: That I, John Quarles, of said county and state (on the condition that the grantee herein allows to me the sum of thirty-three and one-third dollars per month during my natural life), for and in consideration of the love and affection that I have for her, and the further consideration that she pay to me the said sum above mentioned during my lifetime and the further consideration that she give me a home during my lifetime, have granted, sold and conveyed and given, and do by these presents grant, sell, convey and give to my wife, L. A. Quarles, of Erath county, Texas, all the following described real estate and personal property."

The evidence discloses that the instrument of conveyance was filed for record on the date of its execution; that at this time the children of Mr. and Mrs. Quarles were all grown, or practically so, and that one son, Tobe, was married; that the property described in the instrument of conveyance was all community property of John Quarles and his wife; and that he had no separate property. During the year 1915, and beginning shortly after the date of the execution and record of said instrument of conveyance, and ending October 9th, John Quarles incurred an indebtedness to Eaton-Blewett Company of some \$853.10. The items purchased consisted of groceries, farm implements, clothes, fence posts, a wagon, a hay press, plows, and, generally, such articles as would ordinarily be used by a family and on a farm. Of this amount, \$6.80 was purchased during 1914, \$17.10 was purchased during January, 1915, but prior to the date of the deed. A credit for \$22.40, rent of a stable, was allowed Quarles on January 5th. Hence practically the entire indebtedness was incurred after January 25, 1915. During the same period, that is, from January 25th to some time in October, 1915, Quarles purchased,

from the Hardin Lumber Company of Gordon, lumber and other building material in the sum of \$723.28. This material, the evidence shows, was placed in the home and on the premises occupied by Mr. and Mrs. Quarles. During the same time Quarles purchased from J. W. Conway, also a merchant at Gordon, various articles of general merchandise, dry goods, hardware, etc., making a total of \$775.32, from February to October 22d. He also purchased during said period, from J. M. Oden, farmers' supplies of the same character, in the total sum of \$708.80. The total purchases, during said period, aggregated something over \$3,000. While some of these goods were purchased by the adult children of John Quarles and by his tenants, he had instructed the merchants to sell to the said children and to the tenants and charge the items to him.

In October the adult son of Quarles brought some cotton into Gordon for sale. It had been customary that when farmers were indebted to merchants for them to sell to said merchants their cotton and other farm products as they were gathered, and to permit the same, or at least, a portion thereof, to apply on their indebtedness. When young Quarles, by whom some of the articles bought had been purchased and who lived on his father's place, was asked by one of the merchants interested if he would sell his cotton and allow the proceeds to apply on the indebtedness, he replied that he did not owe anything, and must have cash for the cotton. This unexpected attitude on the part of young Quarles caused some surprise, and the investigation following resulted in the discovery that John Quarles was indebted to the several merchants mentioned in an aggregate amount largely in excess of what had been his usual and customary annual expenditure. The creditors had a "grove meeting." It appeared that each merchant dealing in general merchandise had thought that Quarles was dealing exclusively with him, and that during former years Quarles' total account did not run in excess of some \$700. Following a report of the execution and record of this instrument of conveyance, parties were sent to Stephenville, the county seat, and found that the report was true, and that the instrument was on record. Then the creditors sent representatives to see Quarles, who lived some seven or eight miles from Gordon. He admitted the execution of the instrument and acknowledged that he had no present means of paying the indebtedness, or any property with which it could be paid, but stated that he would try to borrow the money with which to settle it. The creditors offered to take notes signed by Quarles and his wife, but Mrs. Quarles refused, and John Quarles failed to execute the notes sent for that purpose. Quarles also declined to tell W. P. Gibbs, attorney for appellee, from what

source he expected to get the money to satisfy the indebtedness to that company. Suits were then filed by the several creditors and judgment obtained against John Quarles. Upon an effort to satisfy the Eaton-Blewett judgment out of a portion of the real and personal property, the injunction application by Mrs. Quarles, joined by her husband, followed.

Appellant urges that as without controversy the indebtedness of John Quarles was incurred subsequent to the conveyance by him to his wife, such conveyance could not be in fraud of the creditors. Appellee, defendant below, pleaded the insolvency of John Quarles at the time of the accrual of the indebtedness complained of, that the articles purchased were reasonably necessary for the support and maintenance of Mrs. Quarles and her children, and certain of the articles, such as lumber and other building material, farm implements, etc., were for the benefit of Mrs. Quarles' claimed separate estate in the property involved, and constituted valuable and permanent improvements upon her real estate, thus enhancing the value thereof, and that both plaintiffs purchased and appropriated all of the goods for which the indebtedness was incurred with the full knowledge on the part of Mrs. Quarles of the insolvency of her husband, by reason of the conveyance aforesaid, of which insolvency defendant had no notice or knowledge whatever. Mrs. Quarles accepted said goods and used them for the benefit of her children, and that she became liable, and promised to pay for them.

Appellee further alleged that the real estate and the personal property was the community estate of Mr. and Mrs. Quarles, and that Mrs. Quarles accepted the conveyance of said community estate to her with the full knowledge of the intention of her husband to purchase goods, wares, and merchandise largely in excess of what he had theretofore purchased annually, and that she received and used said goods and accepted and ratified all of the transactions in question with the full knowledge of her husband's insolvency, and with the full knowledge that he intended at the time to defraud the merchants and tradesmen with whom he was dealing out of the value of said goods; that prior to said time it had been the custom of plaintiffs to purchase, from the defendant and the other merchants at Gordon, largely on credit, running through the season, aggregating \$300 or \$400 a year, and that theretofore the plaintiffs had always paid their debts promptly, and had a good reputation in the said town and among said merchants for honesty and fair dealing; that said merchants, and especially defendant, having no knowledge of the change of heart on the part of plaintiffs, nor of the execution of the instrument of conveyance, relied upon plaintiffs' former conduct and reputation for honesty and fair dealing, and relied on the

fact that they possessed valuable property, upon which they had for many years made good crops, and said merchants parted with their goods relying on such facts, and entirely ignorant of the intent to defraud on the part of both plaintiffs, and of the execution of the conveyance from John Quarles to his wife.

Neither plaintiff testified in the case, nor sought to explain the purchase of goods so largely in excess of their former annual purchases. No explanation was given as to the reason of the conveyance, except that John Quarles stated to the attorney for appellee, when the latter went to the farm to see him:

"I regard the conveyance to my wife as more of a will than anything else. I wanted to fix up my property so if anything happens to me the courts and lawyers would not gobble it up."

Jim Quarles, brother of John Quarles, and T. J. Quarles, his father, testified that about the time the creditors were seeking to get a settlement out of John Quarles, the latter asked if he could get some money from them with which to satisfy his creditors. Jim Quarles told John that if he could sell a certain bunch of cattle he would let him have the money received therefor. The evidence shows that Jim Quarles was asking \$1,800 for said cattle, and that he allowed \$15 between what he asked and what he was offered to prevent the trade. He further testified:

"I did not intend to give John the money; I was just intending to loan it to him. Yes, sir; I intended to make myself secure in the loan. I don't know just how long before I saw Judge Gibbs that day it was before John spoke to me about the money; I guess it was something like a week probably. I expected to get security just any way John could make me safe. Q. You didn't expect him to make you safe if he had no property? A. I supposed he could do it some way or another; I didn't know just how it could be fixed up."

T. J. Quarles testified that he was 84 years old, and lived about one-half mile from his son John. He further testified:

"John spoke to me about getting some money last fall, before the time that Judge Gibbs and some more parties were out there levying on John's property. I had agreed to let John have the money. I had the money in the bank at Gordon, First National. John said he guessed he would need what money I had—he said those people wanted their money, and, 'I have a chance to get some from Jim.' \* \* \* I had before that time promised John this \$500. I didn't tell Judge Gibbs anything about that."

Article 3967, Vernon's Sayles' Texas Civil Statutes, is as follows:

"Every gift, conveyance, assignment, transfer or charge made by a debtor, which is not upon consideration deemed valuable in law, shall be void as to prior creditors, unless it appears that such debtor was then possessed of property within this state subject to execution sufficient to



pay his existing debts; but such gift, conveyance, assignment, transfer or charge shall not on that account merely be void as to subsequent creditors, and though it be decreed to be void as to a prior creditor, because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers."

[1,2] That a conveyance made with intent to defraud subsequent creditors may be held void where the grantee has knowledge at the time of the conveyance of the fraudulent purpose of the grantor is indicated by the article quoted, and is recognized by numerous authorities. While the insolvency of the grantor at the time of the conveyance, or by reason thereof, is not in itself sufficient to render void said conveyance as to subsequent creditors, and while the creation of debts thereafter by the grantor is not sufficient to establish the fraudulent intent with which the conveyance was made, yet the facts and circumstances connected with the entire transaction may constitute circumstantial proof sufficient to show the intent to defraud subsequent creditors, and, if so shown, the conveyance may be held void. Appellant relies on a line of authorities such as *Lewis v. Simon et al.*, 72 Tex. 470, 10 S. W. 554; *De Garca v. Galvan*, 55 Tex. 53; *Monday v. Vance*, 51 S. W. 348, writ denied; *O'Neal v. Clymer*, 61 S. W. 545, writ denied; *Searcy v. Gwaltney Bros.*, 36 Tex. Civ. App. 158, 81 S. W. 576; *Parks v. Worthington*, 101 Tex. 505, 109 S. W. 909.

In *Lewis v. Simon*, supra, the court held that a voluntary conveyance in fraud of existing creditors, recorded on the day of its execution, is not void as to future creditors merely because the grantor afterwards engages in extensive speculations, and soon becomes insolvent. The opinion in part is as follows:

"Conceding, therefore, that the deed from Simon to his wife was a voluntary conveyance, and that it was void as to existing creditors, this does not render it void as to subsequent creditors. The only facts remaining, from which fraud in the conveyance as to the latter class of creditors could be deduced, are that soon thereafter Simon began operating upon a large scale, and shortly became insolvent. The use of the word 'merely' in the statute quoted indicates that the Legislature contemplated that cases might arise in which a voluntary conveyance should be held void even as to subsequent creditors, but we are clearly of opinion that the facts here in evidence do not make such a case. If a grantor should voluntarily convey his property to his wife or children, and should cause the deed to be withheld from the record, intending, notwithstanding his conveyance, to obtain credit upon the faith of his still being the owner of the property, and should he accordingly obtain such credit, a strong case would be presented for holding the conveyance fraudulent, although it might be placed upon the record before the creditor secured a lien upon the property by judgment or otherwise. \* \* \* It has been held that where a voluntary conveyance is made in

contemplation of the grantor's entering upon hazardous speculations, and with a view to protect it from subsequent creditors, in the event his ventures should result disastrously, it is fraudulent as against such subsequent creditors. *Walt, Fraud. Conv.* §§ 100, 101, and cases cited. But the author cited also says: 'As a general rule, a subsequent creditor, who acquired his claim with knowledge or notice of the conveyance sought to be annulled, cannot attack it as fraudulent.' *Id.* § 106; *Baker v. Gilman*, 52 Barb. [N. Y.] 39. This rule has been recognized in former decisions in this court. *Lehmborg v. Biberstein*, 51 Tex. 457; *De Garca v. Galvan*, 55 Tex. 53; *Van Bibber v. Mathis*, 52 Tex. 406. The creditor knowing that the grantor has voluntarily parted with his property, we fail to see the device or deceit by which he can claim to have been defrauded."

In the instant case the evidence shows that the creditor had no actual knowledge of the conveyance, and that neither John Quarles nor his wife, up to the time of the visit by the creditors to the Quarles farm, ever intimated to the creditors that such conveyance had been made. In the case of *Walsh v. Byrnes*, 39 Minn. 527, 40 N. W. 831, cited in footnote to *Lewis v. Simon*, supra, it is said:

"Voluntary conveyances by an embarrassed debtor are *prima facie* fraudulent as to pre-existing creditors, and the presumption arises from the existence of the indebtedness, and hence the rule could not, in the absence of additional facts tending to prove fraud in fact, apply to cases of subsequent indebtedness. But it is well settled that where voluntary conveyances are actually fraudulent, and the purpose or effect of the same is to prejudice subsequent creditors, such conveyances will also be void as to them. \* \* \* And where a conveyance is made *mala fide*, and the fraud is participated in by both parties thereto, it is subject to be assailed by creditors, existing or subsequent. But the question whether a subsequent creditor will be entitled, in any particular case, to have a prior conveyance set aside for fraud, must be one of fact, to be determined upon its own peculiar circumstances."

In *Cole v. Terrell*, 71 Tex. 549, 9 S. W. 668, it is said:

"Appellants insist that the appellees were not existing or prior creditors (or claimants of damages) at the date of Wilson's deed to his wife, and therefore cannot complain at the transfer."

The court then quotes article 2466, now 3967, Revised Statutes, and further says:

"This statutory rule, as explained by itself, does not prevent a voluntary conveyance from attack by a subsequent creditor upon showing not merely that the conveyance was voluntary, but was made with fraudulent intent.

"The Texas statute of frauds (Revised Statutes, article 2465) which is a substantial reenactment of St. 13 Ellis. c. 5, has been construed and applied under the authorities from the many courts upon its terms. In *Bump on Fraudulent Conveyances* (2d Ed.) p. 308, referring to numerous authorities, their general effect is summed up: 'It is, accordingly, well

settled that if a party makes a conveyance of his property with the express intent to become indebted to another and to defraud him of his debt by means of this artifice, such subsequent creditor may contest, and by proof defeat, the transfer, although he was not a creditor of the grantor at the time of the conveyance.' And again: 'The simple fact of a subsequent indebtedness is not sufficient to make a transfer fraudulent.' There must exist, at the time, on the part of the grantor, a fraudulent view, and until this fraudulent purpose is established, either by positive proof or the exhibition of such facts as justify the inference of its actual existence, the conveyance cannot be set aside.' *Id.* p. 310.

"From these citations it appears that article 2466, Revised Statutes, is but a legislative approval of the rule of decision theretofore followed by the courts as to the effect of a voluntary conveyance as against the creditors of the grantor. The cases (55 Tex. 53, *De Garca v. Galvan*, and 65 Tex. 658, *Willis & Bro. v. Smith*) where the general proposition is given that subsequent creditors cannot complain seem to have been cases where the conveyances were attacked without producing evidence of intent to defraud the complaining creditors."

In *Dosche, Adm'r, v. Nette*, 81 Tex. 285, 16 S. W. 1013, the court held that—

"A gift by an insolvent debtor would be void as to prior creditors, but not necessarily so as to subsequent creditors even though it should be decreed void as to prior creditors. *Rev. Stats. art. 2466.*"

The Supreme Court reversed the judgment in this case because the trial court refused a special charge, submitting to the jury the question of fact as to whether the creditor had made the conveyance to his son with intent to place the property beyond the reach of, and to hinder, delay, or defraud, his creditors, and in contemplation of contracting future debts. See *Rives v. Stephens*, 28 S. W. 707, writ denied; *Bergson v. Dunham*, 40 S. W. 17. "The simple fact of subsequent indebtedness is not sufficient to make a transfer fraudulent, but there must exist at the time, on the part of the grantor, a fraudulent view; and, until this fraudulent purpose is established, either by positive proof, or the exhibition of such facts as justify the inference of its actual existence, the conveyance cannot be set aside." *Bump, Fraud. Conv.* (2d Ed.) p. 308. But it is well understood that fraud of the kind charged in this case can rarely be established by direct evidence, and resort must almost always be had to circumstances, more or less conclusive in their nature.

[3] In the instant case, we think the testimony was sufficient to justify the jury in finding, as they did, that the instrument of conveyance was executed by John Quarles with intent of protecting the property therein conveyed from the payment of future debts, and with intent to defraud future creditors, and this intention was shared by Mrs. Quarles, and that Mrs. Quarles had

knowledge at the time the indebtedness was created that her husband was purchasing goods from defendant, on credit, and that he was insolvent from and after the first purchases were made. The evidence discloses that John Quarles was in the prime of mature manhood, in good health, with no reasonable apprehension of premature death, that he was capable of managing the community estate of himself and wife, was a good farmer, and continued to manage said estate subsequent to the conveyance in the same way as before; that in the incurring of the indebtedness to the four merchants mentioned, he never intimated that he had made such conveyance, nor did his wife, who purchased some of the goods and received the benefit of a large portion of them, disclose any purported change in the title to the property. No pretense of the existence of any indebtedness by the husband to the wife in satisfaction of which the conveyance was made. There is no evidence in the record that even the small monthly stipend, recited as a part of the consideration, was ever paid. Quarles and his wife had been known for many years as very economical buyers, thrifty and frugal, their yearly purchases had heretofore not exceeded one-fourth of the amount of the indebtedness incurred from February 1st to the latter part of October, 1915. It must be reasonably presumed that Mrs. Quarles knew of this unusual expenditure, for a large portion of it went into the repair of the house in which she lived, and most of the remainder went to pay for articles of merchandise used by the family or on the farm. The jury were justified in concluding that she knew that her husband, if the conveyance should be held valid and binding, had stripped himself of the means of paying this large indebtedness. By defendant's pleadings an unqualified charge of fraud was made against both husband and wife, a charge, especially in view of the previous conduct and good reputation of both parties, which they would be expected to answer by showing the good faith of the conveyance, but both remained as silent as "Moses' tomb." We think the facts sustain the verdict of the jury and the judgment of the court as to the issue of fraud.

[4, 5] In the third assignment complaint is made of the admission of the testimony of J. P. Browder, to the effect that when he (Browder) went out to Quarles' home to see him with reference to the indebtedness to the Hardin Lumber Company, Quarles said that he regarded the conveyance to his wife as more of a will than anything else; that he wanted to fix up his property so that if anything happened to him the courts and lawyers would not "gobble it up." This testimony was objected to on the ground that a party attacking a conveyance on the ground

of fraud cannot impeach the title of the grantee by statements or declarations of the grantor made out of the presence of the grantee and subsequent to the execution of the instrument of conveyance. It is true that statements of a grantor in derogation of the grantee's title, in cases of this kind, are not ordinarily admissible, but in this instance the instrument was in evidence, and there was no contention on the part of the defendant below that the instrument did not purport to convey and dispose of such title as the grantor had. It is true that the latter part of the instrument following the conveyance to the wife of the life estate, was in the nature of a will, devising and bequeathing the remainder of the estate to his children. The character of the instrument, so far as its recitations were concerned, was not made an issue by the pleading. Hence we conclude that no reversible error is shown by the admission of the testimony complained of.

[6] In her fourth assignment appellant complains of the admission of the testimony of the witness Louis Rogers, to the effect that prior to the year 1915 John Quarles "was a close buyer, but that during said year he was a liberal buyer, was easy to sell, and never questioned prices." It is alleged that this testimony was inadmissible, "because it is fully shown by the pleadings and the evidence that the account of John Quarles with the defendant was a contract with John Quarles in his individual capacity, after the conveyance from John Quarles to plaintiff had been made and placed of record in the proper county. \* \* \* That L. A. Quarles was not a party to the debts of John Quarles with this defendant and was not liable therefor." We think this evidence was admissible as tending to establish the charge of fraud, as John Quarles and his wife, as shown by the evidence, had, during their more than 25 years of married life been close and economical buyers, and if immediately after the conveyance in question John Quarles began a course of liberal buying, what, in view of their former habits, might be called extravagant expenditures, and his wife received the benefit of such purchases and in some instances bought the articles herself, we think such facts were pertinent and admissible upon the issue of fraud as to both parties.

[7] The trial court found the injunction suit was brought merely for delay, and gave judgment against John and L. A. Quarles and their bondsmen for 10 per cent. damages in the way of statutory penalty. This issue was not submitted to the jury, nor was it requested by either party, though defendant, in its answer, asked for such penalty, as provided under article 4667, Vernon's Statutes. We are of the opinion

that under the facts shown, and the condition of the record, such penalty should not have been allowed; therefore we reform the judgment by eliminating such penalty, and, as so reformed, the judgment will be affirmed.

Reformed and affirmed.

SCHALLERT v. BOGGS et al. (No. 5928.)

(Court of Civil Appeals of Texas. Austin.  
April 2, 1919.)

COSTS  $\S$  254(5)—APPEAL—NARRATIVE TRANSCRIPTION OF TESTIMONY—STENOGRAPHER'S NOTES—STATUTE.

Under Acts 32d Leg. c. 119,  $\S$  5, 6 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 1924, 2070), amending Rev. St. 1911, arts. 1924, 2070, requiring official stenographer to transcribe testimony in question and answer form, so that request therefor is not necessary, and requiring him to make out a narrative form of the statement of facts when requested by appellant, for which he shall be paid by appellant, and the amount not taxed as costs, where narrative form of testimony was transcribed by stenographer on request of appellant, his fee is not taxable as cost of appeal.

Appeal from District Court, McLennan County; Geo. N. Denton, Judge.

On motion to recall mandate. Motion overruled.

For former opinion, see 204 S. W. 1061.

J. D. Williamson, of Waco, for the motion.  
W. L. Eason, of Waco, opposed.

JENKINS, J. On a former day of the present term of this court, the above-entitled cause was reversed and remanded. In the itemized bill of costs in the record was the following: "R. K. Barton, Steno.—\$375.00." The clerk of this court, not being able to determine that this was an item properly chargeable as part of the cost of appeal herein, issued the mandate of this court without collecting the same. Appellant filed a motion to recall the mandate, and the clerk of this court was instructed to have said mandate returned until the matter could be further inquired into.

Appellant relies upon article 2070, R. S., which provides that the stenographer's fee for making up a statement of facts shall be charged as part of the cost of appeal, where no question and answer form of the testimony has been filed. We have been furnished with the affidavit of the stenographer and the certificate of the clerk that no question and answer form of the testimony was filed in the instant case. But the Revised Statutes of 1911 have been amended in two

important respects by the Act of March 31, 1911, c. 119, p. 264 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2070). As the law stood prior to the passage of said act, the stenographer was not required to make out a statement of the testimony in question and answer form, unless requested so to do by one of the parties to the suit (R. S. art. 1924); and, in the event no such statement of the testimony was made out, he was entitled to be paid for a narrative form of the statement of facts, the same to be taxed as part of the cost of appeal (R. S. art. 2070). Under the Act of March 31, 1911, § 5, the official stenographer is required to transcribe the testimony in question and answer form "in case an appeal is perfected from the judgment rendered," and a request for the same is not necessary. Vernon's Sayles' Statutes, art. 1924. He is required to make out a narrative form of the statement of facts "when requested by the party appealing," for which he shall be paid by such party 15 cents per folio of 100 words, "and said amount shall not be taxed as costs." Section 6, Act 1911, Vernon's Sayles' Statutes, art. 2070.

For the reason stated, the motion of appellant to require the clerk of this court to tax the stenographer's fee for making out the narrative form of the statement of facts herein as part of the cost of appeal, and to withhold the mandate herein until the same is paid, is overruled, and the clerk of this court is ordered to return said mandate to the trial court.

Motion overruled.

**NATIONAL EQUITABLE SOC. et al. v.  
ALEXANDER. (No. 6118.)**

(Court of Civil Appeals of Texas. Austin.  
March 26, 1919.)

**CONSTITUTIONAL LAW §326—REMEDIES—  
SECURITY FOR COSTS ON APPEAL—RECEIVERS.**

Vernon's Sayles' Ann. Civ. St. 1914, art. 2144, providing that, before an appeal or writ of error is allowed a receiver, he shall give bond with sureties in a sum double the amount of the judgment is unconstitutional and void, as violating Const. art. 1, § 13, in that it denies to receivers the right to have judgments against them reviewed on the same terms as those prescribed for other persons—citing *Dillingham v. Putnam* (Sup.) 14 S. W. 303.

Appeal from District Court, McLennan County; Geo. N. Denton, Judge.

Action by the National Equitable Society and others against James P. Alexander. From a judgment against him, George W. Barcus, receiver of the corporation, appeal-

ed. Motion to dismiss appeal, as to the receiver, overruled.

Alva Bryan, of Waco, for appellants, in reply to the motion.

W. L. Eason, of Waco, for appellee, for the motion.

**KEY, C. J.** At the last sitting of this court, we sustain a motion in this case to dismiss an appeal by a receiver from a judgment against him for \$14,441.54, upon a cost bond for only \$300. The motion referred to, and our holding in sustaining it were based upon article 2144, Vernon's Sayles' Civil Statutes, regulating appeals and writs of error by receivers, and which declares that:

"Before such appeal or writ of error shall be perfected or allowed, such receiver shall enter into bond with two or more good and sufficient sureties, to be approved by the clerk of the court or justice of the peace, payable to the appellee or the defendant in error, in a sum at least double the amount of the judgment, interest, and costs conditioned that such receiver shall prosecute his appeal or writ of error with effect," etc.

Counsel for appellants, National Equitable Society, a private corporation, and George W. Barcus, the receiver of the corporation, filed a reply to the motion to dismiss the appeal, but made no contention, and cited no authority to the effect that the statute referred to is unconstitutional, and therefore void and of no effect. Since our decision was made, the writer hereof, almost by accident, discovered that in *Dillingham v. Putnam* (Sup.) 14 S. W. 303, on June 24, 1890, and within about a year after the statute referred to was enacted, our Supreme Court held that it was in violation of section 13, art. 1, of the Constitution of this state, which declares that—

"All courts shall be open; and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

Notwithstanding that decision, codifiers and Legislatures have brought forward that unconstitutional enactment, and it is now incorporated in article 2144 of the Revised Civil Statutes as part of the existing statutory law of the state; and the only reference the writer has found in any digest or annotation to the decision above cited, holding it to be unconstitutional, is *Harris' Constitution of Texas*, Annotated, page 118. In fact, if *Dillingham v. Putnam*, supra, has been officially reported, the writer has been unable to find it.

While the circumstances referred to may not justify this court and appellants' counsel in overlooking that case, nevertheless they are stated for whatever they may be worth;

and in this connection we also venture to express the hope that the time may soon come when the statutory law of this state will be revised and codified, so as to eliminate all statutes which have been declared invalid by the highest court of the land.

Upon our own motion the opinion heretofore filed will be withdrawn, and the order heretofore made, sustaining the motion to dismiss the appeal as to the receiver, Geo. W. Barcus, will be set aside, and the entire motion to dismiss will be overruled.

Motion overruled.

BRADY, J., not sitting.

### STUMP v. RILEY. (No. 423.)

(Court of Civil Appeals of Texas. Beaumont. March 13, 1919.)

#### APPEAL AND ERROR $\S$ 755—ASSIGNMENTS OF ERROR—INSUFFICIENCY—ABSENCE OF BRIEF—EVIDENCE.

Assignments of error that the judgment is contrary to and not supported by the evidence, and that the court erred in giving judgment for plaintiff as against defendant, for the reason the evidence is insufficient to show plaintiff complied with the contract sued on, without a brief are insufficient to require the Court of Civil Appeals to review them.

Appeal from District Court, Jefferson County; E. A. McDowell, Judge.

Action by T. O. Riley against L. G. Stump. From judgment for plaintiff, defendant appeals. Affirmed.

Guy Robertson, of Port Arthur, for appellant.

Orgain, Butler, Bolinger & Carroll, of Beaumont, for appellee.

WALKER, J. Neither party has briefed this case. It was tried before the court without a jury, and the findings of fact made by the trial judge fully sustain all the allegations in plaintiff's petition. No attack is made on these findings, nor is any error assigned, other than (1) that the judgment of the court is contrary to and not supported by the evidence, and (2) that the court erred in giving judgment for plaintiff as against the defendant, for the reason that the evidence is insufficient to show that the plaintiff complied with the contract sued upon. These assignments without a brief, are not sufficient to require us to further inquire into this appeal.

This case is therefore in all respects affirmed.

### SAN ANTONIO, U. & G. RY. CO. v. ERNST. (No. 6174.)

(Court of Civil Appeals of Texas. San Antonio. Feb. 26, 1919. Rehearing Denied March 26, 1919.)

#### 1. DAMAGES $\S$ 112—DESTRUCTION OF GRASS BY FIRE OR WATER.

Measure of damages for grass and herbage destroyed by fire or water is the market value of the grass when destroyed, or, if without market value, its value in view of the use to which it was to be applied.

#### 2. DAMAGES $\S$ 174(3)—DESTRUCTION OF PASTURAGE—EVIDENCE.

In absence of any evidence in plaintiff's suit tending to show there was any market value of grass, testimony as to what it may have been worth to plaintiff, or his wife, was properly admitted.

#### 3. DAMAGES $\S$ 112—SPECIAL DAMAGES TO PASTURAGE—LOSS OF OWNER.

Where railroad, after running line through plaintiff's lands, by neglecting and refusing to close openings on right of way by fence and cattle guards, gradually destroyed value of grass and herbage as pasturage by failing to protect it from stock of others, case was one of special damages, to be measured by loss to plaintiff rather than market value of grass.

#### 4. APPEAL AND ERROR $\S$ 1004(3)—CURE OF ERROR—EXCESSIVE VERDICT—REMITTITUR.

In action against railroad for destruction of pasturage by failing to fence right of way and thus admitting stock of others to plaintiff's pasturage, any error in excessive verdict for \$1,200, evidence justifying verdict for at least \$750, was cured by remittitur of \$450.

#### 5. DAMAGES $\S$ 228—EXCESSIVE VERDICT—AUTHORITY TO REQUIRE REMITTITUR.

Where jury rendered excessive verdict, the trial court had authority to require remittitur to reduce verdict to a proper amount.

#### 6. JUDGMENT $\S$ 194, 238—DISPOSITION OF ALL PARTIES AND ISSUES.

A judgment was not erroneous because not disposing of one who was a party plaintiff in the original petition, and because not disposing of part of suit to cancel deed to defendant, where such party plaintiff was eliminated by amended petition, and prayer for cancellation of deed was made in case there was no recovery of damages, which were awarded.

Appeal from District Court, Atascosa County; C. C. Thomas, Judge.

Suit by L. H. Ernst against the San Antonio, Uvalde & Gulf Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

J. R. Garnand, of Jourdanon, and Mason Williams, of San Antonio, for appellant.

FLY, C. J. Appellee sued appellant to recover damages in the sum of \$1,000, being the

rental value of 500 acres, more or less, of pasture lands, and which was worth to appellee the sum of \$1.50 an acre for pasturage for live stock, which pasturage was destroyed by appellant after running its line of railroad through the lands, by neglecting and refusing to close the openings on the right of way by fences and cattle guards, and protect the pasture from the inroads of stock belonging to others. The cause was tried by jury, resulting in a verdict and judgment for appellee in the sum of \$1,200.

An exception to that part of the petition which alleged that the grass and herbage on the pasture was worth \$1.50 an acre to appellee was overruled by the court, and an objection was then urged to testimony offered to sustain the allegation to which the exception had been directed. The appellant urged that the true measure of damages in cases of this character is the market or rental value of the grass destroyed, and, if there was no such value, then the intrinsic value of the grass.

[1, 2] The measure of damages fixed by decisions in Texas for grass and herbage destroyed by fire or water is the market value of the grass when destroyed, or, if it had no market value, then its value in view of the use to which it was to be applied. *Railway v. Wallace*, 74 Tex. 581, 12 S. W. 227; *Broussard v. Railway*, 80 Tex. 329, 16 S. W. 30; *Railway v. Matthews*, 3 Tex. Civ. App. 493, 23 S. W. 90; *Railway v. Rheiner*, 25 S. W. 971; *Railway v. Goode*, 7 Tex. Civ. App. 245, 26 S. W. 441; *Railway v. Chittim*, 31 Tex. Civ. App. 40, 71 S. W. 294; *Railway v. Prude*, 39 Tex. Civ. App. 144, 86 S. W. 1048. There was no evidence tending to show that there was any market value of the grass, and testimony as to what the grass may have been worth to appellee or his wife was properly admitted.

[3] In all the cases cited as to value, there was a total destruction of the grass, usually by fire, and the measure of market values, hereinbefore indicated, might be readily applied to the subject-matter, but in this case we have the grass gradually consumed by live stock of others, in conjunction with the live stock of appellee, and it is a case in which it is difficult to fix a measure of damages. Under the facts of this case, if the market value of the grass would be the measure of damages, it would be a market value of the grass to be used, together with the cattle of appellee. It was alleged that the pasturage was used for the stock of appellee, and that the use for that purpose of the pasturage was worth the sum of \$1.50 an acre per year to appellee. The evidence showed that appellee used the pasture for grazing his cattle, and that there was on it the only water in the vicinity for cattle purposes. He used the pasture for his horses, and had cattle that he was raising to butcher for the market, and some milk cows. He was compelled

to feed the stock after the fence was left down, and cattle belonging to others came in. There was no way in which the measure of the market value of the grass, if any, could have been applied to his grass. It was a case of special damages sustained outside of and not to be measured by the market value rule, but only by the general law of compensation. There was no evidence tending to show that he could have obtained pasturage in the immediate vicinity for his cattle. Being a case of special damages, it was to be measured by the loss to appellee.

Appellee did not allege any market value for the grass, but alleged the value of the use to him, and, as said in the case of *Railway v. Matthews*, 3 Tex. Civ. App. 493, 23 S. W. 90, *Railway v. Stone*, 60 S. W. 461, and *Railway v. Brune*, 181 S. W. 547, under the circumstances of this case it is improbable that the pasturage had any market value. As said in the *Matthews Case* and approved by the court in *Railway v. Chittim*, herein cited:

"Any evidence tending to show what the grass was worth when put to any of the uses for which it was valuable should be admitted."

All the evidence tended to show that there was no market value for the pasturage, and the value of it to appellee was properly admitted. The evidence showed that no pastures in the neighborhood of appellee were being rented, and consequently there was no market value.

[4, 5] The petition sought a recovery of \$1,000, and the evidence justified a verdict for at least \$750, but the jury returned a verdict for \$1,200, which under order of the court was reduced by a remittitur of \$450 to \$750. Appellant contends that the judgment should be reversed because the verdict showed passion and prejudice, but that is not necessarily so, and whatever error there may have been was cured by the remittitur. In the case of *Railway v. Shults*, 90 S. W. 506, relied on by appellant, there was no remittitur, and the court reversed the judgment on the ground that it was for more than was claimed, which was fundamental error, and demanded a reversal because it could not be corrected in the appellate court. The error was corrected in the trial court by the remittitur, which it had the authority to require. *Railway v. Johnson*, 24 Tex. Civ. App. 180, 58 S. W. 624; *Railway v. Connell*, 27 Tex. Civ. App. 538, 66 S. W. 246; *Tex. Building Co. v. Reed*, 169 S. W. 211; *Channell Chem. Co. v. Hall*, 187 S. W. 704.

[6] The seventh assignment claims error because the verdict and judgment do not dispose of *Mrs. Ernst*, who was a party plaintiff in the original petition, but did not appear in the amended petition, and because the judgment did not dispose of that part of the suit to cancel the deed to appellant for the right of way. *Mrs. Ernst* was eliminat-

ed from the suit by the amendment, and the prayer for cancellation was made in case there was no recovery for damages. The assignment of error is overruled.

The sufficiency of the evidence to sustain a verdict for damages is not questioned.

The judgment is affirmed.

**BOWDEN et ux. v. WAGGONER et al.**  
(No. 980.)

(Court of Civil Appeals of Texas. El Paso.  
March 13, 1919. Rehearing Denied  
April 3, 1919.)

**1. SALES — 130(3) — RESCISSION — FRAUDULENT MISREPRESENTATIONS — BUYER'S KNOWLEDGE.**

In an action for rescission of purchase of a mercantile business, evidence held sufficient to sustain a finding that the plaintiffs immediately after taking possession of the business had knowledge that defendants' representations of its volume were untrue.

**2. SALES — 124 — RESCISSION — ABILITY TO PUT DEFENDANT IN STATU QUO.**

Where plaintiffs seeking rescission of purchase of a mercantile business, immediately after sale, found such a discrepancy between the volume of the business and that represented by defendant as to constitute notice of being overreached, they should have kept the property in a condition to place the defendants in statu quo in case of rescission.

**3. SALES — 124 — RESCISSION — INABILITY TO PLACE SELLER IN STATU QUO.**

Plaintiffs were not entitled to rescission of purchase of a mercantile business, where, after notice of being overreached, they brought about material business changes by making improvements and disposing of goods received, rendering it impossible to place defendants in statu quo.

Appeal from District Court, El Paso County; W. D. Howe, Judge.

Suit by H. E. Bowden and wife against Alverta Waggoner and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

T. A. Falvey and F. G. Morris, both of El Paso, for appellants.

Beall, Kemp & Nagle and Brown & Wilchar, all of El Paso, for appellees.

**HARPER, C. J.** This is a suit by H. E. Bowden and his wife, Flossie H. Bowden, brought in the district court of El Paso county, Thirty-Fourth judicial district, against Alverta Waggoner to rescind a contract of sale and cancel deed made by her to Bowden and wife, and to cancel the notice executed by them for the unpaid part of the purchase money given therefor, and to recover the

payments made and for the value of improvements made by said Bowden and wife on the lots conveyed, for alleged fraudulent representations made by defendant and which induced plaintiffs to enter into said contract. The plaintiffs also sought an injunction against the State National Bank of El Paso, enjoining it from disposing of or parting with possession of the unpaid notes executed by plaintiffs, for which purpose the said bank was made a party defendant.

The defendant Waggoner answered by general denial, and allegations of knowledge having been acquired by plaintiff of the alleged fraud, and subsequent ratification or election to abide the contract. The defendant also filed a cross-action to recover on the unpaid notes given by plaintiffs and on those given by defendant Waggoner for certain personal property later sold to Bowden and wife, the payment of which was assumed by plaintiff Bowden and wife, as a part of said sale, and to foreclose the lien on the real estate and personal property involved in the deal.

The State National Bank answered by demurrer and general denial.

The case came on for trial September 25, 1918, before the court without a jury, and the court rendered judgment for defendant for \$5,900 and interest, and on motion of plaintiffs filed findings of fact and conclusions of law; and plaintiffs excepted to the judgment and certain of the findings of fact and conclusions of law and filed statement of fact and assignments of error, and has brought the case here on appeal.

The court findings of fact and conclusions of law are as follows:

(1) I find that the defendant Waggoner made representations as to her daily gross receipts from her business as alleged in plaintiffs' petition.

(2) I find that said representations were false, in that her gross receipts during the month preceding the sale had not been more than half as much as she stated to plaintiffs they were.

(3) I find that said representations were made by defendant Waggoner knowingly.

(4) I find that said representations were material to the making of the contract by the plaintiffs, and that plaintiffs relied upon said representations as speaking the truth, and that the belief that the receipts from the daily sales were as large as was stated by the defendant Waggoner was a material inducement to the making of the purchase of the business, property, and location which the plaintiffs purchased.

(5) I find as a fact that the books introduced in evidence by the defendant correctly showed the business which she did up to and including February 24, 1918.

(6) I find as a fact that the plaintiffs, immediately after they took possession, had knowledge that said representations of defendant Waggoner were untrue.

(7) I find as a fact that the Coontown Tablet was not among the tablets seized by the search warrant or among the tablets for which plaintiff H. E. Bowden gave a receipt on May 7, 1918.

(8) I find that said Coontown Tablet was in possession of plaintiffs from the time they took possession of the store, but never came under their personal observation, and were never examined by them until about the middle of August, 1918.

(9) I find that if the plaintiff had undertaken to prosecute inquiry as to the facts concerning said fraud, they could, in the exercise of reasonable diligence, have discovered facts upon which to sustain a judicial decision.

(10) I find that the plaintiffs carried on the business, using the property purchased, made improvements thereon, and made the payments under the contract, for 4½ months, and took no steps to rescind the contract of sale until about August 16, 1918.

(11) I find that plaintiffs are in default of the payments overdue on said purchase as pleaded by defendant in her cross-action, and in the amount, principal, interest, and attorney's fees as pleaded by defendant.

(12) That by the time this suit was filed a material change in the position of the parties had occurred, and it is impossible to place the parties in statu quo.

[1] The first assignment attacks the sixth finding of fact upon the ground that there is no evidence to support it.

The fraudulent misrepresentations charged to have been made, and which induced appellant to enter into the trade, are that appellee stated that her daily sales were not less than \$25 per day, except Sundays, and that on the latter days they were from \$100 to \$150. Appellants testified that the sales began to run, immediately after taking charge of the business, from \$5 to \$10 per day on week days and \$40 to \$50 on Sundays, and business did not increase—taking their testimony—during all the time they ran it, over four months. So great is the difference between these receipts and those they allege appellee represented she had received, as to conclusively show that it was impossible for the representation to have been true.

The second assignment charges error in the ninth finding, in that the evidence did not tend to prove a failure to make inquiry; since we have concluded that the evidence is sufficient to support the sixth finding, the ninth becomes immaterial.

[2] It is urged that the sixth finding, when construed in connection with the ninth simply means that the appellants had sufficient evidence to put them upon inquiry, and

that, there being no proof that if this inquiry had been followed up such evidence of the fraud would have been discovered as to justify an action for rescission, for that reason the appellants were excused from taking action to rescind at an earlier date. And it is further argued that, not until they found the book kept by appellee which showed the daily receipts for some time prior to the sale, did they have such proof, and that therefore any action brought prior to finding said book would have been futile, etc. We answer this by suggesting that, if the evidence does not support the sixth finding, in that the admissions of plaintiffs as to the discrepancy between the daily sales as represented, and those actually made immediately after the purchase, could not be held to be proof, this fact was at least so significant of the fact that they had been overreached that it must be held to have been notice to them that after-dealings with the property must be such as that they should keep it in such condition as to place the parties in statu quo in case they should conclude to rescind. *Jockusch, Davidson & Co. v. Lyon & Sons*, 100 Tex. 598, 102 S. W. 396; *Carlock v. Sweeney*, 82 S. W. 469.

[3] In this connection, appellants' complaint of the twelfth finding of fact and the first conclusion of law must be overruled for the reason that they have continued to use the property for over four months, made their payments as obligated, all the while selling off the stock of goods received, and have made improvements to the value of over \$900 in the nature of a dance hall, which appellee testified she did not approve of and advised against it, and for which they ask a judgment, and that a lien be declared upon the whole property in case a rescission is decreed to secure its payment. Thus they have, as held by the trial court, by such acts brought about such material changes in the position of the parties as to render it impossible to place the parties in statu quo, and for this reason the court did not err in entering judgment for defendant. *Dennis v. Jones*, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899; *Watson v. Baker*, 71 Tex. 749, 9 S. W. 867; *Guthrie v. Lyon*, 98 S. W. 432, at bottom of page 434; *Moore v. Gliesecke*, 76 Tex. 551, 13 S. W. 290; *Manes v. J. I. Case Threshing Machine Co.*, 204 S. W. 235 (4); *Shappiro v. Goldberg*, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419; *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798.

Finding no error in the record, the cause is affirmed.



**McKAMEY BROS. v. JONES. (No. 6144.)**

(Court of Civil Appeals of Texas, San Antonio.  
March 12, 1919. On Motion for Re-  
ing, April 2, 1919.)

**1. TRIAL  $\S$ 260(10) — INSTRUCTION — DAMAGES.**

In suit for breach of contract to sell majority stock of company, carrying control of company and all its property, including notes and accounts, instruction submitting issue of buyer's damages if contract had been breached by sellers was insufficient, where it stated no rule for admeasurement, so that sellers' requested charge eliminating damages for failure to comply with agreement to put notes and accounts in collectable shape should have been given, in view of their pleadings.

On Motion for Rehearing.

**2. CORPORATIONS  $\S$ 121(6) — SALE OF STOCK — BREACH — QUESTIONS FOR JURY.**

In suit for breach of contract to sell majority stock of company, whether there was fraud on the part of the sellers, all errors and mistakes in their failure to carry out the contract, and what accounts were included as assets of the company, or what not owned by it or left out, held questions bearing on a proper valuation of the stock, which should have been submitted to the jury.

Appeal from District Court, Calhoun County; John M. Green, Judge.

Suit by A. L. Jones against McKamey Bros. From a judgment for plaintiff, defendants appeal. Reversed, and cause remanded.

Wilson & Hamilton, of Port Lavaca, and Proctor, Vandenberg, Crain & Mitchell, of Victoria, for appellants.

Davidson & Bailey, of Oquero, and Lewis Wood, of Port Lavaca, for appellee.

COBBS, J. This suit was brought by appellee to recover damages for a breach of contract, resulting in a verdict in favor of appellants for the sum of \$1,161.17. Appellants entered into a contract with appellee, whereby the latter was to sell the former 170 shares of the capital stock of the Bay Trading Company of the par value of each share, \$100, and delivering in exchange therefor 212 acres of land in Red River county, Tex., on which there was a mortgage to secure \$2,000, assumed by appellants. This sale carried with it all property, real and personal, notes, accounts, and choses in action of Bay Trading Company, unless there was some exception and reservation.

Appellees were to render to appellant a statement of the assets and liabilities of Bay Trading Company, that the notes and accounts due to said Bay Trading Company were to be invoiced at 60 cents on the dollar of their face value, and all notes and ac-

counts which were assets were to be included as assets not barred by the statute of limitations, or not otherwise in legal shape for collection regardless of the solvency of said parties owing same, or whether barred by the statute of limitations. The stock and other tangible assets were to be valued at their original cost, and from aggregate assets there was to be deducted the liabilities of said Bay Trading Company, the balance to represent the net assets of the company as a basis to arrive at the value of the stock.

It was agreed that appellants were to have 40 days from December 31, 1915, to place the notes and accounts invoiced by them in a legal and collectable shape. The solvency of such debtors was not to be guaranteed. It was claimed in the list of itemized claims that the sum of \$2,267.80 was worthless and barred by the statute of limitations; that said list of notes and accounts was never put in collectable shape, and appellants thereby misled appellee and caused him to pay an amount in excess of the true value of the stock. It was also alleged by plaintiff that all the notes and accounts mentioned in Exhibit A were worthless and barred by the statute of limitations, and so known to be when defendants invoiced them, and in no manner assets at the time invoiced; that defendants have failed to furnish any data by which he could find the notes and accounts, and the invoice and statement in many respects untrue. Some items were placed at a greater price than the cost, and some did not exist at all or were not the property of the company, and plaintiff relied on the truth and correctness of said invoice and statement which invoiced the assets and which was false and untrue in certain respects.

[1] There are a number of issues raised, submitted, and assigned as error, but this case must turn upon the question of law raised by assignments of error as to the sufficiency of the charge of the court in submitting the issue for measuring damages to the jury. It will be noted from the foregoing there was no rule agreed upon as to how the insolvency of any one owing the company, or in other respects lost to the company as assets, was to be ascertained, or how it would be treated in case such contributed to reduce the par value of the stock by failing to put the claims in a collectable form, or otherwise, in such case how the damages were to be assessed, since the solvency of such debtors was not guaranteed in the transaction.

The court instructed the jury to find, if there was a contract for the purchase by plaintiff of 170 shares of the capital stock of Bay Trading Company, and whether or not either one of the defendants violated the same, and, if so, in special issue 3, charged, "Do you find that the plaintiff has been damaged by reason of the failure of defendants or either of them to comply with said contract?"

to which the jury answered, "Yes." In special issue No. 4 the court charged the jury, "In what sum of money was plaintiff damaged by reason of such failure?" and the jury answered, "\$1,244.62." Defendant excepted to the charges given, and asked two special charges. The first was:

"If you answered 'Yes' in response to special issue No. 3, then you are instructed, in response to special issue No. 4, to state no sum in excess of \$442.33."

This charge assumes a liability. Special charge No. 2 is to the effect:

"That the measure of damages, if any you find in this case, is the difference in the value of the 170 shares of the capital stock of the Bay Trading Company with said notes and accounts mentioned \* \* \* placed in a legal and collectable shape within the 40 days alleged and the value of said 170 shares with the said notes and accounts in the shape and condition same were in at the end of said 40 days."

Special charge No. 1 excludes liability on the plea with respect to the notes and accounts, on the theory that there was no proof of damages with regard thereto, applying the measure of damages deemed by appellants to be the correct one. In special charge No. 2, appellants tried to submit what they conceive to be the correct measure of damages. We conclude that under the plaintiff's pleadings the appellants' theory as to measure of damages is correct, and that the court erred in not giving special charge No. 1 for the reason that no damages legally recoverable were proven for failure to comply with the agreement to put said notes and accounts in collectable shape; that is, in such condition that limitation could not be successfully pleaded against them. Of course, if there had been evidence of such damages, it would have been proper to refuse special charge No. 1 and give special charge No. 2.

The evidence and the findings of the jury establish the breach. For failure to comply with this undertaking, how and in what respect was there any damage? Why were not the notes and accounts collectable, without being put in what is called "collectable" shape? There was no guaranty shown as to solvency, and no pleading and proof showing how any injury resulted from such failure. At any rate, the court's charge did not define the correct rule to ascertain damages in this case. If appellee sustained any injury or loss by reason of such failure to collect any one of such claims that would have been collected; had they been put in a "collectable" form within the 40 days, was the important issue in this case. We do not think the issues submitted by the court were sufficient. The defendants had the right to have the measure of damages more definitely given when requested. It is the fairer practice to instruct the jury clearly and pointedly, and to give definite instructions on the

measure of damages on the issues and facts in the particular case, *H. & T. C. R. R. v. Nixon*, 52 Tex. 25; *Railroad Co. v. Le Gierse*, 51 Tex. 204.

In the view we take of this case, it is not necessary to discuss the remaining assignments of error, and they are overruled.

The judgment of the trial court is reversed, and the cause remanded for a new trial.

#### On Motion for Rehearing.

Appellee complains that the statement of the case by this court does not truly reflect the issues. It was alleged that the defendants owned and controlled 170 shares of the capital stock, of the par value of \$100 per share, in the Bay Trading Company; the said Bay Trading Company being a private corporation, duly incorporated under and by virtue of the laws of the state of Texas, transacting a general mercantile business at Port Lavaca, Tex.

McKamey Bros., acting through J. W. McKamey, entered into a contract in which the McKamey Bros. were to sell to plaintiff stock in Bay Trading Company and value of stock arrived at as follows: McKamey Bros. were to render to plaintiff a full statement of assets and liabilities of Bay Trading Company. Notes and accounts due to said Bay Trading Company to be invoiced at 60 cents on the dollar of their face value, and all notes and accounts which were assets were to be included as assets not barred by statute of limitations, or not otherwise in legally uncollectable shape, regardless of the solvency of the parties against whom they stood. Stock and other tangible assets were to be valued at their original cost, and from the aggregate amount of the above assets there was to be deducted the liabilities of said Bay Trading Company, and the balance, representing the net assets of the said Bay Trading Company, should be taken and accepted as a basis from which to arrive at the value of the corporation stock of said Bay Trading Company, at which said value plaintiff was to purchase said stock from said defendants. McKamey Bros. rendered to plaintiff a statement purporting to be an accurate, full, and fair invoice and schedule of all the assets and liabilities as of said last-named date, and plaintiff, relying upon the accuracy and truthfulness of said statement, computed from the figures therein shown, and on the basis of the net assets thereby found, in accordance with the said terms of said contract, plaintiff purchased all the said 170 shares of stock from McKamey Bros. at the price thereby arrived at.

It was agreed that McKamey Bros. were to be allowed 40 days from 31st day of December, 1915, to place the notes and accounts so involved by them in a legal and collectable shape, not, however, guaranteeing the solvency of such debtors, but to place the same in such shape that said note and

accounts would be legally enforceable on their face, and be legal assets of said Bay Trading Company.

Among the notes and accounts listed and invoiced as assets of said Bay Trading Company were certain notes and accounts mentioned, of the face value of \$2,276.80, set out as Exhibit A, all of which are worthless and are barred by the statute of limitations, and were known to be worthless and barred when defendants invoiced them as assets of said Bay Trading Company, and in no manner assets of said Bay Trading Company, nor at the time so invoiced. Defendants were allowed the full 40 days to put them in collectable shape and make same assets, but they have wholly failed and refused so to do, and the same remain totally worthless, and not assets; and plaintiff became president and general manager of said Bay Trading Company, and has been unable to find any of the notes and accounts mentioned in said Exhibit A on the books of said company, and defendants have refused to furnish him with any such such itemized accounts or data from which he could procure the same, and they were wrongfully included in the statement and contrary to the agreement, and by wrongfully including same caused plaintiff to pay to them an amount in excess of the contract value of said Bay Trading Company's stock of \$1,161.17.

Said invoice and statement of the condition of the Bay Trading Company was in many respects untrue and incorrect, and various items placed therein at a greater price than the original cost thereof, and some items did not exist at all, or were not property of the said Bay Trading Company, and plaintiff relied on the truth and correctness of said invoice and statement, which were false, untrue, and incorrect in the following items: A note for \$92.50, purporting that it was signed by one T. H. Shumpert. Accounts due to a branch store at Kamey, Tex., \$160.91, and no trace thereof can be found in the records of the Bay Trading Company, and, if existing, are in hands of defendants, do not constitute assets of the said Bay Trading Company, and did not when invoiced. By reason of those two items being placed in the statement furnished, they caused the plaintiff to pay defendant a further excess of the contract value of Bay Trading Company stock the sum of seventeen-twentieths of 60 per cent. of said last-named sum, or \$129.25. There was included also "Port Lavaca pavilion stock and equity in fire insurance policies," invoiced at \$800, when in fact Bay Trading Company did not own it. The value of the unexpired term of the insurance company was only \$68.41, and by including those two last-named items there was an excess charge of \$231.59, which caused plaintiff to further pay an excess value of the stock of \$197.85.

In the invoice there were various and sun-

dry items of merchandise overvalued to an aggregate excess of \$34.80, which caused plaintiff to overpay an excess of \$20.74. Defendants omitted from the list of liabilities overdraft at the First National Bank of Port Lavaca of \$115.02, and accounts due local merchants aggregating the sum of \$61.68, which caused the statement to show an excess value of \$176.70, which caused him to pay the further excess value of \$150.16. All of the items defendants became liable to refund to plaintiff.

By reason of the omissions of the items of liabilities in said statements, all of which were relied upon by this plaintiff in carrying out the contract of purchase of 170 shares of stock in Bay Trading Company, and by reason of the premises, plaintiff was damaged \$1,659, which he seeks to recover.

Such are the allegations upon which the plaintiff seeks to recover damages upon the alleged default of defendants to comply with the alleged contract. What we meant by saying "sale carried with it all the property . . . of the Bay Trading Company" was that it carried with it all the claims described in the petition, not that the plaintiff got them individually, but only as they figured in estimating the value of 170 shares of the stock, being the majority thereof, and carrying with it the management and control of said company.

The case was reversed upon what we regard as an error of law in submitting to the jury the true measure of damages responsive to the pleadings and issues, to ascertain what damages, if any, the plaintiff suffered. We have not discussed the various exceptions. We are inclined to believe the allegations in respect to the various claims that appellee sets out in his petition and lists included in the exhibit are sufficient to let in proof for the purpose offered on the issue of his damages. It will be borne in mind that the solvency was not guaranteed of any of the claims, or that they were not barred by the statute of limitations. It is not shown how any insolvent or barred claims, if any, were to be figured as an asset in valuing the stock, as that was not to be taken in account in the sale.

[2] All such issues of fact as to value of the assets are jury questions, for the jury to consider in valuing the stock. As to whether there was fraud, as to errors and mistakes in failure to carry out contract, as to what accounts were to be included as assets, or as to which not owned by the company or left out, and the kindred questions connected with and relating to said sale, are jury questions, bearing upon a proper valuation of the stock under direction of the court, for plaintiff could not recover the specific value of any of such property, as the title is in the company, and plaintiff's recovery must be limited to the damages, if any, he suffered by reason of the acts of appellant in causing him to

pay too great a value for the stock as pleaded. This is the chief issue made by the pleadings and as shown by our opinion the correct rule in submitting it to the jury was not given. The jury were left too wide a range.

Motion for rehearing overruled.

**FARRIAS et al. v. DELGADO. (No. 6147.)**

(Court of Civil Appeals of Texas. San Antonio. March 5, 1919. Rehearing Denied April 2, 1919.)

**1. PLEADING**  $\S$ 433(6) — **AVERMENT AS TO PARTIES—WAIVER.**

The requirement of Rev. St. 1911, art. 6097, that the name and residence of joint owners in partition shall be alleged, is not cured by a failure to take action upon it at the trial.

**2. JUDGMENT**  $\S$ 424 — **SETTING ASIDE — BILL OF REVIEW—DEFECT OF PARTIES.**

A judgment of partition in favor of plaintiffs, in a suit in which there is a defect of parties, two of the persons named as plaintiffs being dead, and a necessary party not being joined, is at least voidable, and may be attacked for fraud and mistake at a subsequent term in a direct proceeding by a bill of review.

**3. PARTITION**  $\S$ 64 — **DISMISSAL OF SUIT —DEFECT OF PARTIES.**

Where, on vacating a judgment rendered at a former term in a partition suit, for fraud or mistake owing to defect of parties, by a bill of review, the plaintiffs were given an opportunity to make proper parties and to secure and introduce their evidence, but refused to do so, the cause was properly dismissed.

**4. APPEAL AND ERROR**  $\S$ 1225—**BOND—PERSONS BOUND.**

An appeal bond will bind the living parties who signed it, although the names of two dead parties, named as plaintiffs in instituting the suit, also appeared as signers of the bond.

**5. APPEAL AND ERROR**  $\S$ 823(1)—**PERSONS ENTITLED TO REVIEW—PARTIES AGGRIEVED.**

Any one or more of the parties aggrieved by the judgment of a trial court may perfect his or their appeal.

Appeal from District Court, Atascosa County; Covey C. Thomas, Judge.

Suit for partition by Maria Louisa Farrias and others against Juan Delgado. Judgment for plaintiffs. From orders at a subsequent term of court, setting aside the judgment and dismissing the suit, plaintiffs appeal. Affirmed.

R. H. Ward, McCollum Burnett, and W. W. Walling, all of San Antonio, for appellants.

Walter E. Jones, of Jourdanton, and R. R. Smith, of San Antonio, for appellee.

**FLY, C. J.** This is an appeal from an order dismissing the cause from the docket of the trial court. The suit was filed in 1914, by Maria Louisa Farrias, Josefa Delgado, Caledonia Delgado, Juan G. Delgado, Manuel Delgado, Martin Delgado, and Jose Delgado against Juan Delgado, appellee, to recover a portion of 160 acres of land in Atascosa county, and partition the same among the plaintiffs and defendant. This information is gained from an answer filed by appellee on November 7, 1914; the petition filed in the suit not being copied into the record. On November 19, 1914, the court rendered a judgment granting a recovery to the plaintiffs, herein named, of seven-eighths of the 160-acre tract, and appointed three commissioners to divide it among the parties. On April 12, 1915, at a succeeding term to that at which the judgment was rendered, an application was filed by Juan Delgado to set aside the judgment, alleging among other grounds that two of the plaintiffs named in the petition, namely, Josefa Delgado and Manuel Delgado, were dead when the suit was filed in their name, and that Jesus Delgado, a necessary party to the partition suit, was not made a party. The court, in its order setting aside the judgment of November 19, 1914, found the following facts in its recitals:

"On this 6th day of May, 1915, coming on to be heard the application of Juan Delgado, defendant in the above entitled and numbered cause, filed herein on the 12th day of April, 1915, as amended May 3, 1915, and supplemented May 6, 1915, praying the court to set aside, annul, and vacate and amend the record of the judgment entered in said cause on the 19th day of November, 1914, adjudging and decreeing to plaintiffs herein an undivided seven-eighths interest in and to the land in controversy in said suit, and appointing commissioners to partition the same and make their report and recommendations to the present term of this court, and the court after hearing the application of defendant, and the answer of plaintiffs, by their attorney of record, and duly considering the same, finds that said judgment was granted in the absence of defendant, and defendant's counsel, and in the absence of plaintiff's original petition, and defendant's original answer (which were the only pleadings at the time filed in said cause), though a substituted copy of plaintiffs' original petition, without application to substitute or notice of substituted copy of plaintiffs' original petition, was read to the court in lieu of said pleadings, and it further appearing to the court that there are other parties claiming an interest in the lands in controversy in said suit, by deed duly of record, and by possession of parcels of said land taken, prior to the commencement of this cause of action, and that two of the named plaintiffs in said cause of action were dead long prior to the commencement of this suit, and the court is of opinion that said judgment entered herein on the 19th day of November, 1914, and which appears of rec-

ord in volume 11, pages 844 and 845, of the minutes of this court, ought to be set aside, annulled, and vacated, and it is hereby ordered, adjudged, and decreed by the court that said judgment be and the same is hereby set aside, annulled, and vacated, and said cause set down for trial in the same manner and position as though no judgment had ever been entered herein."

Afterwards, on April 3, 1918, the court overruled a motion by appellants to set aside the order vacating the judgment of November 19, 1914, and ordered appellants to proceed with a trial on the facts; but they declined to introduce testimony, and the cause was dismissed at their cost. From that order this appeal is prosecuted.

According to the recitals in the judgment granting a new trial in the case, the cause was tried in November, 1914, in the absence of appellee, and without the petition or answer, the only pleadings in the case, and upon an attempted substituted petition, made without an order or notice, and with two of the plaintiffs deceased before the original petition was filed, and other necessary parties not in court, either as plaintiffs or defendants. The case is appealed to this court on a bond purporting to be executed, together with others, by the two dead persons whose names were used as plaintiffs in instituting the suit. The bond is attacked, through a motion to dismiss, because it was executed in part by deceased persons. Before passing upon the validity of the bond, we will discuss the propriety and legality of the order of the court in May, 1915, in setting aside a judgment entered by it at the term next preceding the term at which the order was entered.

[1] The statute requires that the name and residence of the joint owners in a case of partition shall be alleged. Rev. St. 1911, art. 6097. It has been held by the Supreme Court that want of parties is not cured by a failure to take action upon it at the trial. *Franks v. Hancock*, 1 Posey Unrep. Cas. 554; *Ship Channel Co. v. Bruly*, 45 Tex. 8; *McKinney v. Moore*, 73 Tex. 470, 11 S. W. 493; *Holloway v. McIlhenny*, 77 Tex. 657, 14 S. W. 240; *McDade v. Vogel*, 173 S. W. 506. In the *Holloway-McIlhenny* Case the court held:

"Appellee insists that because there was no attempt in the court below to arrest the proceedings for want of necessary parties until the final judgment was amended at a term subsequent to that at which the trial was had the objection comes too late. But we are of opinion that the error cannot be cured by failure to take action in the trial court. A decree of partition in a suit to which one or more of the owners of the land are not parties does not affect their rights. They cannot be bound by the decree, and can have it set aside in any proper proceeding in which all parties are before the court. Courts of justice do not sit to enter empty decrees, and hence will arrest a proceeding of this character for want of necessary parties at any stage of the proceedings.

The rule results from the impossibility of making a binding decree without having all parties who own an interest in the land to be affected by it before the court."

In the cited case of *Ship Channel Co. v. Bruly* the court said:

"It must appear that the parties to the suit, among them, are entitled to the entire estate. \* \* \* Otherwise no final and binding decree of partition can be made, even as between the parties before the court, for at any time the owner of the other interest may also sue for partition."

In the case of *Moore v. Summerville*, 80 Miss. 323, 31 South. 793, 32 South. 294, it was held by the Supreme Court of Mississippi that the failure to have a party at interest summoned in a partition suit rendered the judgment void and it could be attacked by a bill of review.

In the case of *Oneal v. Stimson*, 61 W. Va. 551, 56 S. E. 889, the Supreme Court of West Virginia held:

"Where a judgment of partition and sale was rendered without all the parties in interest being parties to the suit of partition, said judgment is an absolute nullity, and the sale made under it is also null and void"

—the language being quoted and adopted from the case of *Succession of Ernest Poree*, 27 La. Ann. 463.

[2] The motion filed by appellee at the April term, 1915, of the district court, was in the nature of a bill of review, and the bill was not attacked for insufficiency, and the order setting aside the judgment was granted, and after the cause had been continued from term to term until April, 1918, appellants filed their motion to set aside the order made in April, 1915. The judgment of partition was, if not null and void, at least voidable, and could be attacked through a bill of review. This is a direct proceeding to set aside the judgment rendered at a former term for fraud or mistake, and it fully invoked the equitable powers of the court. That such a proceeding is permissible has been held by a long line of decisions, ranging from the case of *Gross v. McLaran*, 8 Tex. 341, decided in 1852, to the present day. The court heard the facts stated in the bill of review and found them to be true. Three years after the judgment was rendered a motion, named "Motion of Plaintiff to Set Aside Judgment Granting New Trial to Defendants," was filed. In reality it was a motion for a new trial, filed at the sixth term of the court after the order vacating the original judgment was granted.

A bill of exceptions taken to the action of the court in vacating the original judgment was of date May 6, 1915, and the only ground of exception was that the judgment was a final one, and a motion for a new trial had been overruled at the time. The objections were without merit. There was undoubtedly

a great mistake or positive fraud in procuring a judgment of partition in favor of two persons who were dead when the suit was instituted, and as herein shown the judgment was void, or at least voidable, because the necessary parties were not before the court. In *Vardeman v. Edwards*, 21 Tex. 737, the court said:

"In general, where it would have been proper for a court of law to have granted a new trial, if the application had been made while the court had the power to do so, the court of chancery will afford its aid and grant it, if the application be made upon grounds arising after the court of law ceased to have power to act. \* \* \* And, in general, the court will be governed by the same principles in passing upon the merits of the application by which the court of law would have been governed."

The facts set out in the bill of review are not assailed for their insufficiency or attacked as to their verity. The diligence of appellee is not questioned, nor is it denied that the necessary parties were not before the court. The only contention in this court is that a district court has no power or authority to set aside a judgment rendered at a previous term for fraud or mistake or any other ground. The authorities do not sustain the proposition.

"It is conclusively settled, by repeated decisions of this court, that a new trial may be granted by the district court in a case properly invoking its equitable powers, after the adjournment of the term at which the judgment was rendered." *Plummer v. Power*, 29 Tex. 6.

Even after a motion for new trial is overruled at the term when the judgment is rendered, a party may obtain a new trial at a succeeding term on proper equitable grounds. *Bryorly v. Clark*, 48 Tex. 345.

This court will not enter into a further discussion of whether ordinarily a judgment in favor of persons who were dead when they were used as plaintiffs to institute a suit was void, but the fact that they were dead and were so used is evidence of palpable fraud or a fearful mistake. This was a direct proceeding, and the judgment was open to attack on the ground that some of the plaintiffs were not in existence when the suit was instituted and when the judgment was rendered in their favor. *Thouvenin v. Rodrigues*, 24 Tex. 468; *Giddings v. Steele*, 28 Tex. 782, 91 Am. Dec. 336. As hereinbefore stated, a judgment, to be valid in a partition suit, must be rendered as to every one interested in the property, and the recovery in such a case is not divisible. However, if it be that, as the want of all necessary parties did not appear in the judgment or other parts of the record, the judgment would be voidable only, still, if void or voidable, it could be attacked in a direct proceeding by a bill of review. *Mokey v.*

*Brackett*, 28 Tex. 443; *Pullen v. Baker*, 41 Tex. 419; *Milam Co. v. Robertson*, 47 Tex. 222; *McClelland v. Moore*, 48 Tex. 355.

[3] Appellants were given an opportunity to make proper parties, and secure their evidence, and place it before the court, and upon their refusal so to do the cause was dismissed, as it should have been.

[4, 5] The appeal bond will bind the living parties who signed it, although the names of the dead parties may have been used in the bond. Any one or more of the parties aggrieved by the judgment of a trial court may perfect his or their appeal. *Simmons v. Fisher*, 46 Tex. 126.

The judgment is affirmed.

## HARTT v. YTURRIA CATTLE CO. et al.\* (No. 8927.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Dec. 7, 1918. Rehearing Denied  
Jan. 18, 1919.)

### 1. EVIDENCE §139—FAILURE OF GUARANTY OF CATTLE SOLD—EVIDENCE OF CUSTOM.

Where defendant cattle company pleaded over against defendant commission company for judgment in case it was held liable for failure of commission company's guaranty that cattle sold were immune from tick fever, evidence was admissible, as between them, as to the existence or otherwise of a custom among commission companies at the place of sale to make such representations or guaranties.

### 2. EVIDENCE §139—AUTHORITY OF AGENT—CUSTOMS AND USAGES.

In an action for failure of guaranty that cattle sold were immune from tick fever, brought against a seller and its agents, evidence of commission merchant's custom as to making such guaranties was admissible, not to enlarge the powers conferred by employer upon agent, but as a means of interpreting and ascertaining the powers actually conferred.

### 3. APPEAL AND ERROR §206(1)—OBJECTIONS IN LOWER COURT—RECEPTION OF EVIDENCE.

Where evidence was admissible for any purpose, and no request was made that it be limited to the purposes for which it was properly admissible, its admission cannot be held reversible error.

Appeal from District Court, Tarrant County; Bruce Young, Judge.

Suit by W. E. Hartt against the Yturria Cattle Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Templeton & Milam, of Ft. Worth, for appellant.

B. K. Goree and McLean, Scott & McLean, all of Ft. Worth, and Craig & Green, of Brownsville, for appellees.

BUCK, J. W. E. Hartt sued the Yturria Cattle Company, the George R. Barse Live Stock Commission Company, and Abraham Cohn for damages for breach of an alleged contract of guaranty. He alleged that the Yturria Cattle Company, hereinafter called the Cattle Company, shipped, from certain named counties in southwest Texas, a number of cattle to the George R. Barse Live Stock Commission Company, hereinafter called Commission Company, for sale on commission, and that the Commission Company was accustomed to selling such live stock as was sent to it through its agent and salesman, Abraham Cohn, "which fact was then and there well known to the Cattle Company." He further alleged that plaintiff also induced him to purchase certain of said cattle by the representations made by Cohn, to the effect that the cattle had come from a "ticky" country—that is, from a place infested with ticks—and that said cattle were safe to go any where, being immune from tick fever; that "in making such statements and representations said Cohn was then and there acting within the scope of his authority, or at least within the apparent scope of his authority," not only as the agent of the Commission Company, but also as the agent of the said Cattle Company. He further alleged that, induced by said representations, he bought 134 head of said cattle, shipping 90 of them to his ranch in Houston county, infested with ticks, and sold 34 head of the remainder to J. M. Dunning, who moved them to Hood county, where they were placed in a pasture infested with ticks. He further alleged that 65 head of the cattle shipped to Houston county contracted tick fever and died, and that 2 of the head shipped to Hood county died from such fever, and that as to these 2 head Dunning was making claims against plaintiff for their value. He claimed damages for the 67 head alleged to have died, and also for the depreciation in value of the remainder.

The Cattle Company answered by general demurrer and special exceptions, by general denial, and specially answered that it had made no representations to the Commission Company as to the cattle shipped it, nor had it authorized said Commission Company to make any such representations with reference to said cattle. It further answered that as a matter of truth and fact all of the cattle shipped by it came from pastures in which were constantly found ticks, and that said cattle had been exposed to ticks. It further denied that Abraham Cohn was its agent, or authorized to act for it in any capacity, or to bind it by any representations or acts. It further pleaded that if the Commission Company should be held to have made to the plaintiff the representations alleged, and that the Cattle Company should be held liable to plaintiff by reason thereof, that the Cattle Company have judgment over against the Commission Company and Cohn, jointly and

severally, for any and all damages that the Cattle Company might be required to pay.

The defendant Commission Company answered by general demurrer and special exceptions and general denial, and further specially denied that either it or its agent, Cohn, made any representations whatsoever with reference to whether said cattle were ticky or non-ticky, either quarantined or non-quarantined, or whether said cattle were subject to tick fever or immune from it. It alleged that plaintiff or his representative, who acted for him as an inspector of said cattle, purchased said cattle through this defendant, acting as a commission company or as agent only. It was alleged that at the time plaintiff bought the cattle the same were confined by the stockyards company at Ft. Worth in "southern pens"; that is, in pens used for the purpose of keeping cattle coming from the southern portion of the state, where ticks were to be found. The defendant Cohn adopted the pleadings of his codefendant, the Commission Company.

The cause was submitted to a jury upon special issues, in answer to which the jury found:

(1) That in offering for sale and in selling to plaintiff's agent the cattle in controversy said Cohn did not represent that the cattle were safe to go to ticky territory, or to places infested with ticks, or that they were safe to go anywhere; nor did he represent that said cattle were immune from tick fever, or that he would guarantee them to be safe to go anywhere.

(2) That plaintiff, or his agent, in purchasing said cattle relied solely upon his own judgment and inspection.

(3) That the defendant Cohn, if he did make the alleged statements and representations as claimed by plaintiff, was not acting within the apparent scope of his authority as agent for the Commission Company, nor was he acting within the apparent scope of his authority as agent of the Cattle Company.

(4) That it was not the general custom and practice on the Ft. Worth market during the month in which these cattle were sold for commission men or their agents to make to prospective purchasers representations and guaranties such as plaintiff alleged were made by Cohn.

(5) That there were some ticks in the pasture from which the Cattle Company had shipped the cattle in question, but at the time of the sale of said cattle to plaintiff, or his agent at Ft. Worth, the cattle did not have ticks on them to any appreciable extent.

(6) That at the time Cohn sold the cattle to plaintiff, or his agent, Cohn was not informed by either of them that the cattle so purchased were to be taken to plaintiff's ranch in Houston county, or that said cattle were to go to a "ticky" country.

[1] Appellant's first and second assign-

ments are directed to the admission of a series of questions propounded to the defendant Cohn, and others of like import propounded to W. H. Barse, of the Commission Company. These questions and the answers thereto cover some seven or eight pages of the brief, and it would subserve no useful purpose to set them out in full. The essence of these assignments, as shown by the first, is that the court erred in admitting evidence as to the existence, or nonexistence, of a custom among the commission men at Ft. Worth to make such guaranties with regard to cattle sold by them as plaintiff alleged were made in this instance. For instance, certain of the questions asked the witness Barse were propounded by the attorney of the Cattle Company as follows:

"Q. I will ask you, Mr. Barse, whether or not it is the custom on this market for commission men to make such guaranties. A. It is not the custom.

"Q. Mr. Barse, did your company ever before make any such representations or guaranties? A. Never.

"Q. With reference to any of the Yturria cattle? A. No, sir.

"Q. I will ask you this question, Mr. Barse: Did you ever make any other representations or guaranties with reference to any cattle that the Yturria Cattle Company had theretofore shipped to you? A. No, sir; or any other cattle.

"Q. Did you ever authorize any agents of your company? A. No, sir.

"Q. To make such representations? A. No, sir.

"Q. Or guaranties? A. No, sir.

"Q. Did you ever make such representations or guaranties with reference to the cattle shipped to you by any one else? A. Never.

"Q. Mr. Barse is it the custom for the agents of the commission men to make such representations and guaranties? A. I never heard of such a custom; if it is, I don't know it.

"Q. Well, you would know? A. I would, I suppose.

"Q. If it existed, wouldn't you? A. Yes, sir."

There is authority holding that, where there exists a sharp conflict as to the issue of whether or not at the time of an accident the train causing the injury was running at a rate of speed in violation of a regulation, it is admissible to show that it was customary for defendant's trains to violate said regulation. See *I. & G. N. Ry. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 218, 21 S. W. 58, 62. In the cited case the Court of Civil Appeals for the Austin District said:

"The customary rate of speed of the train at this place was pertinent, as it gave him the right to regulate his conduct by it. For the same reason, it was not error to allow proof that it was the habit of persons operating the trains not to ring the bell in passing this crossing. The evidence was admissible for the additional reason that it tended to prove that the bell was not rung on the occasion of the

accident. There was a conflict in the testimony as to whether the bell was rung at the time or not. The testimony offered strengthened the probability that it was not rung. The fact was not a distinct collateral fact. In the case of *Grand Trunk Railway Co. v. Richardson*, 91 U. S. 454 [23 L. Ed. 356], the question was whether the company's locomotive caused a fire. Testimony was admitted, over objections, 'that, at various times during the summer before the fire occurred, defendant's locomotives scattered fire when going past the mill and bridge, without showing that either of those which the plaintiffs claimed communicated the fire were among the number, and without showing that the locomotives were similar in their make, state of repair, or management to those claimed to have caused the fire complained of.' Justice Strong, delivering the opinion, said: 'The question has often been considered by the courts in this country and England, and such has, we think, been generally admissible, as tending to prove the possibility, and the consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railway company.' 1 Whart. Ev. §§ 40-43. If special acts are admissible to show a habit of negligence [in the handling of a dangerous agent], as decided in the foregoing case, the habit itself would undoubtedly be."

But, in any event, we think the Cattle Company, by reason of their plea over against the Commission Company, would have the right to show the existence of a custom among the commission companies at Ft. Worth, and especially as to the Barse Commission Company, not to make any representations or guaranties as to the character or quality of the cattle committed to them for sale. If this custom existed, the Cattle Company had the right to rely thereon, at least so far as concerned the issue between it and the Commission Company. In 12 Cyc. § 7, p. 1070, it is said:

"It is well settled that a mercantile agency must be executed in accordance with the usage of the particular trade or market to which it relates and the authority of the agent is regulated and controlled by the usage of the particular business to pledge his principal's goods or to sell on credit. So by usage an agent may have an implied power to delegate his authority, may be required to insure his principal's goods, may have authority to receive payment, or may set off his private debt against his principal's rights." *Harbert v. Neill*, 49 Tex. 143; *Neill v. Billingsley*, 49 Tex. 161.

Therefore we think, undoubtedly, the evidence objected to was admissible as between the Cattle Company and the Commission Company.

[2] Plaintiff alleged in his petition that in making the alleged representations Cohn was acting within the apparent scope of his authority as agent for the Cattle Company, as well as the Commission Company. In determining the question of the apparent authority



of an agent to do certain acts or to make certain representations, where the evidence shows that he had no express authority so to do, it is admissible to show what was the usage or custom of the trade or business in which the act was done or the representation made. Such evidence is not for the purpose of enlarging or circumscribing the powers of the agent, conferred by his employer, but as the means of interpreting and ascertaining those which had been actually conferred. See *Reese v. Madlock*, 27 Tex. 120, 84 Am. Dec. 611; *Telegraph & Telephone Co. v. Dale*, 27 S. W. 1059; *Brennan & Son v. Dansby et al.*, 43 Tex. Civ. App. 7, 95 S. W. 700.

[3] No request was made by appellant to have the testimony objected to limited to the issue between the two defendants named. The court admitted the testimony, as shown by appellant's bill of exception, as bearing upon the issue of apparent authority. If the evidence was admissible for any purpose, and no request was made that it be limited to the purpose for which it was properly admissible, such admission cannot be held to be reversible error. See *H. & T. C. Ry. Co. v. Poole*, 63 Tex. 246; *Walker v. Brown*, 66 Tex. 556, 1 S. W. 797; *Ry. Co. v. George*, 85 Tex. 150, 19 S. W. 1036; *Brin v. McGregor*, 64 S. W. 78; *Ft. W. & D. Ry. Co. v. Harlan*, 62 S. W. 971; *Railway Co. v. Jackson*, 53 S. W. 81; s. c. 93 Tex. 262, 54 S. W. 1023; *Keowne v. Love*, 65 Tex. 152. Therefore we overrule assignments 1 and 2.

We think what we have said in discussing assignments 1 and 2 disposes of the questions presented in assignments 3, 4, and 5. Since plaintiff had charged that the acts and representations alleged to have been done and made by Cohn were within the apparent scope of his authority as agent of both other defendants. It was proper to submit to the jury the issue as to whether said statements and representations alleged to have been made were, if Cohn did make them, within the apparent scope of his authority as agent of the two other defendants.

Under the fifth assignment complaint is made of the definition given by the court of "apparent scope of authority," and also of the submission of question No. 4, divided into paragraphs (a) and (b). We do not think the criticism of the definition given is well grounded, nor that the objections to the submission of the questions mentioned are well taken. The jury having found, upon evidence which we hold was admissible, that Cohn made no such representations, as claimed by plaintiff, as to the immunity of the cattle from tick fever, we do not think that there is any merit in those assignments and the propositions thereunder that the appellees Cattle Company and Commission Company were put upon an election either to assume the burden of Cohn's unauthorized act, if any,

or to disown said act and return the consideration paid for the cattle.

All assignments are overruled, and the judgment is affirmed.

## RAMSEY v. ODIORNE et al. (No. 6051.)

(Court of Civil Appeals of Texas. Austin.  
March 19, 1919.)

### 1. LANDLORD AND TENANT ⇐200(1)—RENT—TERMINATION OF LEASE—INSTALLMENTS.

A lease of land for pasturage purposes for one year at a rental of \$3,000 payable in installments, \$600 down and \$600 a month for five months and \$480 a month for five months, terminable on notice if the landlord should sell, held a lease at \$500 per month, and, where terminated by sale at end of five months, lessee, having paid \$3,000, was entitled to a return of \$500.

### 2. LANDLORD AND TENANT ⇐185—LEASE—CONSTRUCTION.

Under a lease of a ranch for pasturage for one year at \$500 per month, terminated under the terms of the lease after five months by reason of a sale of the premises, lessee should pay for first month of term, although he did not use or occupy premises that month.

Appeal from District Court, Lampasas County; F. M. Spann, Judge.

Action by J. E. Odiorne against J. C. Ramsey, who brought cross-action against F. F. Edwards. From an adverse judgment, defendant appeals. Affirmed.

Word & Walker, of Lampasas, for appellant.

J. C. Abney, of Lampasas, for appellees.

### Findings of Fact.

JENKINS, J. Appellant and appellee, Odiorne, entered into the following written contract:

"This lease contract made and entered into by and between J. C. Ramsey of Lampasas county, Texas, party of the first part, and J. E. Odiorne of the county of San Saba, Texas, party of the second part, witnesseth:

"That party of the first part has and does by these presents lease and demise unto the party of the second part, his ranch, consisting of 11,000 acres of land situated in San Saba county, Texas, and known as the J. C. Ramsey ranch, for the term of one year from the 1st day of May, 1916. And the said J. E. Odiorne, party of the second part, in consideration of the lease and use of said lands, does agree to pay to the said J. C. Ramsey the sum of six thousand dollars, payable as follows, to wit: \$600.00 in cash on the signing of this contract, the receipt of which is acknowledged; the sum of \$600.00 on the 1st day of June, 1916; \$600.00, July 1st, 1916; \$600.00 on August 1st, 1916;

\$600.00, on Sept. 1st, 1916; \$600.00, on Oct. 1st, 1916; and thereafter on the first of each succeeding month the sum of \$480.00, to-wit: on Nov. 1st, 1916, Dec. 1st, 1916, and Jan. 1st, Feb. 1st and March 1st, 1917, evidenced by the 10 promissory notes of the said J. E. Odiorne, payable on the dates above mentioned, with interest at 10 per cent. per annum after maturity.

"It is understood and agreed that in case of sale of said ranch property by J. C. Ramsey, the said Odiorne is to deliver the possession thereof upon notice given him of such sale as much as ninety days, and shall not be required to pay the unearned lease money; but shall pay only for the time he so uses said lands under this lease, when such possession is given.

"It is further agreed, and the said J. C. Ramsey does hereby grant to the said J. E. Odiorne the option to buy said lands at the price of \$7.00 per acre, for six months from said May 1st, 1916, and to further give and grant the said Odiorne the refusal to buy said lands at any price he the said Ramsey may be offered during the period of 12 months from May 1st, 1916. Failure to pay any of said notes at maturity shall mature all at option of the holder thereof. And the statutory lien on the stock that may be run on said lands is hereby acknowledged to secure the payment of said notes.

"Witness our hands, this the 25th day of May, A. D. 1916.

"[Signed] J. C. Ramsey.  
"J. E. Odiorne."

This case was tried before the court without a jury. The court filed the following findings of fact, which are supported by the evidence, and for that reason are adopted by us as the facts in this case:

"(1) The court finds that on May 25, A. D. 1916, the plaintiff, J. E. Odiorne, and the defendant J. C. Ramsey, entered into a lease contract set out in full in the answer of the defendant J. C. Ramsey, for which lease the plaintiff, J. E. Odiorne, agreed to pay the defendant the sum of \$6,000 for the term of one year from May 1, A. D. 1916, the payments to be made as specified in said contract.

"(2) The court further finds that said pasture land covered by the above-mentioned lease had not been pastured and the grass had been growing on the same from the 1st day of April, A. D. 1916, and that said premises were leased by the plaintiff, Odiorne, for the purpose of pasturing cattle thereon; and that the condition of the grass and the fact that it had not been pastured from said date, and that the grass had been permitted to grow on said land, was an inducement for the entering into said lease contract and for the payment of said stipulated sum of \$6,000 from the time said contract was signed, executed, and dated until the expiration of the same one year from May 1, A. D. 1916.

"(3) The court further finds that after the 25th day of May, A. D. 1916, to-wit, on June 1, A. D. 1916, the plaintiff had the privilege of taking possession of said leased property and did thereafter, about the 10th day of June, A. D. 1916, take actual possession of said premises and continue in possession thereof until October 1, A. D. 1916, on which date he surrendered possession of said premises to one F.

F. Edwards, in pursuance of the written request made by the defendant J. C. Ramsey, on the 30th day of August, A. D. 1916.

"(4) The court finds that after the execution of said lease contract and prior to October 1, A. D. 1916, the said plaintiff, J. E. Odiorne, paid to defendant J. C. Ramsey the sum of \$3,000 as rental under said lease contract, said payments being made on different dates and at the times and in the manner as stipulated in said rental or lease contract.

"(5) The court finds that by the terms of said lease or rental contract, in case of a sale of said properties covered by said lease, by the owner thereof, J. C. Ramsey, the said plaintiff, J. E. Odiorne, was to deliver possession thereof upon notice of such sale given him, within 90 days after said notice was served upon him by the said J. C. Ramsey, and that in case of such sale and notice properly given in accordance with the stipulations of said lease contract, that the said J. E. Odiorne was only to pay for the proportionate time from the beginning of the term of said lease to the date of surrender of said premises, as compared with the whole time of the lease, i. e., to pay to the said Ramsey such proportion of said \$6,000 for the entire time as the time prior to the surrender of said lease contract should compare with the time subsequent to the surrender of said lease contract or the proportionate part of said term.

"(6) The court further finds that on the 28th day of August, A. D. 1916, the said J. C. Ramsey, defendant, contracted with one F. F. Edwards, another defendant in this cause, to sell him said leased land and premises, and, by the terms of said contract of sale of said leased premises, the said F. F. Edwards agreed to accept said land subject to said lease contract, beginning October 1, 1916, and the said Ramsey reserved unto himself the benefit of said lease contract up to October 1, A. D. 1916.

"(7) The court further finds that on August 30, A. D. 1916, the defendant J. C. Ramsey delivered to the said plaintiff, J. E. Odiorne, a written notice in writing, in strict conformity with the stipulations of said lease contract, advising and informing him, the said J. E. Odiorne, that the leased premises covered by said lease had been sold by him, the said J. C. Ramsey, to the said F. F. Edwards, and said notice did demand, in accordance with the terms and stipulations of said lease, the possession of said leased premises within 90 days from August 30, A. D. 1916.

"(8) The court further finds that in accordance with the stipulations of said lease contract, and in compliance with said written notice given, made and served by the said J. C. Ramsey on the said J. E. Odiorne, the said J. E. Odiorne did surrender possession of said leased premises on the 1st day of October, A. D. 1916, and did deliver the same to the said F. F. Edwards as heretofore found.

"(9) The court further finds that the period of time from the 1st day of May, A. D. 1916, the commencement of the term of said lease, to the 1st day of October, A. D. 1916, was five-twelfths of the entire term of said lease.

"(10) The court further finds that before the institution of this suit, the plaintiff, J. E. Odiorne, made demand upon the defendant J. C. Ramsey for the return of the unearned lease money paid by the said Odiorne to the said

Ramsey, and that the defendant J. C. Ramsey failed and refused to pay same, or any part thereof.

"(11) The court further finds that there was no stipulation or agreement, express or implied, by which or under which the defendant F. F. Edwards in any manner became liable or bound to the defendant J. C. Ramsey for any part of said lease money."

The court filed the following conclusions of law:

"1. From the foregoing findings of fact, I conclude as a matter of law that the lease contract between the plaintiff and the defendant was for a term of 12 months at an average price of \$500 per month and after 5 months of said time had elapsed on October 1, A. D. 1916, or five-twelfths of said entire term had elapsed when possession was surrendered at the written demand as provided in said contract; that the plaintiff, J. E. Odiorne, was only liable for five-twelfths of the consideration for said entire term or for \$2,500 of said consideration, and that having paid the defendant J. C. Ramsey \$3,000 on said lease, the plaintiff, J. E. Odiorne, is entitled to recover judgment for the sum of \$500 with 6 per cent. interest thereon from October 1, A. D. 1916, for which I give judgment in favor of the plaintiff, J. E. Odiorne, and against the defendant J. C. Ramsey.

"2. From the foregoing findings, I conclude that the defendant J. C. Ramsey is not entitled to recover anything against the defendant F. F. Edwards. I therefore give judgment in favor of the defendant F. F. Edwards, and direct that the said J. C. Ramsey take nothing on his cross-action against the said F. F. Edwards."

#### Opinion.

[1] The sole question here involved is the proper construction of the contract, as set forth in the findings of fact. We agree with the conclusions of law found by the trial court that the contract was for the lease of the pasture for 12 months at the rate of \$500 per month; and that the appellee, Odiorne, having had the use of said pasture only for 5 months, was due on said lease contract the sum of \$2,500, and, having paid on said contract the sum of \$3,000, he was entitled to a judgment against appellant for the sum of \$500, as found and adjudged by the court; and also that, under the facts of the case, the court properly rendered judgment in favor of appellant Edwards.

Appellee objected to the consideration of the findings of fact of the court, for the reason that they were not filed within 30 days after the adjournment of the term of court at which this cause was tried.

If we should sustain this motion, it would make no difference in our judgment herein, for the reason that the statement of facts has been filed, and it supports the findings of the court.

[2] Appellee Odiorne filed a cross-assignment, claiming that he was entitled to a

judgment for \$1,000, for the reason that the evidence shows that he used the pasture only four months.

Under the lease contract, he was entitled to the use of the pasture from the 1st of May, 1916, and should be required to pay for the same from that time until the 1st of October, which is five months, and he should be required to pay for said time, regardless of the fact whether or not he actually used the pasture during the month of May.

For the reasons stated, the judgment of the trial court is affirmed.

Affirmed.

#### CITY NAT. BANK OF WICHITA FALLS v. LAUGHLIN et al. (No. 1470.)

(Court of Civil Appeals of Texas. Amarillo. Feb. 26, 1919. Rehearing Denied March 26, 1919.)

#### 1. CONSTITUTIONAL LAW §83—SELF-EXECUTING PROVISION OF CONSTITUTION—LIEN FOR REPAIRS, ETC.

Const. art. 16, § 87, providing mechanics shall have a lien on buildings and articles made or repaired by them, for the value of labor done or material furnished, and that the Legislature shall provide for speedy and efficient enforcement thereof, is self-executing in the creation of the lien.

#### 2. COMMON LAW §12—APPLICATION—STATUTES—CONSTITUTION.

Where the statutes and the Constitution are merely declaratory of common principles and do not define the civil rights and remedies in any given case, the common law of England, so far as not inconsistent with the Constitution and laws of the state, is applicable, as provided by Rev. St. art. 5492.

#### 3. BAILMENT §18(2)—LIEN OF BAILEE—CHARGES FOR REPAIRS.

An artisan who repairs an automobile has a lien at common law, for his charges, independent of statute.

#### 4. CHATTEL MORTGAGES §138(1)—ARTISAN'S LIENS—PRIORITIES.

Where an automobile was mortgaged to a bank, as security for notes, extending over a considerable period of time, the mortgagor retaining possession and right to use and care for the machine at his expense, one furnishing necessary repairs had an artisan's common-law lien, superior to a recorded chattel mortgage; Rev. St. arts. 5665-5667, providing for mechanic's liens, being but declaratory of the common law, fixing no priority as to other liens, as is done in the case of liens on buildings and improvements on land, by Rev. St. arts. 5628, 5629.

#### 5. CHATTEL MORTGAGES §138(1)—PRIORITIES—CONSTRUCTION OF LIENS—LAWS.

Rev. St. § 5671, providing that nothing therein shall impair or affect the rights as to liens created by special contract, nor impair or

affect other liens not referred to in the title relating to liens, means that priorities of liens existing independent of the statute shall be preserved, and therefore cannot be considered as making a chattel mortgage lien superior to a mechanic's lien, since both liens exist independent of such statute.

Appeal from Potter County Court; T. W. McBride, Judge.

Action by the City National Bank of Wichita Falls against S. G. Laughlin and others. From a judgment for defendants Henderson and Lefforge, plaintiff appealed. Affirmed.

Veale & Lumpkin, of Amarillo, for appellant.

Madden, Trulove, Ryburn & Pipkin, and F. A. Cooper, all of Amarillo, for appellees.

BOYCE, J. A reconsideration of this case on motion for rehearing has caused us to reverse our opinion rendered on original submission, and such opinion will be withdrawn and the following substituted in disposition of the case:

Appellant bank brought this suit on notes executed by appellee Laughlin and to foreclose a chattel mortgage on an automobile given to secure their payment. Appellees Henderson & Lefforge were in possession of the automobile, claiming a lien thereon to secure the payment of charges for labor and material in repair thereof, and were made parties defendant. The chattel mortgage provided that the mortgagor Laughlin should, at his own expense, care for said property to the satisfaction of the mortgagee. It was duly executed and recorded in July, 1917. In October, 1917, the said Laughlin placed the automobile in the garage of appellees Henderson & Lefforge, for repair, and appellees testified that these repairs "were necessary for its preservation and to put it in condition for use. The labor and material placed on the car increased its value in the sum of \$66.35, the amount of our claim." It was also shown that the said Laughlin, for a year prior to the time when the car was placed in the appellee's garage, including the time between the giving of the mortgage and the repairs on the car, had been using it freely in his business. Under this state of facts, the trial court held the lien of the appellees Henderson & Lefforge superior to that of the chattel mortgage, and this holding presents the only question on this appeal.

[1] The Constitution, by article 16, § 37, provides that—

"Mechanics, artisans and materialmen, of every class, shall have a lien upon the buildings and articles made or repaired by them, for the value of their labor done thereon, or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens."

This provision is self-executing in the creation of the lien. *McBride v. Beakley*, 203 S. W. 1137; *Wichita Falls Sash & Door Co. v. Jackson*, 203 S. W. 100. Articles 5665 to 5667 of the Revised Statutes provide that the mechanic or artisan may retain possession of an article, vehicle, etc., repaired until the amount due on same for repairing shall be paid, and that after such possession has continued for a stated time the property may be sold in the manner provided, etc. The Constitution did not attempt to deal with the question of priority between the liens created by it and those otherwise created on the same property, and we do not doubt that the Legislature had authority to do this; the Legislature did, in the case of labor performed and material furnished in the erection of buildings and the improvements on lands, expressly legislate on the subject. Articles 5628 and 5629. But articles 5665 to 5667, just referred to, are the only provisions of the statute that expressly deal with this particular character of lien, and we are thus without any express statutory provision on the subject of priority unless it is to be found in the general provisions of article 5671, which we will discuss later.

[2, 3] Assuming for the present, then, that the statutes and Constitution do not provide any rule to determine the question of priority, we think that such question should be determined under the rules of the common law. Article 5492, R. S.; *Swayne v. Lone Acre Oil Co.*, 98 Tex. 597, 86 S. W. 740, 69 L. R. A. 986, 8 Ann. Cas. 1117; *Henderson v. Beaton*, 52 Tex. 41; *Ex parte King*, 35 Tex. 658; *Gordon v. State*, 43 Tex. 339; *Grigsby v. Reib*, 105 Tex. 597, 153 S. W. 1125, L. R. A. 1915E, 1, Ann. Cas. 1915C, 1011; *Reeves & Co. v. Russell*, 28 N. D. 265, 148 N. W. 654, L. R. A. 1915D, 1149. Article 5492, referred to, reads:

"The common law of England, so far as it is not inconsistent with the Constitution and laws of this state, shall, together with such Constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the Legislature."

The Constitution and statutes are to be construed "in the light of the common law, and of the fact that its rules are still left in force." *Cooley on Constitutional Limitations*, p. 94. Now the artisan's or mechanic's lien for charges on property placed with him for repair existed at common law, independent of any statute. 17 R. C. L. p. 601, § 8; *Jones on Liens*, § 731. A portion of the provisions of the Constitution and of the statute referred to is merely declaratory of the common law, and we think that the decisions and principles of the common law in relation to the question of priority, where not inconsistent with the provisions of the Constitution and statute, would be applicable. *Reeves*

v. Russell, 28 N. D. 265, 148 N. W. 654, L. R. A. 1915D, 1149.

[4] The general rule that settles questions of priority of liens of all classes, to wit, that they take precedence in the order of their creation, is itself of common-law origin. That is the rule that appellant seeks to apply in this case. However, it is subject to exceptions, resulting from the application of other principles recognized by the law, and the appellees base their claim to priority on what they insist is an exception to the general rule stated. If the exception exists, as claimed, we see no particular reason why we should not apply it as well as the general rule, provided, of course, it is not inconsistent with the provisions of the statute and Constitution. What, then, would be the rule of priority between the two liens now asserted, independent of the Constitution and statutes? While the decisions are not altogether in accord, the weight of authority seems to favor the rule that, where a mortgagor of chattels is permitted to retain possession and use the same, and the property and use thereof is of such nature that it may be reasonably expected that from such continued use during the term of the mortgage repairs will probably be necessary, and repairs are made which enhance the value of and preserve the property, then the mechanic or artisan making such repairs under such conditions has a lien on the article repaired superior to the lien of the mortgagee. The repairs in such cases are for the benefit of both the mortgagor and the mortgagee, and the mortgagee may be held to have impliedly authorized them. *Hammond v. Danielson*, 126 Mass. 294; *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615; *Rupert v. Zang*, 73 N. J. Law, 216, 62 Atl. 998; *Reeves & Co. v. Russell*, 28 N. D. 265, 148 N. W. 654, L. R. A. 1915D, 1149. The question has not been directly before our courts, but there are expressions by the Supreme Court in the case of *Texas Bank & Trust Co. v. Smith*, 108 Tex. 265, 272, 192 S. W. 533, 536, that would indicate the tendency of said court to follow such rule. In that particular case, the court was considering the question of priority between a lien on certain crops in favor of one furnishing water to irrigate them, made by the statute "superior to every other lien," and a contract lien given by the owner of such crops prior to the attaching of the statutory lien, and in course of the opinion the following language is used:

"Ordinarily, a statutory lien will not be given precedence over an existing and duly registered lien. But there is no question as to the power of the Legislature to give a statutory lien such priority where its object is to secure a charge necessary for the preservation of the property. \* \* \* An instance of liens having this priority, independently of any statute provision, is the maritime lien upon vessels for repairs necessary to maintain their seaworthiness. The ex-

penditure for such repairs inures to the benefit of the mortgagee, and is as much to his advantage as to the mortgagor. For this reason the mortgage lien, though prior in time, is made subordinate. *Scott v. Delahunt*, 65 N. Y. 125; *Provost v. Wilcox*, 17 Ohio St. 359; *Hammond v. Danielson*, 126 Mass. 294."

It will be noted that the reference in this quotation is only to maritime liens, but the case of *Hammond v. Danielson*, referred to, does not concern a maritime lien at all, but refers to the maritime lien cases and the reasons for holdings therein as authority for holding that a mortgage given on a hack, which was to be continued in use, was inferior to a lien subsequently attaching to the hack in favor of a mechanic for repairs made thereon. Other cases giving the mechanic priority follow the same reasoning.

[5] So we believe that, if there is nothing in the statutes to the contrary, the mechanic's lien may, under the circumstances heretofore stated, be given precedence over an antecedent mortgage lien, and proceed to the examination of article 5671, already referred to as being the only provision of the statute which may be claimed as expressly establishing any rule of priority. This article of the statute reads as follows:

"Nothing in this title shall be construed or considered as in any manner impairing or affecting the right of parties to create liens by special contract or agreement, nor shall it in any manner affect or impair other liens arising at common law or in equity, or by any statute of this state, or any other lien not treated of under this title."

The said title of liens, under which this article appears, deals with many kinds of liens: Judgment, contractors', materialmen's, railroad laborers', accountants', farm hands', chattel mortgage, hotel proprietors', livery stable keepers', etc. We think the purpose of this article was to preserve and maintain liens, rights, and priorities existing independent of the provisions of the statute, rather than to announce a rule for determining such matters within itself. Both chattel mortgage liens and mechanics' liens are treated under the title, though neither are created thereby; both having their existence independent of the statute. If, independent of the statute, the mechanic's lien would, under certain circumstances, be superior to a particular antecedent chattel mortgage, then this very article of the statute would, to a certain extent, impair the mechanic's lien if said article were to be construed as making the chattel mortgage lien superior.

The cases of *Blackford v. Ryan*, 61 S. W. 161, *Masterson v. Pelz*, 86 S. W. 56, and *Piano Co. v. Elliott*, 166 S. W. 29, are relied on as establishing the superiority of a chattel mortgage under the circumstances of this case. The first two cases are in reference to contests between a livery stable keeper's lien at-

taching subsequent to the creation of a chattel mortgage lien. They both maintain the priority of the chattel mortgage over the lien of the livery stable keeper. The case of Masterson v. Pelz only refers to article 5671 as authority for the holding. A consideration of that case and the effect of its construction of said article will be, we believe, aided by first considering the nature of the livery stable keeper's lien. Such lien is not a common-law lien, but is purely statutory (17 R. C. L. p. 1046; Jones on Liens, 641), and takes no precedence over a prior chattel mortgage (Sullivan v. Clifton, 55 N. J. Law, 324, 26 Atl. 984, 20 L. R. A. 719, 39 Am. St. Rep. 652; Jones on Liens, 691; 17 R. C. L. 1050; notes to 12 L. R. A. [N. S.] 310). The distinction between the lien of the mechanic and the livery stable keeper, and the reasons for giving priority in one case and denying it in the other, are discussed in the case of Sullivan v. Clifton, supra, and need not be repeated here. It appears therefor that, independent of article 5671, the antecedent mortgagee's lien would take priority over the subsequent livery stable keeper's lien, and it was so held in the case of Blackford v. Ryan, supra, which case did not refer to said article of the statute. In Masterson v. Pelz, however, the court, after quoting the statute, announced that under its provisions the subsequent lien of the liverymen was inferior to the antecedent lien of the chattel mortgage. Under these circumstances, we do not think this decision is to be construed as holding that the article itself made the one lien superior to the other, and is not in conflict with our opinion that said article is to be construed as simply preserving a superiority otherwise established. This conception is, we think, in

harmony with the reference to the article made by the Supreme Court in a discussion of the livery stable keeper's lien, and the cases of Blackford v. Ryan and Masterson v. Pelz, in which the Supreme Court uses this language:

"The latter article [5671] would alone serve to maintain the priority of the existing mortgage in such a case." Texas Bank & Trust Co. of Beaumont v. Smith, supra.

In the other case cited by appellants, Piano Co. v. Elliott, 168 S. W. 29, the decision was not finally placed on the holding that a prior chattel mortgage on certain pianos would be superior to a lien subsequently acquired for charges for storage, tuning, and repairs thereon, though it was intimated that the chattel mortgage lien would be superior. Distinctions might be made between the facts of that case and of the case we are considering, and the character of liens in the two cases, which we do not consider it necessary to discuss. At any rate, the question is not so decided in said case as to be regarded as controlling authority.

The notes executed by Laughlin and secured by the chattel mortgage extended over a considerable period of time. It is a matter of common knowledge that an automobile in use during such length of time is very apt to require repairs of such a nature as that they may be made only by a skilled mechanic. We think the trial court, under the circumstances, was authorized to find that it was in the reasonable contemplation of the parties that such repairs would be required and that in such event the mortgagor would be authorized to have them made.

The motion for rehearing is granted, and the judgment of the lower court affirmed.

**CAMPBELL BANKING CO. v. HAMILTON.**  
(No. 1504.)

(Court of Civil Appeals of Texas. Amarillo.  
March 19, 1919.)

**1. BOUNDARIES**  $\Leftrightarrow$ 48(4) — **DISPUTED LINE—EVIDENCE.**

Long acquiescence, while strongly tending to show the true location of a disputed boundary line, will not control if it is otherwise shown to have been actually located elsewhere, unless the acquiescence amounts either to an estoppel or an agreement as to boundary.

**2. APPEAL AND ERROR**  $\Leftrightarrow$ 1064(1)—**HARMLESS ERROR—DISPUTE AS TO LINE—INSTRUCTION.**

An incorrect charge as to estoppel by long acquiescence in a disputed boundary line held not such as would withdraw facts tending to show consent or acquiescence on the part of a former owner to its establishment, and not prejudicial, since it left the jury free to ascertain whether there was an agreement to fix a line and whether it was established at the alleged point by agreement.

**3. BOUNDARIES**  $\Leftrightarrow$ 87(5) — **AGREEMENT AS TO BOUNDARY—EVIDENCE.**

In an action involving a boundary dispute, evidence held insufficient to show that the parties had actually agreed to a boundary line, as alleged.

Appeal from District Court, Archer County; Wm. N. Bonner, Judge.

Suit by George B. Hamilton against the Campbell Banking Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 173 S. W. 1012.

Nicholson & Fitzgerald, of Wichita Falls, for appellant.

Kay & Akin, of Wichita Falls, for appellee.

**HUFF, C. J.** The appellee Hamilton instituted suit against Campbell Banking Company, the appellant, to fix the boundary line between the north and south half of section 1810, Texas Emigration Company survey in Archer county, Tex., the north half being owned by the Campbell Banking Company and the south half by Hamilton. It was agreed in the trial court that the action was a boundary line suit, and that E. S. Cooper was the common source of title. E. S. Cooper sold the north 160 acres to the Campbell Banking Company and the south 160 acres to Geo. B. Hamilton, the appellee contending that there was an excess of acreage in the section of land, and the defendant, appellant, contending there was no excess; and, in addition to that issue, the appellant pleaded that after it bought the north half of section 1810 from E. S. Cooper it had an agreement with Cooper to run out and establish the boundary line between their respective lands; that they agreed upon a survey-

or, who did establish the boundary line between their lands, and that Cooper agreed to the line as the true boundary line and appellant built his fence just 10 feet north of the line so run, leaving the 10 feet for its portion of the roadway between the land; that Cooper acquiesced in the line, and recognized the same, and knew that the fence was built by appellant, believing that the boundary line was settled; and that appellee was estopped from claiming any land north of said line; that appellee's vendor, Cooper, lived on the land at the time the fence was built and the line run and established, and cultivated and used the land for one year thereafter, and recognized the boundary line thus established as true boundary line between said tracts of land, and never at any time raised any objection or complained, or in any manner indicated that he was not satisfied with the line as run, and expressed himself as absolutely agreeable thereto. The case was submitted to the jury upon special issues, and the jury found that the true line was 672 varas south of Campbell's north fence on block No. 1810. They found that Cooper and Campbell had no agreement locating or fixing the boundary line between their land.

[1, 2] The first and second assignments assert error on the part of the trial court in charging as to acquiescence and submitting of the issue thereon. The court, in effect, instructed the jury that, where there was a dispute between adjoining proprietors of land as to the true dividing line, and one builds his fence and improves the land with reference to a particular line contended for by him as the true line, and the other respects and long acquiesces in such line, he is bound by such respect and long acquiescence in said line, and cannot afterwards dispute said line and claim that it is somewhere else, even though it may not be the true location; and the fourth issue submitted was whether Cooper, at the time the fence was erected by Campbell, knew that Campbell was claiming and relying on the line between them thus established as the true line, and whether Cooper respected and long acquiesced in the use of the line as the true line between the lands. The jury answered this issue in the negative. Under the facts of this case the issue submitted, as we regard the matter, was wholly immaterial. According to appellant's evidence, Cooper was then the owner of the adjoining land, and entered into an agreement to have the line run and established, and that it was so established, and that appellant built its fence in accordance with the agreement, and that Cooper accepted the line as the division line, and recognized it for a year before he sold it to the appellee. Cooper denies by his testimony that he entered into the agreement to

establish the line so run as the division line between them, and after it was run simply stated that it would be all right with him, provided it was the correct and true line. It is well settled that general reputation and long acquiescence, while strongly tending to show the true location of a disputed line, will not control if it is otherwise shown to have been actually located elsewhere, unless the acquiescence amounts either to an estoppel or an agreement as to the boundary. *Bohny v. Petty*, 81 Tex. 524, 17 S. W. 80; *Schunior v. Russell*, 83 Tex. 83, 18 S. W. 484; *Wiley v. Lindley*, 56 S. W. 1001; *Camp v. League*, 92 S. W. at page 1066. Also *Bundick v. Moore-Cortes Canal Co.*, 177 S. W. at page 1036. We do not think the objections of the appellant to the charge and issue should be sustained. It is possible that facts and the pleadings authorized the submission of acquiescence as an estoppel, and should have, upon proper request being made, been so submitted. The charge of the court, as will be seen from the above quotation, was not correct as a proposition of law, but as the facts did not require acquiescence as an aid to prove the boundary, there was no necessity for the charge or the issue as submitted. But as we conceive it, no injury to appellant is shown, and we do not feel authorized in holding that it did probably cause an improper verdict. We do not understand that the charge or issue would withdraw the facts tending to show consent or acquiescence on the part of Cooper to the establishment of the line where Campbell placed it on the issue of an agreement to so fix the division line. The jury were left free to look to such acquiescence in ascertaining whether there was an agreement to fix the line, and whether it was established at that point by agreement.

[3] The third assignment assails the finding of the jury to the effect that Cooper and Campbell did not have an agreement locating and fixing the boundary line between their lands. The testimony of Cooper would authorize the jury in finding that Campbell proposed that they procure a brother of Mr. Campbell who had a surveying outfit to locate the division lines between the two tracts of land, and in order to save expenses Cooper agreed that the brother might be used for that purpose, but that he was to be present when the line was run, and that the purpose was to find the true line; that Campbell and his brother, in the absence of Cooper, ran and staked the line, and afterwards saw Mr. Cooper and asked him if he had seen the line, and if it was satisfactory, and he told them he had seen the stakes where they had run the line, and it was satisfactory, provided the line was correctly run, and was at the right place, but that he did not assent or agree upon the line as being prop-

erly located, but only did so if it was the true dividing line. Campbell afterwards erected his fence, and, while Cooper offered to build his part of the fence, Campbell declined on the ground that he did not want a partnership fence, etc. We think from these facts the jury were authorized to find that there was no agreement to fix the line as run by Campbell as the true division line or as the division line between the parties. The facts in the case strongly suggest it was the purpose of Cooper and Campbell to locate and fix the true boundary line between their respective tracts, or at least that was Cooper's purpose. Campbell ran and staked the line in the absence of Cooper, and when he met Cooper he was asked if it was satisfactory, and Cooper told him it was if it was the true line. In this statement he is corroborated by his wife. We do not think this would amount to an agreement to fix the line at the place run and in order to settle the controversy. It was the purpose in agreeing to the survey to fix the true line, and, if it was not placed on the true line, neither party would be bound by the line so run. *Schraeder v. Packer*, 129 U. S. 688, 9 Sup. Ct. 385, 32 L. Ed. 700; *Ware v. Perkins*, 178 S. W. at page 849, and authorities cited. This will also dispose of the fourth, fifth, and sixth assignments.

We find no such error assigned as will require a reversal of the judgment, and it will therefore be affirmed.

#### BEALL v. MOORE. (No. 6182.)

(Court of Civil Appeals of Texas. San Antonio. Feb. 28, 1919. Rehearing Denied April 2, 1919.)

#### JUSTICES OF THE PEACE § 72 — VENUE — PLEA OF PRIVILEGE—WAIVER.

Where case was pending in justice's court for several months, and five continuances were had, and no plea of privilege was ever called to attention of justice and ruling procured with respect thereto, the plea was waived.

Appeal from Medina County Court; R. J. Noonan, Judge.

Suit by Crit Moore against J. E. Beall. From an order overruling a plea of privilege, defendant appeals. Affirmed.

R. W. Hudson, of Pearsall, and De Montel & Fly, of Hondo, for appellant.

Briscoe & Morris, of Devine, and L. J. Brucks, of Hondo, for appellee.

MOURSUND, J. This is an appeal from an order overruling a plea of privilege, which had originally been filed in justice's court of precinct No. 5 of Medina county in a suit



by appellee against appellant for \$150, alleged to be due appellee by appellant on account of the killing of appellee's mule by appellant. While the transcript of the justice's docket shows that the case was filed on March 7, 1917, there is an agreement to continue to the next regular term in the record, which purports to have been filed on December 18, 1916. The plea of privilege states that the case was filed November 7, 1916, and the citation served on November 15, 1916. The plea was sworn to on December 15, 1916, but purports to have been filed January 18, 1916. The judgment in the justice's court was rendered on June 18, 1917, and the cost bill shows that five orders continuing the case are charged for.

The transcript from the justice's court discloses that the case was pending in such court for several months, and disregarding the discrepancies in dates above pointed out, that one continuance was had without prejudice, but the record is silent as to the other continuances. In addition, the transcript wholly fails to show that the plea of privilege was ever called to the attention of the justice and a ruling procured with respect thereto. Under these circumstances it was the duty of the county court to hold that the plea had been waived. *Spinks v. Mathews*, 80 Tex. 373, 15 S. W. 1101; *Aldredge v. Webb*, 96 Tex. 122, 46 S. W. 225; *I. T. A. v. Votaw*, 197 S. W. 237; *Hillsman v. Cline*, 145 S. W. 727; *T. & N. O. Ry. Co. v. Parsons*, 109 S. W. 241; *Parrott v. Peacock Military College*, 180 S. W. 133; *Edwards v. Youngblood*, 162 S. W. 1166. The plea must be held to have been abandoned in the justice's court, in view of the condition of the record filed in the county court. The appellant is therefore in no attitude to complain of errors touching the matter of the plea alleged to have been committed in the county court. *Chatham Mach. Co. v. Smith*, 44 S. W. 592. We are, however, of the opinion that the record shows no error in the county court proceedings.

Judgment affirmed.

GILROY et al. v. ROWLEY et al. (No. 924.)

(Court of Civil Appeals of Texas. El Paso. March 13, 1919.)

1. VENDOR AND PURCHASER — 232(9)—BONA FIDE PURCHASER—TENANT IN POSSESSION.

Where purchasers knew that defendants, as lessees, were in actual possession of premises and cultivating the land, they were put on notice of the extent of defendants' rights therein.

2. SEQUESTRATION — 21 — WRONGFUL SEQUESTRATION—DEFENSE.

Where in trespass to try title it was determined that plaintiff's writ of sequestration was wrongfully issued and served, the taking of the property under such writ amounted to a conversion, and it was no defense to defendant's claim in reconviction for damages for wrongful sequestration that defendants were given an opportunity to harvest all crops that they had seeded and cultivated as lessees of the premises, for defendants had a right to refuse such offer.

3. TRESPASS TO TRY TITLE — 39(3) — EVIDENCE—ADMISSIBILITY.

In an action by purchasers in trespass to try title to obtain possession from vendor's lessees, the written lease was admissible to support defendants' right to possession.

4. APPEAL AND ERROR — 544(1)—BILL OF EXCEPTIONS—OVERRULING MOTION TO STRIKE EVIDENCE.

Where the action of the court in overruling a motion to strike out evidence is not evidenced in the record by any bill of exceptions, the question cannot be reviewed.

Appeal from District Court, El Paso County; P. R. Price, Judge.

Suit by Helen Gilroy and husband against R. E. Rowley and another. From judgment for defendants, plaintiffs appeal. Affirmed.

Edward L. Medler and Fred Knollenberg, both of El Paso, for appellants.

Brown & Wilchar, of El Paso, for appellees.

HARPER, C. J. Helen Gilroy and her husband, J. T. Gilroy, brought this suit against R. E. Rowley and N. Thayne, in the form of trespass to try title to certain lands described, and sued out writ of sequestration and took possession. Defendants answered by plea of not guilty. General denial, and reconvened for damages for wrongful sequestration. Submitted to a jury by special issues, and upon the verdict, judgment was entered in favor of defendants for \$397.40 actual damages and \$200 exemplary. From which this appeal.

Statement of the Case.

Mrs. E. C. Mundy, being the owner of the premises in controversy, on September 27, 1916, executed a written lease to defendants N. Thayne and R. E. Rowley, for one year from the date thereof, for cultivation, etc., when in fact it was intended that the lease should begin October 17, 1916, and expire October 17, 1917. On November 7, 1916, plaintiff purchased the premises with knowledge of the written lease.

[1] The writ of sequestration was served October 10, 1917. The jury found that it was the intention of the parties, at the time

the lease was executed, that it should run from October 17, 1916, to October 17, 1917, and that the time fixed in the writing was put in by mutual mistake. By the first, second, third, and eighth assignments of error, it is urged that the said findings are not a proper basis for judgment for defendants upon their plea in reconvention; because there is no evidence that plaintiffs had notice that the lease expired October 17th, instead of September 17th, as shown by the writing. There is positive evidence in the record that plaintiffs had notice that the time limit of the lease had not expired. Besides they were put on notice of the extent of defendants' rights by the fact that they were in actual possession of the premises, cultivating the lands. *Willson v. Clemmons*, 170 S. W. 855; *Miller v. Flattery*, 171 S. W. 253; *Pipkin v. Ware*, 175 S. W. 808; *Bounds et al. v. Little*, 75 Tex. 316, 12 S. W. 1109.

The fourth charges error in refusing to submit the question:

"Did plaintiffs, or either of them, have any knowledge of the fact that the lease should run from October 17, 1916, to October 17, 1917?"

Is answered by the holding next above. The defendants being in actual possession under contract antedating plaintiffs' deed, the latter were chargeable with notice thereby.

[2] The fifth is that the court erred in refusing to submit the question:

"Were defendants given an opportunity to harvest all crops that they seeded and cultivated during the term of the lease in evidence?"

It having been determined that the writ of sequestration was wrongfully issued and served, the taking of the property amounted to a conversion, and the defendants had the right to refuse the offer. *Crawford v. Thomason*, 53 Tex. Civ. App. 561, 117 S. W. 181.

There is no merit in the tenth, which asserts that there is no evidence to support the finding of the jury that the plaintiff did not have probable cause to believe that the lease expired on September 27, 1917.

[3] The admission of the written lease in evidence was proper because it was a necessary item of defendants' evidence in support of their claim for damages, in that it evidenced their rights to possession of the premises.

In answer to the twelfth and thirteenth: It was not error for the court to submit the question of exemplary damages under the facts of this case, and the verdict is supported by the evidence.

[4] The fourteenth reads:

"The court erred in overruling and denying the plaintiffs' motion to strike out certain testimony admitted over the objections of plaintiffs. Said testimony being set out in said motion to strike out the same in paragraphs (a), (b), (c), (f), (g), (h), and said motion is now referred to and made a part hereof."

The action of the court is not evidenced by any bill of exceptions so far as this record discloses, without which we cannot review the questions presented.

Finding no error in the record, the assignments are overruled, and cause affirmed.

(138 Ark. 63)

**E. O. BARNETT BROS. v. PORTER.**  
(No. 157.)

(Supreme Court of Arkansas. March 24, 1919.)

**APPEAL AND ERROR §1099(1)—LAW OF CASE—SUBSEQUENT APPEAL.**

Where refusal to grant new trial for false testimony is alleged as error on appeal, holding that trial court had refused to allow exception in regard to surprise occasioned by alleged false swearing, and that the exception had not been brought up on the record by a bystanders' bill of exceptions under the statute is conclusive on subsequent appeal from judgment, refusing to set aside judgment in former action upon ground of falsity of such testimony.

Appeal from Hot Spring Chancery Court;  
J. P. Henderson, Chancellor.

Suit by E. O. Barnett Bros. against Joe T. Porter. Decree of dismissal, and plaintiff appeals. Affirmed.

Oscar Barnett, of Malvern, for appellant.  
E. H. Vance, Jr., of Malvern, for appellee.

SMITH, J. The parties to this litigation were the parties to a suit brought originally as an action in replevin, and after a trial which resulted in a judgment in favor of Porter in the circuit court Barnett Bros. prosecuted an appeal to this court. The judgment of the circuit court was affirmed by us in an opinion found reported in 203 S. W. 842. Thereafter Barnett Bros. brought this suit in the chancery court of Hot Spring county—the county in which the trial at law had occurred—to set aside the judgment which had been pronounced thereon and affirmed by this court.

The relief prayed for was asked upon the ground that fraud had been practiced in the trial of the original cause, in that witnesses for Porter had testified, for the purpose of increasing the damages, that the colt of the mare, which constituted the subject-matter of the replevin suit, had died for the want of nourishment after the mare had been seized under the order of delivery, when in truth and in fact the colt had not died. It was also alleged that the falsity of this testimony was not known until after the trial. Attached to the complaint as exhibits thereto were copies of the affidavits which had been used in support of the motion for a new trial. A demurrer to the complaint was sustained, and this appeal has been prosecuted to reverse the decree of the court below dismissing the complaint as being without equity.

We have before us here the identical record upon which the judgment of this court has already been pronounced, with allegations to the effect that the false testimony

in regard to the colt constituted such a fraud in the procurement of the judgment as authorizes the chancery court to set it aside.

It appears, however, from the recitals of our former opinion and the complaint now before us that all the facts now alleged as constituting the fraud complained of were known to appellant when he filed his motion for a new trial and were recited in said motion, and one of the points sought to be raised on the former appeal was the alleged error of the trial court in refusing to grant a new trial in view of the showing made of false testimony in regard to the colt. We there held that the trial court had refused to allow the exception in regard to the surprise occasioned by the alleged false swearing in regard to the colt, and that the exception had not been brought up on the record by a bystanders' bill of exceptions as provided by statute. The decision to that effect is conclusive of the facts raised on this appeal, and the decree of the court below sustaining the demurrer is therefore affirmed.

(138 Ark. 63)

**BUSBY v. REID. (No. 152.)**

(Supreme Court of Arkansas. March 24, 1919.)

**1. ANIMALS §50(1)—RUNNING AT LARGE—STOCK LAWS—DISTRICTS—STATUTE.**

Acts 1915, p. 707, amending Acts 1907, p. 474, authorizing the county court of Pike county on petition to form a district, not less than five miles square in extent, wherein certain animals should be prohibited from running at large, operates to extinguish a district formed under the old statute, which permitted the organization of districts comprising five square miles.

**2. ANIMALS §50(1)—CONSTITUTIONAL LAW §92—VESTED RIGHTS—DISSOLUTION OF STOCK DISTRICT.**

The Legislature may, without impairing vested rights, dissolve any district formed under a statute authorizing the creation of a district, not organized for any length of time, wherein animals are prohibited from running at large.

**3. ANIMALS §51—IMPOUNDING TRESPASSING ANIMALS—RIGHT TO IMPOUND.**

The right to impound stock running at large depends entirely upon statute conferring such right, which must be strictly construed.

Appeal from Circuit Court, Pike County;  
J. S. Lake, Judge.

Action by A. Busby against G. M. Reid. From judgment for defendant, plaintiff appeals. Reversed and remanded.

W. S. Coblenz, of Murfreesboro, for appellant.

O. A. Featherston, of Murfreesboro, for appellee.

**McCULLOCH, O. J.** This is an action in replevin to recover possession of certain hogs, the property of plaintiff, which were impounded by defendant while trespassing on the inclosed lands of the latter.

A fencing district in Pike county was formed pursuant to the terms of a special statute (Acts of 1907, p. 474) which provided for the formation of such districts by order of the county court on petition of the owners of property in the territory to be affected, which was, according to the terms of the statute, not to consist of less than "five square miles." The statute also contained provision for impounding stock trespassing on inclosed lands inside of a prohibited area.

The Legislature of 1915 amended the first section of the statute (Acts of 1915, p. 707) by providing that a district so formed shall consist of not less than "five miles square," and another section of the new statute prescribes a penalty for allowing stock to run at large in the district.

The case of *Green v. State*, 130 Ark. 87, 196 S. W. 813, was a criminal prosecution under the statute for permitting stock to run at large in a district which had been formed under the original statute prior to its amendment, and we held that the penalty prescribed by the statute did not apply in a district organized under the old statute. We expressly pretermitted a decision of the question now presented, whether or not the amendment of the statute prescribing a larger area for such districts operated as a dissolution of districts formed under the old statute which do not come up to the requirements of the new statute.

Plaintiff's hogs were trespassing on inclosed lands inside the boundaries of the old district, and the question is squarely presented now whether or not the old district is legally in existence.

[1, 2] We think that the amendment to the statute prescribing different requirements, and also prescribing a penalty for violations necessarily operated as a dissolution of districts formed under the old statute which do not meet the requirements of the new statute. The Legislature undoubtedly had power to dissolve any district formed under the statute. Such districts are not organized for any specified length of time, and are subject completely to the will of the lawmakers. No vested rights are involved. It is merely the exercise of a phase of the state's police power. The old statute stands amended according to the terms of the new statute, and, since the old district does not conform to the law as it now stands, it has no legal existence.

[3] The right to impound stock running at large depends entirely upon statute confer-

ring that right, which, according to settled rules, must be strictly construed.

The trial court erred in submitting the case to the jury under the law as established by the statute referred to.

Reversed, and remanded for a new trial.

(138 Ark. 99)

**ALEXANDER ECCLES & CO. v. MUNN.**  
(No. 155.)

(Supreme Court of Arkansas. March 24, 1919.)

**1. WAREHOUSEMEN §16 — WAREHOUSE RECEIPTS—LOST RECEIPTS—RIGHTS OF HOLDER.**

The finder of an indorsed warehouse receipt, nonnegotiable under Acts 1915, p. 986, §§ 4, 5, which on its face shows name of true owner, cannot by selling it transfer title of true owner.

**2. WAREHOUSEMEN §13—RECEIPTS—NEGOTIABILITY.**

Acts 1915, p. 987, § 7, requiring that nonnegotiable warehouse receipts be marked "nonnegotiable," has no application, so as to make negotiable a receipt nonnegotiable in form, in proceeding against a purchaser of receipt from one who had found receipt; warehouseman not being a party.

**3. CUSTOMS AND USAGES §8—STATUTES—WAREHOUSEMEN—RECEIPTS.**

Acts 1915, p. 1001, § 39, providing that nonnegotiable warehouse receipts cannot be negotiated, cannot be set aside by showing custom for many years of cotton buyers, farmers, and merchants to treat and consider that a cotton ticket or warehouse receipts would pass title to cotton and right to possession of it by delivery of receipt from one person to another.

Appeal from Circuit Court, Hempstead County; Geo. R. Haynie, Judge.

Action by W. M. Munn against Alexander Eccles & Co. From a judgment in favor of plaintiff on appeal from justice court, defendants appeal. Affirmed.

This is an action in replevin brought in a justice court by W. M. Munn against Alexander Eccles & Co. to recover a bale of cotton alleged to be worth \$140. There was a judgment in the justice court in favor of the plaintiff, and the defendants appealed to the circuit court. There the case was tried upon a state of facts substantially as follows: During the year 1917 W. E. Mitchell raised a crop on shares on the farm of the plaintiff, W. M. Munn. After Mitchell had gathered the first two bales of cotton, he brought them to Hope, Ark., and placed them in a warehouse. Receipts were issued to him for the cotton. Mitchell and Munn then divided the cotton, each taking a bale. Mitchell turned over to Munn the warehouse re-

ceipt for his bale, which, together with the indorsements on it, is as follows:

"Planters' Warehouse, No. 4709.

"In consideration of the price paid it is understood and agreed by the seller that 10¢ for weighing and 15¢ for handling be deducted from the amount of each bale of cotton sold. Storage after 30 days. Positively not liable for fire.

"Hope, Ark., 10/11, 1917.

"Bought of W. E. Mitchell one bale of cotton

Mark. Weight. Tara. Price. Remarks.

520	10		
	—	14092	
	27	25	

140.87

"Ruff Boyett, Manager."

Stamped across the face of said ticket in blue ink appears:

"Void after Oct. 10, 1917. Betts & Brundidge, Hope, Ark."

Stamped across the face of said ticket in purple ink appears:

"Planters' Wa. Co. Cancelled Oct. 16, 17. Ruff Boyett, Mgr."

Mitchell did not indorse the warehouse receipt when he turned it over to Munn. The latter either lost the receipt or it was stolen from him. When Munn first lost the warehouse receipt, he came to the warehouse at Hope and tried to locate the bale of cotton. At that time the party in possession of the receipt had sold the bale of cotton to Alexander Eccles & Co., the defendants, and had delivered to them the warehouse receipt. Alexander Eccles & Co. bought the cotton believing the holder of the receipt to be the owner thereof. They did not know that it had been lost or stolen from Munn. The value of the cotton was alleged and proved to be \$140.

The circuit court directed the jury to return a verdict in favor of the plaintiff for the possession of the bale of cotton or its value, \$140.

From the judgment rendered, the defendants have prosecuted an appeal.

Jas. H. McCollum, of Hope, for appellants.  
Steve Carrigan, Jr., of Hope, for appellee.

HART, J. (after stating the facts as above).

[1] The circuit court was right in directing a verdict for the plaintiff. The undisputed facts show that the plaintiff was the owner of the warehouse receipt for the bale of cotton in controversy, and that he either lost it or that it was stolen from him. The party finding the receipt or stealing it could bestow no greater rights upon the transferee than he himself possessed. The defendants, Alexander Eccles & Co., therefore acquired no greater rights than were transferred to them by the delivery to them of the warehouse receipt. In other words, the finder of an in-

dorsed warehouse receipt which on its face shows the name of the true owner cannot by selling it transfer the title of the true owner. *Citizens' Bank v. Arkansas Compress & Warehouse Co.*, 80 Ark. 601, 96 S. W. 997, 117 Am. St. Rep. 102. The correctness of this holding depends upon the construction to be given to our uniform warehouse receipt law passed by the Legislature of 1915. See Acts of 1915, p. 983. Sections 4 and 5 of the act read as follows:

"Sec. 4. A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a nonnegotiable receipt.

"Sec. 5. A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt is a negotiable receipt."

[2] Our statement of facts shows that the receipt contained all the essential requirements prescribed by the statute, and is therefore a valid one. The receipt states that the cotton belongs to the depositor, or at least to a specified person. It is therefore, under the statute, a nonnegotiable receipt. It is true it is not marked on its face "nonnegotiable," as required by section 7 of the act. That section provides that, in case of the warehouseman's failure so to mark a receipt, a holder of it who purchased it for value supposing it to be negotiable may, at his option, treat such as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable. The warehouseman, however, is not a party to this action, and this section, therefore, has no application to the present case.

Section 39 of the act reads as follows:

"Sec. 39. A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee.

"A nonnegotiable receipt cannot be negotiated, and the indorsement of such a receipt gives the transferee no additional right."

As we have already seen, the warehouse receipt is nonnegotiable, and it is apparent from the latter part of the section just quoted that, even if the receipt had been indorsed to the defendants, they would not have acquired any greater rights than the transferor. As stated in *Citizens' Bank v. Arkansas Compress & Warehouse Co.*, supra, a thief who finds a compress receipt can give no more title to a purchaser from him than he could to property which he had found or stolen.

[3] It is also contended by counsel for the defendants that a long and well established usage of trade at Hope made the receipt negotiable and transferable by delivery, and that the delivery thereof to the defendants, who were innocent purchasers for value, carried the title and right to the possession of the bale of cotton. It was proved by the de-

defendants that it had been the custom for many years at Hope for cotton buyers, farmers, and merchants to treat and consider that a cotton ticket or warehouse receipt would pass title to the cotton and the right to the possession of it by the delivery of the receipt from one person to another. Such a custom, however, could have no effect to set aside the statute, where the latter is designed to prohibit such a mode of transfer. As we have just seen, the receipt was a nonnegotiable one, and, under the terms of the statute, the transferee acquired no greater rights than the transferor. The defendants cannot set up a custom which would be in violation of the express terms of the statute, and in that way abrogate the statute. *Citizens' Bank v. Ark. Compress & Warehouse Co.*, supra.

In a case note to 17 Ann. Cas. at page 672, it is said that it is generally held that a statute making warehouse receipts negotiable by indorsement does not prohibit their transfer by delivery, and that title to the property represented thereby will pass if the delivery is made with that intent. It is further stated that a transfer without indorsement will merely transfer the title of the transferor and will not afford the transferee the greater rights which are granted under the statute; and several cases are cited in support of the statement.

It follows that the trial court was right in directing a verdict for the plaintiff, and the judgment will be affirmed.

(138 Ark. 105)

**J. R. WATKINS MEDICAL CO. v. HOGUE**  
et al. (No. 153.)

(Supreme Court of Arkansas. March 24, 1919.)

**1. SALES — 7 — DISTINGUISHED FROM AGENCY.**

A contract under which defendant was to sell medicines and extracts manufactured by plaintiff held to create relation of vendor and vendee, and not that of principal and agent.

**2. PRINCIPAL AND SURETY — 156 — ANSWER — CONTRACT — ABANDONMENT.**

In action against principal and sureties on a contract for selling goods of plaintiff, allegations of answer to effect that relation was that of principal and agent held insufficient to justify conclusion that parties by their conduct had abandoned their original contract, relieving sureties.

Appeal from Circuit Court, Saline County;  
W. H. Evans, Judge.

Action by the J. R. Watkins Medical Company against Jinks S. Hogue and others. Judgment for defendants, and plaintiff appeals. Reversed and rendered.

This action was brought by the appellant against the appellees. The appellant is a

Minnesota corporation, duly authorized to do business in the state of Arkansas. It alleged that it entered into a contract with Jinks S. Hogue by which it agreed to sell and deliver to the latter, f. o. b. cars, at any of its regular places of shipment, certain goods, extracts, and other articles manufactured and sold by it, at customary wholesale prices between January 29, 1915, and March 1, 1916; that Hogue agreed to pay for the goods so purchased, as specified in the terms of the written contract, and at the expiration of the period named therein to pay the entire sum remaining unpaid; that A. B. Cox and J. L. Smith, in consideration of \$1 paid by the company and the execution of the contract, as sureties jointly and severally promised and guaranteed the full and complete payment for the said goods according to the terms of the contract; that there was due and unpaid by Hogue the sum of \$731.26, for which it prayed judgment. The complaint was duly verified.

The appellant attached the copy of the contract, as an exhibit to its complaint, which is as follows:

"This agreement, made at Winona, Minn., U. S. A., this 29th day of January, A. D. 1915, between the J. R. Watkins Medical Company, a Minnesota corporation, hereinafter called the company, party of the first part, and Jinks S. Hogue, of Bauxite, Ark., party of the second part, witnesseth that for and in consideration of the promises and agreements hereinafter contained, to be kept and performed by the party of the second part, the company promises and agrees to sell and deliver to the party of the second part, free on board cars at Winona, Minn., or at its option, at any of its regular places of shipment, any and all medicines, extracts, and other articles manufactured or sold, or which may hereafter be manufactured or sold by it, unless prevented by fire, insurrection, invasion, strikes, or other cause, at the usual and customary wholesale prices, as the party of the second part may reasonably require for sale by him from time to time from the date hereof until the 1st day of March, 1916, as hereinafter provided, in the following described territory, excepting the incorporated municipalities therein located, to wit: In the state of Arkansas, the part of Saline county lying southeast of the military road, including the townships of Fairplay and Liberty.

"In consideration of the sale and delivery to him f. o. b. cars at Winona, Minn., or other regular shipping point as above mentioned, by said company, of the medicines, extracts, and other articles manufactured or sold by it, in such reasonable quantities as he may require for sale in said territory as herein provided, upon the terms herein expressed, the party of the second part promises and agrees, as soon as practicable after said medicines, extracts, and other articles are received, to make a thorough and personal canvass of said territory at least three times a year, at his own cost and expense and to provide a good team and proper wagon and outfit therefor, and to sell said medicines, extracts, and other articles, or so

much thereof as possible, and at all times during said term said party of the second part agrees to keep a complete record of all goods disposed of by him and on hand, and to make to said company complete, regular, weekly written reports of all sales and collections, and also report the goods on hand and outstanding accounts when requested by said company so to do.

"And the party of the second part promises and agrees to pay to said company, at Winona, Minn., the wholesale prices aforesaid for the medicines, extracts, and other articles sold to him from time to time as herein provided, and the prepaid freight and express thereon, if any, during said term, at the time and in the manner and in accordance with the provisions of the weekly report blanks of said company to be furnished to the party of the second part, and at the termination of this agreement to pay the whole amount thereof then remaining unpaid; or in cash, within ten days from date of invoice, with the understanding that said company will allow a discount of 3 per cent. from said wholesale prices on cash payments, provided full payment for all goods previously furnished shall then have been made; but such payments, or any of them, may be extended by the said company without notice to the sureties herein and without prejudice to the rights or interests of said company, and if the party of the second part shall not pay cash for said medicines, extracts, and other articles so sold and delivered to him, and if the payments at the time and in the manner and in accordance with said weekly report blanks, as aforesaid, are insufficient to pay therefor, said company may, in its discretion, thereafter either limit the sales herein agreed to be made, or discontinue the same until such indebtedness is paid or reduced as said company may require; and at the termination of this agreement the party of the second part agrees to return by prepaid freight to said company at Winona, Minn., or other point at which the same were delivered, in as good condition as when delivered to him f. o. b. cars, all of the said medicines, extracts, and other goods undisposed of by him, and the company agrees to receive such medicines and other goods, if the same are in such condition when received at Winona, Minn., or other point at which they were delivered to the party of the second part f. o. b. cars, and pay or credit the party of the second part therefor at the same prices at which the same were sold and delivered to him, and, if not in such condition when so received, the company shall make a reasonable charge for putting them in such condition, if that can reasonably be done, and deduct the same from the amount of the goods so returned, and pay or credit the party of the second part with the balance thereof, but no medicines, extracts, or other goods left by said second party with his customers, on time or trial, not paid for by them, or by them partially used and then returned to him, shall be returned to said company, or be paid for by it or credited to the account of said party of the second part.

"And it is mutually agreed between the parties hereto that the party of the second part shall pay all transportation charges of goods he so purchases and all expenses and obligations incurred in connection with the canvass of said territory and the sale of the goods therein, and

shall have no power or authority to incur any debt, obligation, or liability of any kind whatsoever in the name of or for or on account of said company, and that said company shall in no way contribute to the expense of, nor share in the profits or losses on the sales of said goods by said second party, nor have any interest in the accounts due for goods sold by the said second party, and no printed, advertising, or other matter of said company sent to or distributed by said second party shall be construed to change or modify the terms of this agreement, and that this is the complete, entire, and only agreement between the said parties, and that it shall not be varied, changed, or modified in any respect except in writing executed by the parties hereto. And it is further mutually agreed that either of the parties hereto may terminate this agreement at any time by giving the other party notice thereof in writing by mail and any sum then owing from said second party to said company shall thereupon be and become immediately due and payable."

The appellees answered, and admitted the execution of the contract, and admitted that the amount claimed was a true and correct statement of the account, but denied that the goods were sold to Hogue. They set up that the goods under the contract were furnished to Hogue as agent of the plaintiff company, and that same were to be sold and accounted for by Hogue, as agent; that immediately after the contract was executed the plaintiff company abandoned the idea, if it ever entertained such, that the contract created the relation of vendor and vendee between it and Hogue, and by its conduct in carrying out the contract, as well as by the contract itself, the plaintiff company became the principal and Hogue its agent. The answer then specified the terms of the contract upon which the defendants rely as creating the relation of principal and agent, and also set up that the plaintiff company had terminated the contract after Hogue, acting under the directions of the company, had sold large amounts of goods on credit for which he was not responsible; that the contract was entered into with the fraudulent intent to induce Hogue to place on credit and on trial as great an amount of goods as possible and then terminate the contract and compel the sureties to pay for the goods; that the contract was terminated by the plaintiff company at that season of the year when collections could have been made; and that Hogue had no opportunity to continue the business and make the collections. The answer was not verified.

At the trial, before any evidence was taken, the plaintiff company filed a motion for judgment on the pleadings; which motion was overruled, and the plaintiff company saved its proper exceptions.

Testimony was then introduced by the plaintiff and the defendants. At the conclusion of the testimony the plaintiff requested the court to instruct the jury to return a verdict in its favor, which the court refused.

The verdict and judgment were in favor of the defendants, and this appeal followed.

J. S. Utley, of Benton, and Tawney, Smith & Tawney, of Winona, Minn., for appellant. Mehaffy, Reid, Donham & Mehaffy, of Little Rock, and J. C. Ross, of Malvern, for appellees.

WOOD, J. (after stating the facts as above). The contract sued on herein is very similar in much of its language to the contract sued on and set forth in *Clark v. J. R. Watkins Medical Co.*, 115 Ark. 168, 170-174, 171 S. W. 138. But it also differs in some very material respects from the language of that contract, and there is eliminated from the contract in the instant case the language which rendered the contract ambiguous in the case of *Clark v. J. R. Watkins Medical Co.*, supra. Moreover, other language contained in the contract here in suit, which was not in the contract in the above case, served to differentiate that case from the one at bar, and renders the contract in the present case free from ambiguity.

[1] The court therefore erred in not construing the contract as one which created the relation of vendor and vendee. There is no language in the contract which would warrant the court in submitting this as an issue of fact to the jury. The contract being one which in plain terms created the relation of vendor and vendee, the court should have so declared as a matter of law. The case is ruled on this point by the cases of *W. T. Rawleigh Medical Co. v. Holcomb*, 126 Ark. 597, 191 S. W. 215, and *Lange Medical Co. v. Johnson*, 131 Ark. 15, 197 S. W. 1168.

[2] Nor do we find that the allegations of the answer are sufficient to justify the conclusion that the parties to the contract, by their conduct, had abandoned the same, and entered upon a new and different contract which would relieve the appellee and his sureties from liability on the contract sued on. See *Hughes et al. v. W. T. Rawleigh Medical Co.*, 208 S. W. 295.

It follows that the court erred upon the pleadings in not granting appellant's prayer for a directed verdict in its favor.

The judgment is, therefore reversed, and judgment will be entered here for the appellant in the sum of \$731.26, as prayed for in its complaint.

(141 Tenn. 362)

#### RUGG v. STATE.

(Supreme Court of Tennessee. March 22, 1919.)

#### 1. INDICTMENT AND INFORMATION $\Leftrightarrow$ 59 — MISDEMEANORS—DESCRIPTION OF OFFENSE.

In indictments for misdemeanors, a substantial description of the offense is required to

reasonably identify the offense for which the defendant is being prosecuted.

#### 2. WEIGHTS AND MEASURES $\Leftrightarrow$ 12—CRIMINAL PROSECUTION—SUFFICIENCY OF INDICTMENT.

Indictment for selling, offering, and exposing for sale a commodity by measure numerically less than the quantity represented, in violation of Pub. Acts 1913 (1st Ex. Sess.) c. 35, not stating the names of the person or persons to whom the alleged sales or offers to sell were made, held insufficient.

#### 3. ELECTRICITY $\Leftrightarrow$ 20½, New, vol. 7A Key-No. Series—USE OF FALSE METER—SUFFICIENCY OF INDICTMENT.

An indictment for using false meter in supplying town with electrical current in violation of Thomp. Shan. Code, § 6734, which fails to state that such use was with intent to defraud, is insufficient; such intent being the gravamen of the offense.

#### 4. ELECTRICITY $\Leftrightarrow$ 20½, New, vol. 7A Key-No. Series—INTERFERENCE WITH TESTING OF METER—SUFFICIENCY OF INDICTMENT.

Indictment charging interference by defendant with the sealing and testing of electric meters by deputy and assistant state sealer of weights and measures, in violation of Pub. Acts 1913 (1st Ex. Sess.) c. 46, § 9, held sufficient without stating the location of the meters alleged to have been changed or tampered with by defendant and the manner in which they had been changed or tampered with.

#### 5. ELECTRICITY $\Leftrightarrow$ 20½, New, vol. 7A Key-No. Series—TAMPERING WITH METER—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

In a prosecution for tampering with or changing electric meters before they could be tested by assistant state sealer of weights and measures, in violation of Pub. Acts 1913 (1st Ex. Sess.) c. 46, § 9, evidence of the assistant sealer and superintendent of weights and measures that the meters had been tampered with or changed by defendant before they could be tested, where such facts were not of his own knowledge, but merely from information, was insufficient to sustain conviction.

Appeal from Criminal Court, Trousdale County; J. N. Fisher, Special Judge.

E. W. Rugg was convicted of selling, offering, and exposing for sale a commodity by measure numerically less than quantity represented, of unlawfully using a false measure for measuring a commodity, and for interfering with the performance of duties by the deputy sealer of weights and measures, and he appeals. Reversed and remanded.

Willard N. Smith, of Hartsville, for appellant.

Charles L. Cornelius, Asst. Atty. Gen., for the State.

HALL, J. The defendant below, E. W. Rugg, was indicted in the circuit court of Trousdale county at its March term, 1918,



the indictment containing three counts. The first count is as follows:

"The grand jurors for the state of Tennessee upon their oaths present that E. W. Rugg heretofore, on the 1st day of March, 1918, in the state and county aforesaid, did unlawfully sell and offer and expose for sale a commodity, viz. electric current for lighting and other purposes, which was by measure and numerical count less than the quantity he represented the same to be, against the peace and dignity of the state."

The second count reads as follows:

"And the grand jurors aforesaid upon their oaths aforesaid further present that E. W. Rugg, on the date aforesaid, and in the state and county aforesaid, did unlawfully by himself and as servant and agent for another, to wit, as agent for Hartsville Light & Ice Company, a corporation supplying the town of Hartsville, Tenn., with electric current for lighting and other purposes use a false measure or measuring device commonly called a meter, used for measuring the amount of electric current furnished a consumer of same, in selling a commodity, viz. electric current used for lighting and other purposes in homes and shops in said town of Hartsville, Tenn., for hire and reward against the peace and dignity of the state of Tennessee."

The third count is in words as follows:

"And the grand jurors aforesaid upon their oath aforesaid further present that E. W. Rugg, on the date aforesaid, in the state and county aforesaid, did unlawfully hinder and obstruct and interfere with one D. J. Frazier, a deputy and assistant state sealer of weights and measures, while in the performance of his official duties, viz.: The said D. J. Frazier, being engaged in sealing and testing meters used by householders and shopkeepers in the town of Hartsville, Tenn., for measuring electric current being furnished in said town by the Hartsville Light & Ice Company, notified said Rugg that he was so engaged in said work and to refrain from changing or in any way tampering with any meters in the said town until the said work was complete in order that the said meters might be tested as to whether the same had been registering correctly the amount of current being consumed, when the said Rugg, knowing that said official was so engaged in the discharge of his said official duties, and in order to hinder, interfere with, and obstruct said official in same, tampered with and changed divers and numerous meters in said town before said official could test and inspect same, against the peace and dignity of the state."

The defendant made a motion to quash each of the counts of said indictment. The motion sought to quash the first count because it failed to designate or aver the names of the person or persons to whom the sale or sales, or offers of sale, of electric current, which was, by measure, less than the quantity he represented the same to be.

The motion challenged the sufficiency of the second count upon the ground that it failed to aver that the defendant knowingly, and with the intent to defraud, used a false

measure or measuring device for measuring the quantity of electric current sold by him.

The motion challenged the sufficiency of the third count, because it failed to specify the meters alleged to have been changed or tampered with by the defendant, or their location, and also failed to aver in what manner or how said meters were tampered with and changed.

The motion to quash was overruled by the trial judge. Whereupon the defendant demurred to said indictment, assigning five grounds, all presenting the same question, however, and that is: Does the statute upon which the first count is predicated apply to the sale, or exposing to sale, of electric current as a commodity measured by a device known as a meter?

The trial court was of the opinion that it did, and overruled the demurrer. Thereupon the defendant pleaded not guilty to said indictment, and was tried before a jury at the August term of said court, 1918, when a verdict was returned finding him guilty upon each of the counts of the indictment. His motion for a new trial having been overruled, he has appealed to this court, and has assigned errors.

The first assignment of error relates to the ground of the motion to quash the first count of the indictment. It is insisted by the defendant that this count should have been quashed, because the indictment fails to aver the names of the person or persons to whom the alleged sale or sales, or the offers to sell, were made; it being insisted that this averment was essential to a proper description of the offense, and to give the defendant reasonable notice of the offense which he was called on to defend himself, and to enable him to properly make his defense.

The first count of said indictment is predicated upon chapter 35 of the Public Acts of the General Assembly of 1913 (1st Ex. Sess.) which is an act to prevent frauds in the weight, measure, or numerical count of articles sold or offered for sale in the state, and making the violation of said act a misdemeanor. The first section of said act reads as follows:

"Section 1. Be it enacted by the General Assembly of the state of Tennessee, that any person who, by himself or by his servant or agent, shall sell, offer, or expose for sale any quantity of any commodity which is by weight, measure, or numerical count less than the quantity which he represents same to be, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than \$10 nor more than \$50 for the first offense, and for subsequent offenses not less than \$50 nor more than \$100, or shall be imprisoned in the county jail not more than ninety days, or both such fine and imprisonment: Provided, that the state superintendent of weights and measures and the state sealer of weights and measures shall jointly fix and determine reasonable variations for all classes

of commodities; and no penalties for violation of this act shall be imposed when the variation in weight, measure, or numerical count does not exceed the reasonable variation so fixed: Provided, further, that the said state superintendent and state sealer shall give the reasonable variations so established all possible publicity through the public press and through bulletins of their offices."

**Section 2 reads:**

"Sec. 2. Be it further enacted, that the grand juries of the several counties of the state shall have inquisitorial power over said offenses, and the judges of the several criminal courts and circuit courts having criminal jurisdiction shall especially charge this law to the grand juries of the several counties of the state."

[1] In indictments for misdemeanors a substantial description of the offense is required to reasonably identify the offense for which the defendant is being prosecuted. This is necessary in order that he may know whereof he is accused and may prepare his defense, and in the event of a subsequent prosecution that it may be made to appear whether he is being prosecuted twice for the same offense. *Bilbro v. State*, 7 Humph. 534; *State v. Pennington*, 3 Head, 119; *State v. Woodson*, 5 Humph. 55.

In the case of *State v. Woodson*, last cited above, the defendant was indicted for keeping "certain false weights for weighing iron, goods, wares, and merchandise by him sold in the way of his trade." The indictment charged:

That the defendant, "well knowing said weights to be false, did willfully, falsely, and fraudulently sell to divers persons iron, goods, wares, and merchandise which, by reason of having been weighed with said false weights, were very much deficient and short of the true and just weight."

To this indictment the defendant demurred, which demurrer was sustained by the trial court. The state appealed, and this court, speaking through Judge Green, said:

"The indictment in this case does not charge that the goods were sold to any particular person, but states that they were sold to 'divers persons.' This we think too vague and indefinite in a criminal charge. The party ought to be notified by the indictment of the transaction in relation to which he is called on to defend himself."

[2] We think the first count of the indictment in the case under consideration is subject to the same criticism. It does not contain a sufficient description of the offense to enable the defendant to make his defense, and to protect him against a subsequent prosecution growing out of the same transaction. It results, therefore, that we think the motion to quash the first count was well grounded.

The second count of the indictment is predicated upon section 6734 of Thompson's Shannon's Code, which reads as follows:

"If any person, with intent to defraud, have in his possession, or use, any false balance, weight, or measure in any business, trade, or transaction, it shall be a misdemeanor."

It is insisted by the defendant in his motion to quash that this count of the indictment is fatally defective, because it fails to aver that the false measuring device was used with the intent to defraud.

[3] We think the words in the statute "with intent to defraud" are material, and constitute the gravamen of the offense, and that their averment was necessary to make said count valid.

In *Wharton on Criminal P. & P.* § 220, it is said:

"Where a statute prescribes or implies the form of the indictment, it is usually sufficient to describe the offense in the words of the statute, and for this purpose it is essential that these words should be used. In such cases the defendant must be specially brought within all of the material words of the statute, and nothing can be taken by intendment."

In *Bishop's New Criminal Procedure*, vol. 1, sec. 611, subsec. 2; sec. 612, subsecs. 1, 2, and 3, it is said:

"Where the offense is statutory, the indictment should follow the statute. To the extent that the statute defines the offense, not less is admissible. The indictment must charge the defendant with all of the acts within the statutory definition."

This same rule is announced in *Harrison v. State*, 2 Cold. 234; *State v. Ladd*, 2 Swan, 226; *Morrow v. State*, 10 Humph. 120; *Whiteside v. State*, 4 Cold. 182.

It results, therefore, that we think the motion to quash the second count should have been sustained.

This brings us to a consideration of the third count. This count is predicated on the provisions of section 9 of chapter 46 of the Public Acts of 1913 (1st Ex. Sess.), providing a system of standard weights and measures in the state. Said section reads as follows:

"Be it further enacted, that any person who shall hinder, obstruct, or interfere in any way with the state superintendent, state sealer, any deputy or assistant state sealer, or any county or city sealer while in the performance of his official duties, or who shall fail to produce, upon demand by any authorized sealer or inspector of weights and measures, any weights, measures, balances, weighing devices, or measuring devices in or upon his premises, place of business, or in his possession for use in manufacture or trade, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not less than \$10 nor more than \$50, or to imprisonment for not more than ninety days, or to both such fine and imprisonment."

It was insisted that the third count was fatally defective, because it failed to state the location of the meters alleged to have been changed or tampered with by the defendant, and the manner in which they had been changed or tampered with.

[4] We do not think the omissions complained of in the motion to quash said count rendered it fatally defective. To require the state to designate in the indictment the meters changed or tampered with, and their exact location, would, we think, be placing an unreasonable burden upon the state. It must be presumed that the defendant knew the location of each meter under his supervision and control. The indictment averred that he tampered with and changed a number of them before D. J. Frazier, the assistant state sealer of weights and measures, could inspect and test them. We think this constituted reasonable notice to the defendant of the offense with which he was charged, and conveyed to him sufficient information to enable him to make his defense. It put him in a position to rebut the charge that any of said meters had been tampered with or changed. The gravamen of the offense prescribed by the statute is the interference "in any way with the state superintendent, state sealer, any deputy or assistant state sealer, or any county or city sealer while in the performance of his official duties." The indictment charged that the defendant did interfere with said officer by tampering with and changing a number of the meters under his supervision before the same could be inspected and tested by said officer. We think this was sufficient.

It is next insisted by the defendant that there is no evidence to support the verdict of the jury upon this count of the indictment.

[5] We think this contention is well taken. The record fails to disclose any evidence tending to show that the defendant tampered with or changed any of the meters before they could be tested by the assistant state sealer of weights and measures. Mr. Frazier, the assistant sealer and superintendent of weights and measures, who testified on behalf of the state, did not undertake to state of his own knowledge that any of said meters had been tampered with or changed by the defendant before they could be tested. He only claimed to have information that such was the case. No witness was introduced to show that the defendant had tampered with or changed any of said meters in advance of their being tested by the assistant sealer of weights and measures, or that said officer was in any other way hindered or interfered with in the making of tests.

We are of the opinion that the trial judge committed error in not quashing the two first counts of the indictment, and that he

committed further error in not granting the defendant a new trial on the third count of the indictment, because there was no evidence to support that count.

It results, therefore, that the judgment will be reversed, and the cause is remanded.

(141 Tenn. 342)

WEST CONST. CO. v. SEABOARD AIR  
LINE RY. CO.

(Supreme Court of Tennessee. Jan. 20, 1919.)

1. CARRIERS ~~§~~135—CARRIAGE OF FREIGHT—  
INJURY—DAMAGES—OVERHEAD EXPENSES.

In an action against a carrier for damage to an asphalt plant transported by it and wrecked in transit, no recovery could be had for overhead expenses due to the enforced idleness of plaintiff's workmen, such item of damages not being in contemplation of the parties.

2. CARRIERS ~~§~~135—ACTION FOR DAMAGE TO  
GOODS—INTEREST ON AMOUNT OF RECOVERY.

In an action against a carrier for damages to an asphalt plant in transit, it was within the discretion of the chancellor to allow interest on cost of repairs paid by complainant, recovery of which was sought from carrier.

3. CARRIERS ~~§~~35—CARRIAGE OF FREIGHT—  
CONTRACT AS TO RATE—VALIDITY.

Where a railroad company inspects and classifies as pitch material which is claimed to be asphaltum, and enters into a contract with a shipper to transport it for a given sum, the contract is binding, notwithstanding that the rate charged is less than the authorized tariff rate, in the absence of a showing of mistake.

4. CARRIERS ~~§~~192—CARRIAGE OF GOODS—  
CONTRACT FOR TRANSPORTATION—WAIVER.

Where a shipper under protest pays a higher rate than called for by the contract under which material is shipped, in order to obtain the material which he needed, such payment is not a waiver of the contract.

Appeal from Chancery Court, Hamilton County; W. B. Garvin, Chancellor.

Action by the West Construction Company against the Seaboard Air Line Railway Company, with cross-bill by defendant. From the judgment plaintiff appeals. Affirmed and remanded.

Williams & Lancaster, of Chattanooga, for West Const. Co.

Brown, Spurlock & Brown, of Chattanooga, for Seaboard Air Line Ry. Co.

McKINNEY, J. This is a damage suit. The complainant delivered its asphalt plant to the defendant at Bartow, Fla., to be transported to Chattanooga, Tenn. The car in which said plant was loaded was wrecked in transit, and the plant was badly damaged.

The damage was repaired at a cost of \$1,-

\$358.30, which was paid by the complainant. The defendant declined to reimburse the complainant, and suit was brought to recover same, with interest.

On account of this injury complainant was deprived of the use of said plant for 37 days, during which time complainant's force, used in operating said plant, remained idle, and on this account complainant also seeks to recover, as damages, the sum of \$1,800, as overhead expenses.

The chancellor decreed in favor of the complainant for the \$1,358.30, with interest, but held that the complainant was not entitled to recover the \$1,800, but did hold that it was entitled to recover the reasonable rental value of said plant for the 37 days that it was deprived of the use of same, and referred the matter to the master for the purpose of having said rent ascertained.

The defendant filed a cross-bill, in which it undertook to recover \$32.97 rent, unpaid freight charges amounting to \$713.25, and \$13 demurrage, aggregating \$759.22.

The defendant to the cross-bill answered, admitting the indebtedness set forth in the cross-bill, and by way of cross-bill to the cross-bill set up a claim of \$40 for loss on stone in transportation, and \$769.08 overcharges made by the defendant on pitch shipped over defendant's railroad from Tampa to Bartow.

The chancellor disallowed the claim of \$40, but allowed the freight overcharge of \$769.08.

The item of \$40 is not insisted on by complainant, and complainant only assigns one error, which goes to the action of the chancellor in fixing the measure of special damages.

The proof shows that when this plant was delivered to the railroad for transportation at Bartow, Fla., its agent was notified that the complainant had a large contract in Chattanooga awaiting execution, and that it was necessary to transport said plant with all speed possible.

[1] We do not think the item of damages, as claimed by the complainant, can be sustained, for the reason that same was not within the contemplation of the parties. The defendant was not advised that the delay in transporting this plant would result in a serious loss by virtue of said overhead expenses, and this assignment of error is disallowed.

[2] The first assignment of error made by the cross-complainant is to the action of the chancellor in allowing interest on the \$1,358.30 item. Complainant was not entitled to interest as a matter of law, but it was discretionary with the chancellor as to allowing interest, and in this instance we do not think there was any abuse of such discretion.

The second and third assignments of error go to the action of the chancellor in allowing \$768.88 overcharges.

This was not erroneous. The record dis-

closes that the rate on asphaltum from Tampa to Bartow was eight cents per hundred pounds more than it was on pitch. The material came from Pitch Lake in the Island of Trinidad. Upon its arrival in Tampa, Mr. Redmon, treasurer of the complainant company, went to the defendant's manager of inspection and classification, and had him to classify this material and make a rate on same, and thereupon, same was classified and billed as pitch. When this material arrived in Bartow, the local agent of the defendant railway company demanded eight cents per hundred pounds more than the railway company had contracted to transport said material for, and complainant, being badly in need of this material, paid this advanced rate, amounting to \$768.88, paying same, however, under protest. It seems that the matter was then brought before the Railroad Commission in Florida, but there is no valid proof showing its finding. It appears that the complainant did not undertake to collect this sum from the railroad company. Neither did the railroad company undertake to collect from the complainant the items for rent, freight charges, and demurrage amounting to \$759.22, the parties having, in effect, treated one as an offset of the other, and neither of these claims were attempted to be enforced until this suit was instituted to recover damages sustained by the complainant on account of the injury to its asphalt plant. The complainant has not shown clearly whether this material was asphaltum or pitch. No proof was introduced by the defendant. It does appear, however, that the railroad company, through its inspector and classifier, classified this material as pitch, and entered into a contract with complainant by which it agreed to transport same to Bartow for a given sum.

[3, 4] We think this was a binding contract, and the only way that the defendant could avoid the binding effect of said contract would be to show that by mistake it agreed to transport said material for eight cents per hundred pounds less than the tariff rate, and this it has not done. The fact that the complainant paid this high rate upon the material reaching Bartow does not change the result, since it appears that the complainant was very badly in need of this material, and in order to procure same paid this excessive charge, but under protest. We think the complainant pursued a wise course in this matter, and its action in obtaining this material as it did, so as to enable it to complete its contract in Bartow, was in no wise a waiver of its right to insist on the contract, and we cannot see that the defendant's rights were in any wise prejudiced thereby.

In 6 Cyc. at page 498, it is said:

"If freight in excess of the amount contracted for, or a reasonable rate, in the absence of

contract, is demanded, either as a condition precedent to accepting the goods for transportation or to their delivery at the end of the transportation, the consignor or the consignee, as the case may be, may pay under protest and bring action to recover back the excess."

And again, in 30 Cyc. at page 1308, it is said:

"Where a person unlawfully demanding a payment is in a position to seize or detain the goods or other personal property of a person against whom the claim is made, without a resort to judicial proceedings in which the parties may contest the validity of the claim, payment under protest to recover or retain the property will be considered as made under compulsion, and the money can be recovered back, at least where a failure to get or retain immediate possession and control of the property would be attended with serious loss or great inconvenience."

Numerous authorities are cited in support of the two foregoing texts. If, as a matter of fact, the defendant had contracted to transport this material for a lower rate than that fixed by the tariff, it could have very easily shown that fact.

We find no error in the decree of the chancellor, and same is affirmed, and the cause is remanded for further proceedings.

(141 Tenn. 373)

**MENGEL BOX CO. v. STEVENS, Secretary of State.**

(Supreme Court of Tennessee. March 29, 1919.)

**1. CONSTITUTIONAL LAW §137—TAXATION §37—ADDITIONAL PRIVILEGE TAX—FOREIGN CORPORATION—IMPAIRING OBLIGATION OF CONTRACT.**

Acts 1909, c. 504, requiring corporations, which had already entered state and paid for privilege of entering, to pay a privilege tax measured by their capitalization, and to pay difference between sum paid on entering state and amount required by statute, is constitutional.

**2. TAXATION §165—FOREIGN CORPORATIONS—PRIVILEGE TAX.**

Act 1909, c. 504, requiring foreign corporations to pay a privilege tax measured by their capitalization, applied to corporations that had already entered the state; the substance of the privilege being doing of business in state.

**3. STATUTES §219—CONSTRUCTION—INTERPRETATION BY OFFICIALS.**

While an interpretation of a statute long adopted by state officials will be highly favored by the court, it will not be followed if palpably wrong.

Appeal from Chancery Court, Davidson County; Jno. Allison, Chancellor.

Suit by the Mengel Box Company against Ike B. Stevens, Secretary of State. From

a decree in favor of complainant, defendant appeals. Reversed, and bill dismissed.

Frank M. Thompson, Atty. Gen., for appellant.

Randolph & Randolph, of Memphis, for appellee.

**GREEN, J.** This suit was brought by the complainant to recover from the Secretary of State a balance of a privilege tax exacted by that official and paid under protest.

The complainant, on September 9, 1899, applied to the then Secretary of State for admission to do business in Tennessee. The complainant was a corporation, organized under the laws of New Jersey, with a capital stock of \$1,000,000 on the date mentioned. Permission was granted to the complainant to enter into this state, and it complied with all the laws in force with respect to the admission of foreign corporations, and paid a privilege tax of \$100, which was required by the statute at that time of all foreign corporations. It is a manufacturing corporation and has acquired considerable property in this state.

By subsequent acts of the Legislature, the privilege tax on foreign corporations was changed from a flat rate of \$100, and the privilege was graduated according to the capitalization of such corporations. The complainant has increased its capital stock several times, and by the last amendment to its charter was capitalized at \$6,000,000.

Each time the complainant has increased its capital stock, it has properly filed copy of its amended charter with the Secretary of State and has paid an additional amount on account of its privilege tax by reason of such increase of its capital. The complainant and the several Secretaries of State have, in every instance, agreed on the additional sum that was to be paid, except on the occasion of the last amendment.

By chapter 504 of the Acts of 1909, the Legislature, pursuing its later policy of assessment, enacted that the coming into this state of any foreign corporation for the purpose of doing business was declared to be a privilege, and that such foreign corporation should pay a tax measured by the amount of its capital stock. Corporations capitalized at \$5,000,000 and over were required to pay \$1,500.

The complainant and the present Secretary of State were not able to agree on the amount of privilege tax for which the former was liable, under the last amendment to its charter increasing its capital stock to \$6,000,000, and, as above stated, the complainant paid in the amount claimed by the Secretary of State to be due from it, under protest, and has brought this suit for its recovery.

[1] While, in its previous dealings with

the Secretaries of State, the complainant has recognized its amenability to the state's change of method and rate of such privilege taxation, nevertheless it now presents the whole question of its liability for any privilege tax other than the \$100 originally paid by it. It is insisted for the complainant that, having paid the sum of \$100 for the privilege of entering into this state to do business, in 1899, which was the full tax then required, it became entitled to do business in Tennessee thereafter, without any further liability on this account. The Chancellor took this view of the case, but in so doing we think he was in error.

This contention would be more plausible if the privilege was merely the entry into the state. That, however, would be an idle and worthless thing. The substance of the privilege is the right of a foreign corporation to do business in Tennessee, in the language of the statute, the coming into the state "for the purpose of doing business here."

By the payment of the sum exacted of it in 1899, the complainant merely obtained license to do business in this state. The state was not cut off from imposing a higher license or from changing its method of privilege or excise taxation. This is what the state has done. In 1899 any foreign corporation could obtain a license to do business in Tennessee upon the payment of \$100 and complying with other requirements of the law. In 1909 the state required foreign corporations to pay a privilege tax measured by their capitalization. The state was entitled to do this, and for the privilege of doing business in Tennessee, since 1909, a foreign corporation capitalized at \$6,000,000 has been required to pay a tax of \$1,500.

The Secretary of State gave to the complainant credit for all sums paid by it herein, and exacted only the difference between the aggregate paid and \$1,500. We think the complainant was clearly liable for this amount.

The Supreme Court of the United States has considered at length in several recent cases the taxation of foreign corporations by the several states, and we could add nothing to what has been said by that court in its various opinions. The last of these cases is *Cheney Bros. v. Massachusetts*, 246 U. S. 147, 38 Sup. Ct. 295, 62 L. Ed. 632.

The opinion of the court therein fully sustains what we have previously said. See, also, *Kansas City, M. & B. R. Co. v. Stiles*, 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176; *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed. 265; *Baltic Min. Co. v. Massachusetts*, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127.

[2] In reply to complainant's argument that the act of 1909 is prospective and did not relate to corporations that had already

entered into the state, we repeat that the substance of the privilege here is the doing of business in the state. A foreign corporation, previously admitted, that continued to do business in the state subsequent to 1909, became liable to the tax prescribed in the Revenue Act of that year, just as a foreign corporation that entered the state after the act was passed. In either case, the exercise of the privilege—the doing of business—was after and under the statute.

[3] As heretofore stated, the complainant has recognized the validity of the graduated privilege tax ever since it was adopted in Tennessee and has paid an additional sum on the occasion of each increase of its capital. Former Secretaries of State adopted a construction of our revenue statutes, and a method of computation of the amounts due from complainant upon the various amendments to its charter, which, if now followed, would result in a smaller liability than the sum required of complainant by the present Secretary of State, when its capital stock was last increased. It is not necessary to go into these former computations. They were somewhat complicated and certainly erroneous. It is urged that we should give heed to this interpretation of our revenue statutes by the officers charged with their enforcement. The construction of our statutes for which complainant contends had not been followed by the Secretaries of State long enough to make a precedent, and, as we have seen, was disregarded by the present incumbent of that office. Moreover, while an interpretation of such a statute long adopted by such officials would be highly favored by the court, it would not be followed if palpably wrong.

The case before us is just this. By the act of 1909, all foreign corporations with a capital stock of \$5,000,000 and over are required to pay \$1,500 for the privilege of doing business in Tennessee. This is not an annual tax, nor is the privilege limited to any period of time. It endures until legally revoked. The tax applies to all foreign corporations so capitalized. If such a corporation has only paid a portion of the tax, it must pay the remainder. It can only exercise the privilege after the payment of \$1,500.

There is no question of interstate commerce, nor of due process of law, herein that has not been ruled favorably to the contentions of the state by the decisions of the Supreme Court, hereinbefore cited. Domestic corporations are required to pay an additional tax upon each increase of their capital stock. *Thompson's Code*, § 720.

Without further elaboration, we reverse the decree of the Chancellor, and dismiss this bill, with costs.

(141 Tenn. 379)

## GILL v. STATE.

(Supreme Court of Tennessee. March 22, 1919.)

1. CRIMINAL LAW  $\S$  97(4)—JURISDICTION — UNITED STATES PROPERTY.

Where land is ceded to or purchased by the United States with the consent of the state under Const. U. S. art. 1,  $\S$  8, subsec. 17, the federal courts have jurisdiction of the prosecution for a crime committed thereon to the exclusion of the state courts.

2. CRIMINAL LAW  $\S$  84(1)—JURISDICTION—UNITED STATES PROPERTY—CONSTITUTIONALITY OF STATUTE.

A state statute conferring jurisdiction on the state courts for the prosecution of a crime committed upon property ceded to or purchased by the United States government with the consent of the state under Const. U. S. art. 1,  $\S$  8, subsec. 17, is unconstitutional and void.

3. UNITED STATES  $\S$  3 — AUTHORITY OVER PROPERTY PURCHASED FROM STATE—OWNERSHIP OF SOIL.

Where the United States purchases land without the consent of the state in which the land is situated, the mere ownership of the soil does not give the United States paramount authority over such land.

4. CRIMINAL LAW  $\S$  97(4)—JURISDICTION — UNITED STATES PROPERTY — COMPLIANCE WITH STATUTE.

Where map of land purchased by United States had been taken to office of judge of county for purpose of closing road, and was not filed in county court clerk's office as required by Acts 1895, c. 110,  $\S$  1, to show state's consent to acquisition of such property by the United States, jurisdiction of offense committed on such land remains in state courts; there having been no consent to purchase by United States as required by Const. U. S. art. 1,  $\S$  8, subsec. 17.

Appeal from Criminal Court, Davidson County; J. D. B. De Bow, Judge.

Charles H. Gill was convicted of petit larceny, and he appeals. Affirmed.

R. L. Sadler, of Nashville, for appellant.

Frank M. Thompson, Atty. Gen., and Thos. J. Tyne, of Nashville, for the State.

HALL, J. The defendant below (plaintiff in error here), Charles H. Gill, was convicted in the criminal court of Davidson county of the offense of petit larceny, and was sentenced to 60 days in the county workhouse. He made a motion for a new trial, which was overruled, and he has appealed to this court and has assigned errors.

Before the case was called for trial in the court below the defendant filed a plea in abatement to the jurisdiction of the court as follows:

"Comes defendant in person and for plea says that the venue of the crime with which he is charged is on the territory of the United States of America commonly known as the powder plant, and that said territory or property is within the exclusive jurisdiction of the courts of the United States within the meaning of sections 82, 83, and 80 of Shannon's Code of Tennessee, and not within the jurisdiction of the criminal court of Davidson county, Tenn.; it being used for public purposes."

This plea was sworn to by the defendant as required by law. The state joined issue on said plea, and in lieu of evidence a stipulation containing the following facts was entered into by the Attorney General for the state and counsel for the defendant, and presented to the court:

"In this case, on the issues by the indictment, and the plea in abatement thereto, it is stipulated as follows:

"That the crime with which this defendant is charged was committed on territory purchased by the United States of America on which has been erected a munition plant known as the Old Hickory powder plant in Hadleys Bend, Davidson county, Tenn.

"This land comprises numerous tracts purchased from various individuals who separately conveyed their respective tracts to the United States of America on or about January, 1918, and that about the time of said purchase, or shortly thereafter, the Todd Bond & Mortgage Company, who prepared the abstracts for the owners of this land, prepared a map or plat showing the various tracts, which map or plat is attached hereto as Exhibit A to this stipulation.

"This map or plat was found about two months ago on a shelf in the office of the county judge of Davidson county, it having been taken to this office for the purpose of asking the proper county authorities to formally close a public road, the road to be closed being particularly marked on the said map. This road was closed, and the map was not intended to serve any further purpose. That this map was not marked filed by the county court clerk or any one else. That it was not filed, or intended to be filed as a compliance with chapter 110, Acts of Tennessee 1895, or any other provision or condition of law precedent to the surrender of the jurisdiction of the state of Tennessee and its sovereignty over said lands in the United States of America. That it was not placed, or filed, by any one authorized by the United States of America for the purpose of complying with said statute or the laws of the state of Tennessee. That there has been no authority or act of the government of the United States of America showing any purpose or intention of assuming jurisdiction over the land in question. On the contrary, the United States of America has continually recognized, and now recognizes, the complete sovereignty and jurisdiction of the state of Tennessee over said land.

"It is also agreed that one or more tracts shown on said plat have never been conveyed to the United States government; therefore the said plat does not accurately describe the

lands purchased by the United States of America."

The trial judge overruled the plea in abatement. Thereupon the defendant entered a plea of guilty to the charge of petit larceny, for which he was sentenced to 60 days in the county workhouse, as before stated.

The sole question presented by the assignments of error is: Did the criminal court of Davidson county have jurisdiction of the offense committed by the defendant, or was the jurisdiction exclusively in the federal court?

Article 1, § 8, subsec. 17, of the Constitution of the United States provides that the Congress shall have power to—

"exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square), as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

[1-3] The rule is well settled that, if a crime is committed within the boundaries of such lands so ceded or purchased by the United States with the consent of the state, the federal courts have jurisdiction of a prosecution therefor to the exclusion of the state courts. 8 R. C. L. § 65; *State v. Tully*, 31 Mont. 365, 78 Pac. 760, 3 Ann. Cas. 824, and note; *State v. Mack*, 23 Nev. 359, 47 Pac. 763, 62 Am. St. Rep. 811; *Baker v. State*, 47 Tex. Cr. 482, 38 S. W. 1122, 122 Am. St. Rep. 703, 11 Ann. Cas. 751. Hence any statute of a state that attempts to confer its jurisdiction of such territory must necessarily be unconstitutional and void. *State v. Kelly*, 76 Me. 331, 49 Am. Rep. 620. But the United States, as a mere proprietor of land which is situated within the limits of a state and which was acquired by purchase without the consent of the Legislature, has no paramount authority derived from ownership of the soil. 8 R. C. L. § 65; *In re O'Connor*, 37 Wis. 379, 19 Am. Rep. 765.

It appears from the stipulation of counsel that the crime with which the defendant was charged was committed on territory purchased by the United States of America on which has been erected a munition plant known as the Old Hickory powder plant in Hadleys Bend, Davidson county, Tenn. This territory is comprised of numerous tracts from various individuals who separately conveyed their respective tracts to the United States of America on or about January, 1918. It is further stipulated that there has been—

"no authority or act of the government of the United States of America showing any purpose or intention of assuming jurisdiction over the land in question. On the contrary, the United States of America has continually recognized, and now recognizes, the complete sovereignty and jurisdiction of the state of Tennessee over said land."

By section 1 of chapter 110 of the Public Acts of the General Assembly of 1895 it is provided as follows:

"That pursuant to article (1) one, section eight, clause seventeen, of the Constitution of the United States, consent to purchase is hereby given, and exclusive jurisdiction ceded to the United States, over and with respect to any lands within the limits of this state, which shall be acquired by the United States for any of the purposes described in said clause of the Constitution of the United States; said jurisdiction to continue as long as the said lands are held and occupied by the United States, for public purposes, reserving, however, to this state, a concurrent jurisdiction for the execution upon said lands of all process, civil or criminal, lawfully issued by the courts of the state, and not incompatible with the cession: Provided, that an accurate map or plan, and description by metes and bounds of said lands shall be filed in the county court clerk's office of the county in which the same are situated; and provided, that the state reserves the right to tax all property of any railroad, or other corporation, having a right of way, or location over or upon the said lands."

In *State v. Tully*, *supra*, it was held that, where a state cedes to the United States lands for forts, etc., reserving concurrent jurisdiction to serve state process, civil and criminal, in the ceded place, such reservation merely operates as a condition of the grant, and does not defeat the exclusive jurisdiction of the United States over such place, and the state courts have no jurisdiction of the crimes committed. But, unless Congress takes jurisdiction of territory thus ceded or purchased, by exercising its exclusive right of legislation over the place, the jurisdiction of the state to support and maintain its laws and to punish crimes committed within its acknowledged jurisdiction and limits may be asserted and maintained. 8 R. C. L. § 65.

[4] We think that, in order for the United States to acquire exclusive jurisdiction over the territory in question, the proviso in the cession act of 1895 must be complied with; that is, an accurate map or plat, and description by metes and bounds of said lands, shall be filed in the county court clerk's office of the county in which the same are situated. This was not done. The stipulation shows that a map or plat showing the various tracts of land composing said territory had been made, and was taken by some one, the stipulation does not disclose when or by whom, to the office of the county judge of Davidson county for the purpose



of asking the proper authority to formally close a public road, the road to be closed being particularly marked on said map; that the map was not intended to serve any further purpose, and was not marked filed by the county court clerk, nor was it intended to be filed as a compliance with chapter 110 of the Acts of 1895.

It is insisted by counsel for the defendant that the act of 1895 is invalid, but he states no valid reason why it is invalid. It is next insisted that, if the act is valid, then the provision with reference to filing an accurate map or plan, and a description of said lands by metes and bounds in the county court clerk's office of the county in which the same are situated, is merely directory.

We do not think so. We see no reason why the state, through its lawmaking body, would not have the right to prescribe this as a condition precedent to the vesting of exclusive jurisdiction in the United States of lands purchased by them for public uses. The condition is reasonable, and is demanded by every consideration of public policy. Without such map, properly verified and filed, it would be difficult to establish the venue in many cases. The filing of such map or plan, together with a description of the lands purchased, is vitally important, in that the public may know where the state's jurisdiction ends and the federal jurisdiction commences.

It would seem that the federal government has given this construction to the act of 1895; for it is stipulated that it has taken no action showing a purpose or intention of assuming jurisdiction over the territory in question. On the contrary, it has continually recognized, and now recognizes, the complete sovereignty and jurisdiction of the state over the same.

We are of the opinion that there is no error in the judgment, and it will be affirmed.

(141 Tenn. 325)

Petition of SOUTHERN LUMBER & MFG. CO. NEW RIVER LUMBER CO. v. TENNESSEE RY. CO. et al. TENNESSEERY CO. v. STANDARD TRUST CO. et al.

(Supreme Court of Tennessee. Jan. 20, 1919.)

**1. COURTS** ¶24, 37(1)—JUDGMENT ¶489—JURISDICTION BY CONSENT OR WAIVER—COLLATERAL ATTACK.

When the court has no jurisdiction of the subject-matter, it cannot be conferred either by waiver or consent, and all of its orders and decrees are a nullity, and may be collaterally attacked.

**2. APPEAL AND ERROR** ¶185(1) — COURTS ¶37(2)—JURISDICTION OF SUBJECT-MATTER—OBJECTIONS.

The question of jurisdiction of the subject-matter can be raised at any time in any court, and may be considered by the Supreme Court on appeal.

**3. COMMERCE** ¶8(1) — INTERSTATE COMMERCE ACT—REMEDIES OF SHIPPER.

Interstate Commerce Act, § 22 (U. S. Comp. St. § 8595), providing that nothing in the act shall abridge existing remedies, but that the provision of the act shall be in addition thereto, reserves to the shipper his remedies existing at common law or statute, in so far as they do not conflict with the provisions of the act, so that, where no administrative question is involved, and the shipper does not invoke the aid of the Interstate Commerce Commission, he may prosecute his common-law or statutory remedies.

**4. COMMERCE** ¶86—INTERSTATE COMMERCE COMMISSION — PROCEDURE — REMEDIES OF SHIPPERS.

Where a shipper applies to the Interstate Commerce Commission in regard to discrimination, he must proceed in accordance with the Interstate Commerce Act.

**5. COMMERCE** ¶8(1) — ACTIONS FOR DAMAGES AGAINST CARRIERS—INTERSTATE COMMERCE—PROCEDURE.

Interstate Commerce Act, § 9 (U. S. Comp. St. § 8573), allowing persons damaged by any common carrier to complain to the Interstate Commerce Commission, or to bring suit for damages in federal courts, provides two methods for the ascertainment of damages, which are exclusive, one to the commission, and the other to the federal courts.

**6. COURTS** ¶489(9) — SHIPPERS' ACTIONS FOR DAMAGES—ACTION ON AWARD OF INTERSTATE COMMERCE COMMISSION — JURISDICTION OF FEDERAL AND STATE COURTS.

Under Interstate Commerce Act, § 16 (U. S. Comp. St. § 8584), relating to awards of damages to shippers, when an award has been made by the Commission, but such order has not been complied with by the carrier, the shipper may institute suit either in the federal or state court.

**7. COURTS** ¶489(9) — ACTIONS FOR DISCRIMINATION — JURISDICTION OF STATE COURT.

The state court has no jurisdiction of a suit by a shipper to recover damages for discrimination against a common carrier, based on a finding of the Interstate Commerce Commission reducing rates for freight shipments on the ground of discrimination; no award of damages having been made by the Commission.

Appeal from Chancery Court, Scott County; Hugh G. Kyle, Chancellor.

In the matter of the petition of the Southern Lumber & Manufacturing Company. Suit by the New River Lumber Company against the Tennessee Railway Company and another,

and proceeding by the Tennessee Railway Company against the Standard Trust Company. From a decree dismissing the petition, complainant appeals. **Affirmed.**

A. W. Akers and Perkins Baxter, both of Nashville, for petitioner.

H. M. Carr, of Harriman, for receiver.

**McKINNEY, J.** The complainant is a corporation engaged in the lumber and stave business, and for several years has operated a sawmill at Nick's Creek, Tenn.

The defendant Tennessee Railway Company owns 60 miles of railroad in Tennessee, and connects with the Cincinnati, New Orleans & Texas Pacific Railway Company at Oneida, Tenn. Under an agreement with the Cincinnati, New Orleans & Texas Pacific Railway Company, the Tennessee Railway Company received freight on its line for interstate shipment, and it is conceded that it was engaged in interstate transportation.

Nick's Creek and Norma are two stations on the road of the Tennessee Railway Company—the former being 30 miles from Oneida and 240 miles from Cincinnati; the latter being 22 miles from Oneida and 232 miles from Cincinnati.

Since 1906 the published tariff on lumber from Norma to Cincinnati has been 15 cents per 100 pounds, while the rate from March 1, 1914, has been 17½ cents per 100 pounds from Nick's Creek to Cincinnati.

On December 9, 1915, the complainant filed a complaint before the Interstate Commerce Commission against the Tennessee Railway Company and the Cincinnati, New Orleans & Texas Pacific Railway Company, charging that the rate of 17½ cents from Nick's Creek to Cincinnati was unreasonable, and that said rate, when compared with the rate of 15 cents from Norma to Cincinnati, was unduly prejudicial to complainant and Nick's Creek, and unduly preferential to Norma and those doing business at that point.

Answers were filed, proof taken, and a hearing had, and it was decreed by said Interstate Commerce Commission that said rate of 17½ cents from Nick's Creek to Cincinnati was not unreasonable, but that same was prejudicial and discriminatory, and it was decreed that defendant should in the future only charge 1 cent per 100 pounds more from Nick's Creek to Cincinnati than it charged from Norma to Cincinnati, which, on the then tariff, would make the rate from Nick's Creek to Cincinnati 16 cents per 100 pounds. This order was made on October 12, 1917.

The defendant Tennessee Railroad Company was being administered in the chancery court of Scott county, Tenn., as an insolvent corporation, in the above-styled causes; Byrd M. Robinson being its receiver.

On January 31, 1918, this suit was instituted by a petition being filed in the above

causes, in which the New River Lumber Company set forth the foregoing facts, and further charged that said discrimination, as found by the Interstate Commerce Commission, was in violation of the Interstate Commerce Act (Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379), and that it was damaged in the sum of \$6,000 on account thereof, and prayed for a decree for that amount.

After the cause was put at issue, the matter was referred to the master to report as to damages. It is not necessary to go into detail as to this matter, further than to say that the master filed his report, to which both parties filed exceptions, and after hearing the whole matter the chancellor dismissed the petition of the complainant, on the ground that it had not sufficiently shown itself entitled to any damages.

The period during which the complainant shipped lumber from Nick's Creek to Cincinnati and points beyond, and upon which it paid a rate of 17½ cents, was from September 1, 1915, to November 1, 1917, and the difference in freight on this lumber, had a charge of only 16 cents been made, as was found to be proper by the Interstate Commerce Commission, would have amounted to \$2,844.71, and the complainant insists it is damaged in this sum.

The complainant has brought the case to this court by appeal and has assigned errors.

[1] The defendant, for the first time in this court, raises a question of jurisdiction, and says that under the federal act to regulate commerce the state court is without jurisdiction in a case of this character.

It is well settled that, when the court has no jurisdiction of the subject-matter, it cannot be conferred either by waiver or consent, and all of its orders and decrees are a nullity, and may be collaterally attacked. *Gibson's Suits in Chancery* (New) par. 290; *Agee v. Dement*, 1 *Humph.* 332; *White v. Buchanan*, 6 *Cold.* 32; *Noel v. Scoby*, 2 *Heisk.* 20; *Ferris v. Fort*, 2 *Tenn. Ch.* 150; *Board v. Bodkin Bros.*, 108 *Tenn.* 700, 69 *S. W.* 270; *Baker v. Mitchell*, 105 *Tenn.* 610, 59 *S. W.* 137.

[2] In *Penn. R. R. Co. v. International Coal Co.*, 230 *U. S.* 184, 33 *Sup. Ct.* 893, 57 *L. Ed.* 1446, *Ann. Cas.* 1915A, 315, the question of jurisdiction was raised for the first time in the Supreme Court of the United States, and the court considered the question and held that it had jurisdiction. The question of jurisdiction of the subject-matter can be raised at any time in any court, and we think it proper for this court to consider that question here, and the case of *Southern Railway Co. v. Tift*, 206 *U. S.* 423, 27 *Sup. Ct.* 709, 51 *L. Ed.* 1124, 11 *Ann. Cas.* 846, relied on by the complainant, is not in conflict with this holding.

In order to a proper understanding of this question of jurisdiction it becomes necessary

to consider certain parts of the federal act to regulate commerce, together with its amendments, as well as some of the decisions of the Supreme Court of the United States construing the same. The provisions of the Interstate Commerce Act bearing upon this question are as follows:

"Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

"Sec. 9 [in so far as here material]. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

"Sec. 16 [in so far as here material]. That if, after hearing on a complaint made as provided in section thirteen of this act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the Circuit Court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years

from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court or state court within one year from the date of the order, and not after.

"Sec. 22 [in so far as here material]. Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." U. S. Comp. St. §§ 8572, 8573, 8584, 8595.

Without a careful analysis of these provisions it may appear that the state courts have jurisdiction of every character of a case that may arise with reference to transportation of commerce under either the common law or the Interstate Commerce Act, and it requires a careful application of the decisions of the Supreme Court of the United States to these several provisions in order to determine just how far the jurisdiction of the state courts extends.

Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, was an action instituted in the state court to recover moneys alleged to have been paid for transportation of cotton seed over and above a just and reasonable charge; it being averred that the rate exacted was discriminatory, constituting an undue preference. It appeared that the rates charged were those established by the railway company under the Interstate Commerce Act. It was insisted by the plaintiff that, the action being one recognized at the common law, under the authority of section 22 of the Interstate Commerce Act the action could be maintained either in the state or the federal court. On the other hand, it was insisted by the defendant that the court was without jurisdiction, for the reason that the question of discrimination was an administrative one, which, under the act, should be passed upon by the Interstate Commerce Commission and not by the court. The court adopted the theory of the defendant. It held that the matter complained of was actionable at common law, but that, in a case of this kind, such action was destroyed or taken away by the Interstate Commerce Act, but that in all other respects the common-law or statute rights or remedies remained. In other words, the spirit of the Interstate Commerce Act was to provide for uniform, equal, and just rates, and to prohibit unreasonable and discriminatory charges; the court saying, in effect, that, if it were left to the courts to determine this question, one court and jury might hold a certain rate reasonable, while another court and jury might hold the same rate unreasonable, and that as a result there would not be a uniform rate, and the very object for which the law was enacted would be defeated. This question is fully and ably re-

soned out in that opinion. Speaking as to the effect of section 22, the court on page 447 of 204 U. S., on page 357 of 27 Sup. Ct. (51 L. Ed. 553, 9 Ann. Cas. 1075), says:

"But it is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in section 22 of the act to regulate commerce, viz: ' \* \* \* Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act."

Penn. R. R. Co. v. Puritan Coal Co., 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867, was a case where the jurisdiction of the state court was sustained, where the aid of the Interstate Commerce Commission had not been invoked. The court, on pages 131 and 132 of 237 U. S., on pages 487 and 488 of 35 Sup. Ct. (59 L. Ed. 867), said:

"There are several decisions, already cited, which hold that suits against railroads for unjust discrimination in interstate commerce can only be brought in the federal courts. But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule and the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction as provided in section 9.

"But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved; the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or federal courts."

In *Illinois Central R. R. Co. v. Mulberry Coal Co.*, 238 U. S. on pages 282, 283, 35 Sup. Ct. 760, 763 (59 L. Ed. 1306), the court says:

"Upon a review of sections 8 and 9 of the act to regulate commerce, and of the proviso in section 22 which declares that 'nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies,' we held \* \* \* that, while the act gave shippers new rights, it at the same time preserved existing causes of action; that it did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission, or relate to a subject as to which the jurisdiction of the federal courts had otherwise been made exclusive; that in actions against railroad companies for unjust discrimination in interstate commerce, where the rule of distribution itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the authority of the Interstate Commerce Commission; but, if the action is based upon a violation or discriminatory enforcement of the carrier's own rule for car distribution, no administrative question is involved, and such an action, although brought against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or the federal courts. And because in that case the action was not based upon the ground that the carrier's rule of car distribution was unreasonable or discriminatory, but that plaintiff was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled even upon the basis of the carrier's own rule of distribution, it was held that the state court had jurisdiction without previous application to the Interstate Commerce Commission."

It will thus be seen that, under these authorities, the complainant in this suit could not prosecute its claim in either the federal or the state court, but that it was necessary for it to resort to the Interstate Commerce Commission, which it did, with the result previously stated.

We have been unable to find where the Supreme Court of the United States has passed upon the exact question here involved, but the case of *Penn. R. R. Co. v. Clark Coal Co.*, 238 U. S. 458, 35 Sup. Ct. 896, 59 L. Ed. 1406, is nearly in point and very persuasive.

That action was brought in a state court to recover damages for inadequate and unjustly discriminatory car service and supply. The state statute prohibited unjust discrimination, and provided that a carrier guilty of such conduct for such discrimination should be liable for damages treble the amount of injury suffered. The railroad company insisted that the court had no jurisdiction, upon the ground that with respect to car distribution the claim was cognizable only by the Interstate Commerce Commission or by the courts of the

United States. It also appeared that in a proceeding before the Commission, which the plaintiff had instituted against the defendant prior to the beginning of the action, the Commission had found that the method of car distribution practiced by the defendant was unjustly discriminatory, and the Commission had made an award of damages accordingly, and it was urged that by reason of this proceeding and the action of the Commission the plaintiff was precluded from maintaining that action, so far as it related to the alleged loss sustained with respect to the mines considered by the Commission. These contentions were overruled by the trial court, and the jury found that the defendant had been guilty of unjust discrimination, and assessed the damages at \$41,481, and trebling the amount a judgment was entered for \$124,443, which judgment was affirmed by the Supreme Court of the state. The Supreme Court of the United States held that the question of whether the rule or method of car distribution practiced by the railroad company was unjustly discriminatory was one which the Commission had authority to pass upon; that by reason of the nature of the question involved in an attack upon the method of distributing cars no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule; that the Commission had authority to make examination and report upon the amount of damages which the plaintiff had suffered from the unjust discrimination alleged in its complaint; and that where it appears that the act has been violated, and the requisite ruling as to the unreasonableness of the practice assailed has been made by the Commission, section 9 of the Commerce Act is applicable. And with reference to said section the court said:

"This provision defines the remedies to which a person in the situation of the plaintiff is entitled, and the terms of the provision clearly indicate that these remedies are exclusive. The express requirement of an election between the proceeding before the Commission and suit in the federal court leaves no room for the conclusion that there is an option in such case to resort to the state court. Where the proceeding has been had before the Commission and reparation awarded, suit under section 16 (as amended in 1910) may be brought in either a state or federal court, but this is after the Commission's award has been made."

In response to the insistence that no administrative question was involved the court said:

"It is said that the present action is brought to recover damages caused by the violation or discriminatory enforcement of the carrier's own rule, and that in such case, no administrative question being involved, resort to the Commission was not necessary. And this, it is urged,

was held in *Panna, R. v. Puffan Coal Co.*, 287 U. S. 121 [35 Sup. Ct. 484, 59 L. Ed. 837]. See, also, *Illinois Central R. R. v. Mulberry Hill Coal Co.*, decided June 14, 1915 [238 U. S. 275, 35 Sup. Ct. 760, 59 L. Ed. 1306]. The distinction, however, is apparent. In the cases cited the plaintiff had not invoked the jurisdiction of the Commission. In this case, it had done so. It went before the Commission, with its complaint under the act, assailing the rule of the company, and it secured from the Commission a finding as to the illegality of the rule and the violation of the act. This proceeding established the character of the claim so far as interstate transactions were concerned, and it could be prosecuted solely under the federal statute. This follows necessarily from the supremacy of the federal legislation in relation to interstate commerce. So long as the creative provisions of the federal act did not appear to be involved, and the wrong was not disclosed in the aspect presented by the Commission's finding, the plaintiff was free to avail itself of common-law remedies or of those afforded by local statutes. But when, as a result of its own insistence upon its federal right under the act, it appeared that the act had been violated and that the special remedial provisions of the act were applicable, it was not possible for the plaintiff to ignore the statute it had thus called into play and disregard its provisions for the purpose of measuring relief by local standards. The federal statute governed the plaintiff no less than the defendant. In the situation in which the plaintiff stood after the Commission's finding, that statute determined the extent of the damages it was entitled to recover with respect to interstate sales and shipments, and the plaintiff was not free to seek another remedy in the state court and there to secure treble damages under the state statute with respect to the same transactions.

"This is not to say that the finding of the Commission as to the amount of damages has any other effect than that prescribed in section 16 of the act. It is simply to hold that the plaintiff, having demanded and obtained the appropriate ruling from the Commission as to the discrimination which had been practiced, was then entitled to proceed for the recovery of damages in accordance with the act, and not otherwise. The fact that the Commission had not made its award of damages at the time the action was brought is immaterial. The proceeding before the Commission was pending and the plaintiff's right and remedy were fixed by the federal act.

"We conclude, therefore, that with respect to the damage sustained by the plaintiff in its interstate business, by reason of the unjustly discriminatory distribution of cars for interstate shipments, the plaintiff was not entitled to maintain this action under the state statute."

From the foregoing authorities we reach the following conclusions:

[3] 1. That section 22 simply reserves to the shipper his remedies existing at common law or by statute in so far as same do not conflict with the provisions of the act; that is to say, that where no administrative question is involved, as defined in *Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co.*, supra,

and where the shipper does not invoke the aid of the Commission, he may prosecute his common-law or statutory remedies.

[4] 2. That where he applies to the Commission he must proceed in accordance with the act.

[5] 3. That the act (section 9) provides two methods for the ascertainment of damages, which are exclusive—one to the Commission and the other to the federal courts.

[6] 4. That by section 16, when an award of damages has been made by the Commission, and the order awarding same is not complied with, the shipper may then institute suit in either the federal or the state court.

[7] 5. That the complainant's suit does not fall within any of these provisions and the chancery court was therefore without jurisdiction to determine the questions raised by the pleadings in this cause.

Since the court is without jurisdiction it is unnecessary to pass upon the other questions submitted.

The decree of the chancellor is therefore affirmed, with costs.

(141 Tenn. 387)

**DICKENS et al. v. BRANSFORD  
REALTY CO.**

(Supreme Court of Tennessee. March 29,  
1919.)

**1. GARNISHMENT — 63—PROPERTY SUBJECT  
TO—SALARY OF RAILROAD EMPLOYÉ.**

The salary of an employé of a railroad corporation being operated by the United States government under Act Cong. March 21, 1918 (U. S. Comp. St. 1918, §§ 3115½a-3115½p), is not subject to garnishment.

**2. RAILROADS — 5½, New, vol. 6A Key-No.  
Series—GOVERNMENTAL AGENCIES.**

Under Act Cong. March 21, 1918 (U. S. Comp. St. 1918, §§ 3115½a-3115½p), and under previous statutes and a proclamation of the President, the railroads of the country are merely agencies or instrumentalities of the United States government.

**3. GARNISHMENT — 17, 18—MUNICIPALITIES  
—GOVERNMENTAL AGENCIES.**

It is the settled policy of the state to hold immune from garnishment all municipalities and other governmental agencies.

**Certiorari to Court of Civil Appeals.**

Suit by the Bransford Realty Company against B. T. Dickens and the Nashville Terminals garnishee defendant. Judgment for plaintiff, and from judgment of Court of Civil Appeals both parties bring certiorari. Judgment of lower court reversed, and suit dismissed.

Keeble & Seay and A. W. Stockell, all of Nashville, for plaintiff.

W. E. Norvell, Jr., of Nashville, for defendants.

GREEN, J. This suit was brought by the Bransford Realty Company, a creditor of B. T. Dickens, to subject the salary of the latter in the hands of his employer, Nashville Terminals, as garnishee, to the payment of the Realty Company's claim.

Nashville Terminals is a railroad corporation, handling the terminal business of the Nashville, Chattanooga & St. Louis Railway, and the Louisville & Nashville Railroad Company in Nashville, and said Terminals is and was at the time of this suit, being operated by the United States government.

The sole question presented is as to the liability of a railroad corporation operated by the government to be subjected to process of attachment and garnishment by a creditor of one of its employes.

The trial court held that such garnishment proceedings might be maintained, and rendered judgment accordingly. The Court of Civil Appeals likewise reached this conclusion, but held that execution upon such judgment could not be issued while the defendant was being operated by the United States government.

Both parties have brought the case to this court by petitions for certiorari, complaining of the judgment of the Court of Civil Appeals, in so far as adversely affected.

[1] We are of opinion that garnishment proceedings cannot be maintained against such a defendant, under such circumstances, in this jurisdiction at least.

This court held long since that the controller of the state might not be garnished by a creditor of a state employé, to subject the salary of the latter. *Bank of Tennessee v. Dibrell*, 3 Sneed (35 Tenn.) 379.

Later it was declared that the same rule applied to garnishments against municipal corporations, arms, or agencies of the state, to subject the salaries of their employes. *City of Memphis v. Laski*, 9 Helsk. (56 Tenn.) 511, 24 Am. Rep. 327; *Baird v. Rogers*, 95 Tenn. 492, 32 S. W. 630.

In *Bank of Tennessee v. Dibrell*, supra, the court, speaking of such garnishments, said:

"Every consideration of policy would forbid it. No government can sanction it. It would be very embarrassing generally, and, under some circumstances, might prove fatal to the public service, to allow the means of support of the servants of the government to be intercepted in the hands of distributing agents. If the funds of the government, thus specifically appropriated for the support and maintenance of its agents, were allowed to be divested by process of attachment, in favor of creditors, or other-

wise, from their legitimate object, the functions of the government might be suspended."

In *City of Memphis v. Laski*, supra, quoting from the Supreme Court of Illinois, in *Merwin v. City of Chicago*, 45 Ill. 134, 92 Am. Dec. 204, it was said:

"The city should not be subjected to this species of litigation, no matter what may be the character of the indebtedness. If we hold it must answer in all these cases, and the exemption from liability be allowed to depend in each case upon the character of the indebtedness, we shall leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials in the management of matters wholly foreign to the object of its creation. A municipal corporation cannot be properly turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits in order that one private individual may the better collect a demand due from another."

The court has likewise held that the funds of a municipal corporation in the hands of a third person might not be subjected to garnishment by a creditor of the municipality. *Moore v. Mayor, etc., Chattanooga*, 8 Helsk. (55 Tenn.) 850; *Board of Directors v. Bodkin Bros.*, 108 Tenn. 700, 69 S. W. 270.

The principle seems to me that this court will not permit any obstruction of the financial administration of government. It will not permit any interference with the collection of its funds by a governmental agency nor with the disposition of such funds by a governmental agency.

The case of *Board of Directors v. Bodkin Bros.*, supra, dealt with an attempt to attach the funds of the St. Francis levee district, which was a public corporation, clothed with governmental duties and functions, organized under the laws of Arkansas, with an office in the city of Memphis.

So, it will be seen that this court has extended the same immunity against proceedings by garnishment to agencies of other governments that it extends to agencies of the government of the state of Tennessee.

[2] Under Public Act No. 107 of the Sixty-Fifth Congress, approved March 21, 1918 (Act March 21, 1918, c. 25, 40 Stat. 451 [U. S. Comp. St. 1918, §§ 3115½a-3115½p]), and under previous statutes and the proclamation of the President, the railroads of the country, including the defendant Nashville Terminals, are now merely agencies or instrumentalities of the United States government.

[3] While it is true Public Act No. 107 of the Sixty-Fifth Congress above referred to, very broadly authorized suits against such common carriers, still their liability to suit

is not greater than that of the various municipal corporations of this state. Such liability, however, should be confined to their own creditors. Since it is the settled policy of this state to hold immune from garnishments all municipalities and other governmental agencies, we think such protection must be accorded to defendant Nashville Terminals, as it is now operated.

Moreover, section 10 of the Act of Congress above referred to (U. S. Comp. St. 1918, § 3115½j), expressly provides that "no process, mesne or final, shall be levied against any property under such federal control," and this would doubtless preclude proceedings by attachment and garnishment.

We have not had occasion to consider in this opinion the effect of General Order No. 43, promulgated by the Director General of Railroads September 5, 1918, which undertook to exempt carriers under federal control from proceedings by garnishment; however, as stated heretofore under our previous decisions, we think such carriers so operated are freed from such process.

It results that the judgment of the lower court will be reversed, and this suit dismissed.

(141 Tenn. 392)

OGILVIE et al. v. HAILEY, Clerk, et al.

(Supreme Court of Tennessee. March 29, 1919.)

1. CONSTITUTIONAL LAW — 46(2) — CONSTITUTIONALITY OF STATUTE—SUFFICIENCY OF OBJECTION.

Where a bill is bottomed on the unconstitutionality of a statute, it is duty of complainant to point out and state with particularity details of supposed invalidity.

2. EQUITY — 228 — DEMURRER—SUFFICIENCY.

A demurrer which challenges generally the legal conclusions of a bill bottomed on unconstitutionality of a statute is sufficient.

3. CONSTITUTIONAL LAW — 48 — CONSTITUTIONALITY OF STATUTE—PRESUMPTION.

Every intendment is in favor of the constitutionality of a statute.

4. CONSTITUTIONAL LAW — 48 — STATUTES — CONSTITUTIONALITY—PRESUMPTION.

If any possible reason can be conceived to justify classifications in revenue statutes, they will not be held unconstitutional as discriminatory.

5. LICENSES — 7(3) — PRIVILEGE TAX — DISCRIMINATION.

Priv. Acts 1915, c. 407, assessing a privilege tax on automobiles used for pleasure, but not on automobiles used for business, is not unconstitutional as arbitrary and discriminatory.

**6. LICENSES** **§14(2) — "PRIVILEGE" — AUTOMOBILES.**

As was done in Priv. Acts 1915, c. 407, the use of automobiles on highways for pleasure may be declared a "privilege."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Privilege.]

**7. STATUTES** **§121(1) — TITLE — LICENSES — MOTOR VEHICLES.**

The caption of Priv. Acts 1915, c. 407, entitled "an act to provide revenue by assessing a privilege tax," etc., "on automobiles and motorcycles used for pleasure," etc., conforms to the body of the act.

**8. LICENSES** **§7(1) — STATUTES — PURPOSE AND DISPOSAL OF TAXES.**

Priv. Acts 1915, c. 407, assessing a privilege tax on automobiles used for pleasure, must be construed together with Priv. Acts 1917, c. 441, creating a board of highway commissioners, etc., and hence is not open to the attack that it contains no provisions for the expenditure of such taxes when collected.

**9. CONSTITUTIONAL LAW** **§46(1) — NECESSITY OF DETERMINING QUESTION — ISSUES.**

In a suit to enjoin the collection of a privilege tax on automobiles under Priv. Acts 1915, c. 407, on ground that such statute was unconstitutional, court need not pass on question as to whether or not penalty provided in section 2 was excessive and vitiated the statute, where no penalty was involved in the suit in question.

**10. STATUTES** **§64(8) — PARTIAL INVALIDITY — LICENSES.**

Even though the penalty provided in Priv. Acts 1915, c. 407, § 2, for nonpayment of privilege tax on pleasure automobiles should be held to be excessive and unconstitutional; it would not vitiate the remainder of the act.

Appeal from Chancery Court, Davidson County; Jas. B. Newman, Chancellor.

Bill by J. A. Ogilvie and others against Romans Halley, Clerk, and others. From a decree in favor of defendants, the complainants appeal. Affirmed.

Roscoe Bond, Wm. Fuqua, and Lurton Goodpasture, all of Nashville, for appellants.

T. J. McMorrough, of Nashville, for appellees.

LANSDEN, C. J. The bill in this cause was filed to enjoin the collection of a privilege tax on automobiles used for pleasure, applicable to Davidson county. It is averred that the statute authorizing this tax is unconstitutional. A demurrer was interposed, which was sustained by the chancellor, and the complainants have appealed to this court.

[1-3] Some criticism is made of the form of the demurrer. It is insisted that it is too broad in its terms to be considered. Where a bill is bottomed on the unconstitutionality of a statute, it is the duty of the complainant to point out and state with particularity

the details of the supposed conflict of the statute with the organic law. In such a case a demurrer which challenges generally the legal conclusions of the bill is sufficient. Every intendment is in favor of the statute and against the attack, and the complainant must lay his grounds of attack with the precision ordinarily required of a demurrant.

The statute involved is chapter 407 of the Private Acts of 1915, entitled:

"An act to provide revenue by assessing a privilege tax in counties having a population of from 149,000 to 190,000 inhabitants by the federal census of 1910, or any subsequent federal census, on automobiles and motorcycles used for pleasure, to oil the turnpike roads of said county which are under the supervision of the turnpike board."

Section 1 of the act provides that a privilege tax shall be collected in the counties named, by the county court clerk, on all automobiles and motorcycles used for pleasure, of \$7.50 on seven-passenger automobiles, \$5 on five-passenger automobiles, \$3 on two-passenger automobiles, and \$2 on motorcycles, and it is provided that said tax is to be paid annually to the county court clerk, as other privilege taxes.

Section 2 provides that the owners of such vehicles shall pay said privilege tax in advance, and that any violation of the act subjects them to payment of a penalty of \$25, and that said tax and penalty shall be a lien on said machines.

Section 3 provides that it shall be the duty of the county court clerk to turn over to the county trustee all collections under this statute, to be placed by the trustee "to the credit of account for oiling turnpikes in said counties."

The foregoing act, as stated, was passed by the Legislature of 1915. Prior to this was chapter 141 of the Acts of 1907, creating a turnpike board for Davidson county. Omitting reference to other Davidson county road laws, by chapter 441 of the Private Acts of 1917, a board of highway commissioners was created for Davidson county, which was given charge of all the highways of the county, both turnpikes and roads, and it was provided in the act of 1917 (section 15) that—

"All funds assessed for pike and district road purposes shall be collected by the county trustee, as now provided by law and shall be paid out on the warrants of the county judge on orders signed by the superintendent of road, and countersigned by at least two members of the board of highway commissioners."

The bill herein was filed July 19, 1917, after the aforesaid act of 1917 was passed. Therefore, at the time this suit was brought, there was in force chapter 407 of the Private Acts of 1915, herein attacked, and chapter 441 of the Private Acts of 1917, creating the board of highway commissioners, and confer-



ring upon such board jurisdiction of the turnpike roads of Davidson county.

So far as these complainants are concerned, these two acts must be construed together, in *pari materia*, as part of the same scheme of legislation. This latter observation removes some of the objections urged to the act of 1915 by the complainants herein, and by Mr. Shannon in the Annotations in his new Code. For the purpose of this suit, both these statutes may be treated as one.

[4, 5] It is first insisted that the taxation of automobiles used for pleasure and failure to tax automobiles used for business is an arbitrary and unconstitutional discrimination.

The later decisions of this court and of the Federal Supreme Court have conceded to the Legislature a very wide range of discretion in the matter of classification in police statutes and revenue statutes. The idea is that, if any possible reason can be conceived to justify the classification, it will be upheld. *State v. McKay*, 137 Tenn. 280, 193 S. W. 99, Ann. Cas. 1917E, 158; *City of Memphis v. State ex rel.*, 133 Tenn. 83, 179 S. W. 631, L. R. A. 1916B, 1151, Ann. Cas. 1917C, 1056; *Motlow v. State*, 125 Tenn. 547, 145 S. W. 177, L. R. A. 1916F, 177—and federal cases reviewed in these three decisions.

It is possible that automobiles used for pleasure run more rapidly and are more destructive to the county roads. It is possible that no automobiles are used for business purposes except in the interest of a business that itself pays a privilege tax. It is possible that other reasons may exist for this discrimination, which we think of, and we are not disposed to say that this classification is arbitrary and unreasonable.

[6] It is next insisted that the use of automobiles for pleasure cannot be declared a privilege, inasmuch as such use is not the pursuit of any business or occupation, and it is sought to limit a privilege to such pursuits.

While some of our older cases apparently justify these arguments, later decisions of this court declare that the doing of a single act may be declared a privilege. The right to inherit may be declared a privilege. *State*

*v. Alston*, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178.

The transfer of property to a foreign corporation may be declared a privilege. *State ex rel. v. L. & N. R. R. Co.*, 139 Tenn. 406, 201 S. W. 738.

The right of registration may be declared a privilege. *State ex rel. v. American Trust Co.*, 208 S. W. 611.

In view of our later decisions, we have no hesitation in holding that the Legislature may declare it to be a privilege to operate pleasure cars over the turnpike roads of our counties. Such operation amounts indeed to the pursuit of an occupation with many, although not for gain.

[7] It is again urged that the caption of the act does not conform to its body. We have carefully examined the statute, and think this objection is hypercritical and unsound, and does not merit discussion.

[8] It is also said that the act is unconstitutional in that it authorizes the collection of this privilege tax by the county court clerk to be turned over to the county trustee, to be placed to the account for oiling turnpikes, but that it nowhere contains any provisions for the expenditure of said fund nor authorizes the payment of such fund, when collected, to any public purpose or good.

The latter criticism is entirely obviated by construing this act in connection with the act of 1917, which does provide exactly how the taxes raised for road purposes shall be appropriated and paid out.

[9, 10] It is finally insisted that the penalty of \$25 provided by the act is so excessive as to be invalid, and it is argued that this vitiates the entire statute.

There is no question of the penalty involved in this case, and we do not find it necessary to pass on the validity of this portion of the statute. If it were involved, and should be held to be excessive and unconstitutional, the penalty could be easily elided without affecting the remainder of the statute, and this course would doubtless be followed by the court.

We are of opinion that there is no error in the decree of the chancellor, and the same is affirmed.

(141 Tenn. 899)

**MENEES v. EWING.**

(Supreme Court of Tennessee. March 28, 1919.)

**ELECTIONS — 180(2) — METHOD OF DESIGNATING CANDIDATE — MANDATORY PROVISION.**

Shannon's Code, § 1248, as to voter designating candidate of his choice by a cross (X), is not mandatory in the sense that a voter who uses a different mark, such as a check mark, will be deprived of his vote even when the intention is clear and obvious in view of section 1255; the provision of the latter section that none but ballots provided in accordance with the article shall be counted having reference to ballots described in section 1233 et seq. and not to manner of marking ballots.

Appeal from Circuit Court, Montgomery County; W. L. Cook, Judge.

Election contest between R. L. Menes and F. E. Ewing, instituted in the county court and carried to circuit court. Both courts held that contestee, Ewing, was legally elected, and an appeal was prosecuted to the Supreme Court. Affirmed.

Wm. Daniels, Jr., and Austin Peay, both of Clarksville, for appellant.

Dancey Fort, of Clarksville, for appellee.

**LANDSEN, C. J.** This is an election contest over the office of justice of the peace in the First district of Montgomery county. The suit was instituted in the county court and carried from thence to the circuit court of the county. Both courts held that the contestee, Ewing, was duly and legally elected as shown by the return of the officers of election. An appeal was prosecuted to this court, and errors have been assigned, which present a number of questions, but the only matter of public interest is the question presented upon the two ballots cast for contestee marked with a check mark instead of a cross mark.

We are satisfied that the ballots were preserved so that the ones inspected by the county judge, and later by the circuit judge, and presented for our inspection, are the true ballots deposited in the ballot box by the voters. It was so held in the county court and the circuit court, and there is evidence to support the holding.

As to the other ballots counted for contestee, and which present the question of fact as to whether the voters intended to place the cross mark opposite the name of contestee, we are satisfied with the holding of the circuit court. By a personal inspection of the ballots all of these authorities concluded that the voters designated contestee in a proper manner by the making of the cross mark opposite his name. We affirm their action as to this.

As to the ballots upon which the name of contestee was designated by a check mark. The point made against these ballots is that the voters used a check mark instead of a cross mark. No point is made that the mark used could designate any other name than that of contestee, and that the voter intended to designate another than him as his choice for the office of justice of the peace. It is insisted that the statute having designated a cross mark (X) as the way by which voters are to select their choice of candidates, no other mark can be allowed; the insistence being that the language of the statute is mandatory, and the court has no discretion in the matter.

The Dortch Ballot Law originated in the act of 1890 First Extra Session, chapter 24. So far as we are advised it has not been construed by this court with respect to the question presented in this case. An examination of the statute discloses that it inaugurated a new method of voting in the territory to which it has application. It designates the ballot and the manner of issuing them as well as the way in which the voter shall cast his vote. The main purpose of the act is to secure privacy upon the part of the voter in casting his ballot and to secure purity in the elections. After describing in considerable detail how the election booths are to be established, the ballots are to be furnished, the kinds of ballots, and other details respecting the election, the marking of the ballot by the voter is set forth in the following language found at section 1248 of Shannon's Annotated Code.

"He shall then go to one of the voting shelves, tables, or compartments, and shall prepare his ballot by marking in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled, or by filling in the name of the candidate of his choice in the blank space provided therefor and marking a cross (X) opposite thereto, and likewise a cross opposite the answer he desires to give in case of a constitutional amendment."

The act then describes how the ballot is to be folded and the stub torn off, the manner and time of voting, to prevent repeating, who are allowed in the room, spoiled ballots, assistance to physically disabled voters, and then describes what are known as improperly marked ballots. This provision is found in section 1255 of the foregoing Code, and is as follows:

"If the voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office. But this shall not vitiate the ballot so far as properly marked. No ballot without the official indorsement of the chairman of the board of commissioners shall be deposited, and none but ballots provided in accordance with the provisions of this article shall be counted."

It will be perceived that section 1248 sets forth in detail the manner in which the voter shall cast his ballot, and designates how the candidates of the voter's choice are to be pointed out by him, and the designation selected by the Legislature is the cross (X) opposite the name of the candidate. Anticipating that some of the ballots will be improperly marked, section 1255 points out the effects of improperly marking them. It is seen that it is there provided if the voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballots shall not be counted for such office. But to prevent a misunderstanding of the language employed, the Legislature expressly provided that such was not to vitiate the ballot so far as properly marked. It is specified, however, that ballots which are not provided in accordance with the provisions of this article are not to be counted. We think the reference last made is to ballots described in section 1233 et seq., and not to the manner of marking ballots. The Legislature designated the cross (X) as the proper way to designate the candidate for whom the voter was voting, but it did not intend by this designation to deprive a voter of his vote if he had so marked his ballot that his intention was made clear and obvious to the officers of election. We think this is shown by the two sections of the act set forth in this opinion. To deprive a voter of his vote when he makes his choice clear and obvious is such an act of apparent injustice that the intention to do so will not be ascribed to the Legislature, unless the language employed by it in reference to the matter is plain and unambiguous. It cannot be assumed that the Legislature intended to deprive a voter of his choice merely upon the form of the mark employed to designate the candidate voted for. This all assumes what is not denied in this case, that the voter employed a method of designating the candidate for whom he intended to vote, which was clear.

Of course, what has been said cannot have application to marks or insignia, which are used upon the ballot for the purpose of designating a particular candidate, or candidates, for whom the voter should vote. It has effect only in those cases in which the intention of the voter to designate the candidate of his choice by the unusual mark is clear and satisfactory. 9 Ruling Case Law, 132; 15 Cyc. 353; Parker v. Orr, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 230. See, also, Rail v. Potts et al., 8 Humph. 225.

The clear weight of authority is to the effect that the method of marking the ballot is not mandatory in the sense that the voter will be deprived of his vote if it is clear that the only question involved is the use of the mark by the voter to designate his choice.

Each state has an act upon the subject with more or less divergence from our own, and, of course, the cases upon the subject, of which there are many are only persuasive. Affirmed.

(141 Tenn. 405)

STATE ex rel. WILLIAMS v. CITY OF NASHVILLE et al.

(Supreme Court of Tennessee. March 29, 1919.)

1. STATUTES ~~§~~125(7)—TITLE AND SUBJECT-MATTER—AMENDMENTS—OFFICERS' COMPENSATION.

Priv. Acts 1917, c. 525, providing for the payment of salaries to fire and police departments of the city of Nashville, designated in its caption to amend the city charter, being an amendatory act, it is not unconstitutional, as violating Const. art. 2, § 17, relating to title of statutes, since an amendment incorporating provisions germane to the original act sought to be amended need recite nothing further than a correct statement of title of the original act.

2. STATUTES ~~§~~16(8)—READING OF BILLS—AMENDMENTS.

Where Priv. Acts 1917, c. 525, amending city charter of Nashville, in its original form had been passed three times in the Senate and sent to the House, where it was substituted for an identical bill, which had been twice read in the House, and then amended by unnecessary additions and read a third time and passed and sent to the Senate, where amendment was concurred in and bill approved by Governor, it was not a violation of Const. art. 2, § 18, requiring three readings of a bill in each house.

Appeal from Chancery Court, Davidson County; Jas. B. Newman, Chancellor.

Proceedings by the State, on the relation of one Williams, against the City of Nashville and others, to compel the adoption of an ordinance fixing salaries of the members of the fire department. Decree for relator, and defendants appeal. Affirmed and remanded.

A. G. Ewing, Jr., and J. Washington Moore, both of Nashville, for appellants.

W. E. Norvell, Jr., of Nashville, for appellee.

BAOHMAN, J. The constitutionality of chapter 525 of the Private Acts of 1917 is here assailed by a demurrer filed by the city of Nashville and its commissioners to a bill filed against them by the members of the fire department of the city of Nashville on relation, wherein it was sought to compel the city authorities to adopt an ordinance fixing the salaries of the members of the fire department, as provided in the act under consideration.

The caption of the act, as finally passed, is as follows:

"An act to be entitled 'An act to amend an act entitled "An act to create a municipal corporation to be known as the city of Nashville, and to define its rights, powers, duties and obligations, and to repeal all laws or parts of laws in conflict with the provisions of this act," being chapter 22 of the Private Acts of the General Assembly of the State of Tennessee for the year 1913 by amending section 17 thereof so as to provide for the payment of certain salaries to the members of the fire department and the police department of said city of Nashville.'"

It appears from the legislative journals that the act is the embodiment of Senate Bill No. 1210, with the exception that in the course of its three passages in the Senate it contained no reference to the police department of the city of Nashville. House Bill No. 1619, identical in caption and body with Senate Bill No. 1210, had passed two readings on April 7, 1917, when Senate Bill No. 1210, having passed its third reading and had been transferred to the House, was substituted for House Bill No. 1619, and amended in the House by adding to the caption the language, "and the police department of the city of Nashville," and also by providing in the body of the bill for a schedule of salaries for the members of the police department, which the city authorities were required to adopt by ordinance. In its amended form Senate Bill No. 1210 was finally passed by the House on April 7, 1917, and on that date was transmitted to the Senate, where the amendments previously made in the House were upon motion concurred in. The bill was duly signed and was approved by the Governor.

From the foregoing summary history of the bill it will be seen that in its original form and as passed on three readings in the Senate and two readings in the House, it contained no reference to the police department of the city of Nashville, and that only after substitution in the House was the caption and body of the bill amended so as to include in the charter changed provisions affecting the salaries of members of that department.

Upon this state of facts the appellants contend that the procedure attending the enactment of the measure is not in accord with sections 17 and 18 of article 2 of the Constitution of the state, and the act is therefore void. These sections of article 2 of the Constitution are as follows:

"Sec. 17. Bills may originate in either house, but may be amended, altered, or rejected by the other. No bill shall become a law which embraces more than one subject, \* \* \* to be expressed in the title. All acts which repeal, revive or amend former laws, shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended.

"Sec. 18. Every bill shall be read once on three different days, and be passed each time in the house where it originated, before transmission to the other. No bill shall become a law until it shall have been read and passed,

on three different days in each house; and shall have received on its final passage, in each house, the assent of a majority of all the members to which that house shall be entitled under this Constitution; and shall have been signed by the respective speakers in open session—the fact of such signing to be noted on the journal; and shall have received the approval of the Governor, or shall have been otherwise passed under the provisions of this Constitution."

It is to be noted that the act in question is an amendatory, and not an original, measure, and, further, that while its effect is to provide for the payment of certain salaries to designated municipal employes, it is an act specifically designated by its caption as amending the charter of incorporation of the city of Nashville. The fixing of salaries within certain limits is the particular wherein the subject is to be changed.

[1] As an amendatory act, we are of opinion that the same is not obnoxious to the provisions of the Constitution. It has been repeatedly held by us that an amendment incorporating provisions germane to the subject of the original act sought to be amended need recite nothing further than a correct statement of the title of the original act. *Hyman v. State*, 87 Tenn. 110, 111, 9 S. W. 372, 1 L. R. A. 497; *State ex rel. v. Algood*, 87 Tenn. 168, 10 S. W. 310; *Wright v. Cunningham*, 115 Tenn. 454, 455, 91 S. W. 293; *Memphis Street Railway v. State*, 110 Tenn. 613, 75 S. W. 730.

And, as stated in the case of *State ex rel. v. Algood*:

"The criticism is that this title does not indicate the character of the proposed amendment. This is not necessary if, in fact, the amendment is germane to the original act and is embraced within the title of the original or amended act. In such case, the title of the original act being made a part of the title of the amendatory act, the particulars of the amendment need not be shown by the title."

We have further held that, where the caption of an amendatory act contains a recital of the title of the original act proposed to be amended, it is unnecessary that the particular character of the amendment be indicated, and that unnecessary recitals in a title or superfluous matter therein do not invalidate an act otherwise constitutional. *Goodbar et al. v. City of Memphis et al.*, 113 Tenn. 38, 81 S. W. 1061; *City Lumber Co. v. Temple*, 138 Tenn. 91, 195 S. W. 1127.

It is insisted for the appellants that the insertion in the caption of the act of the language "by amending section 17 thereof so as to provide for the payment of certain salaries to the members of the fire department" operated to restrict and limit the subject and extent of the proposed amendment, and that therefore the restricted title could not thereafter be made by adding the words "and the police department of said City of Nashville," without constituting the bill in effect

a new one; and one subject, as amended, to the requirements of section 18 of article 2 of the Constitution.

[2] This insistence would necessarily be upheld if the act were an original one, or if the language used to particularly describe the nature of the amendment could be construed as an expression of the subject of the legislation, but, as above noted, the one subject expressed in the title and coming within the constitutional limitation is the amendment of the city charter. It is the constant quantity fixing the identity of the bill, as stated in *Erwin v. State*, 116 Tenn. 80, 98 S. W. 73, and as expressed it presents a valid constitutional amendatory act which was regularly enacted. The added language, specifically designating the particulars wherein the charter was to be amended, was unnecessary and superfluous, and its additions cannot be held to invalidate that which was constitutionally sufficient without it. To so hold would be subversive

of the fundamental principle that every intendment must be made for, and all doubts resolved in favor of, the constitutionality of the act.

In support of the contention made for the appellants we are cited to the case of *State v. Bradt*, 103 Tenn. 584, 53 S. W. 942. As pointed out in *Goodbar v. Memphis*, supra, this case is authority for the proposition that legislation under a limited and restricted title must be confined to the limits prescribed, and the principle was there correctly applied. The title of the act there being considered related alone to one subject, while the body of the act embraced three separate and distinct subjects of legislation. Here we have an amendatory act, reciting in its caption the title of the original act, and embracing legislation coming within the purview of the original act.

The decree of the chancellor is affirmed, and the case remanded.

(277 Mo. 516)

**HUBBARD v. DAHLKE.**

(Supreme Court of Missouri, Division No. 1.  
March 1, 1919. Rehearing Denied  
March 28, 1919.)

**1. MORTGAGES 497(2) — FORECLOSURE — RECORD TITLE.**

Where mortgagee, in foreclosing property, failed to join owner of record, to whom mortgagor had sold premises, as a party in the proceedings, purchaser at foreclosure sale is not entitled to premises as against such record owner.

**2. TRIAL 11(2) — TRANSFER FROM LAW TO EQUITY — PLEA OF ESTOPPEL.**

In action to try title, defendant's plea that plaintiff in good conscience should be estopped from claiming title under his quitclaim deed, because he was and had been defendant's agent as to the land involved, and secured quitclaim deed by virtue of knowledge of facts secured as such agent, held sufficient to carry the case to the equity side of the court.

**3. TRIAL 11(2) — TRANSFER FROM LAW TO EQUITY — PLEADING.**

Whether the equity side of the court shall take jurisdiction in a law action is determined by the pleadings.

**4. LIMITATION OF ACTIONS 167(2) — MORTGAGES — BAR OF DEBT — FUTILE FORECLOSURE.**

Foreclosure of mortgage was barred by limitations under Rev. St. 1909, § 1892, where action on note secured thereby was barred by statute of limitations, though futile attempt to foreclose mortgage was made during the period of limitations.

**5. LIMITATION OF ACTIONS 13 — MORTGAGES — FORECLOSURE — PURCHASER OF EQUITY OF REDEMPTION.**

No principal of estoppel of one purchasing mortgaged property to contest the mortgage prevents such a purchaser from setting up the defense that foreclosure of the mortgage is barred by limitations.

**6. ADVERSE POSSESSION 14 — NECESSITY OF ACTUAL POSSESSION — PAYMENT OF TAXES — ATTEMPT TO SELL LAND.**

Purchaser at mortgage sale following futile foreclosure did not obtain title under the 10-year statute of limitations by payment of taxes on the land and attempts to sell the land, where she was never in possession thereof.

**7. PRINCIPAL AND AGENT 69(7) — ACQUISITION OF OUTSTANDING TITLE.**

Where agent, attempting to sell land for principal, discovered by reason of such agency that principal's title was defective, and secured land from record owner by quitclaim deed, he will not in equity and good conscience be permitted to claim title as against principal, and principal, upon payment to agent of consideration of quitclaim deed, will be decreed title.

Appeal from Circuit Court, Morgan County; J. G. Slate, Judge.

Action by George H. Hubbard against Emma Dahlke. Decree for plaintiff, and defendant appeals. Reversed, with directions.

A. L. Ross, of Versailles, and H. G. Pope, of Kansas City, for appellant.

Capron, Butcher & Knoop, of Kansas City, for respondent.

GRAVES, J. Action to try title. Petition in the conventional form, including, however, the allegation that the land involved is in the possession of no person, and the further allegation that plaintiff is unable to describe the interest of defendant, because such interest is not known to plaintiff.

The answer pleaded: (1) General denial; (2) by way of answer and cross-bill she avers that she held a mortgage deed given by A. F. & L. E. Kull on the land in dispute, that she employed reputable counsel to foreclose this mortgage by suit, that such counsel brought the suit against the two Kulls, that her said counsel bought in the land at special execution sale under such judgment, and then conveyed to her, and she asked for a new foreclosure of the mortgage deed; (3) this count likewise recounts the foregoing facts and others and asks for a foreclosure; (4) is a plea of estoppel, in which it is averred that Hubbard was the agent of plaintiff, and was thereby in equity estopped from acquiring an outstanding title against her; (5) plea of 10-year statute of limitations.

The reply fully met the issues of the answer. The court declined to hear evidence on the second and third counts of the answer, on the ground that the right to foreclose the mortgage had long since been barred. On the other matters of defense the trial court found the facts against defendant, and found plaintiff to be the fee-simple owner of the land. From such decree, defendant has appealed.

I. The whole trouble (for defendant) in this case arises out of the slip of her counsel in not making the record owner of the land a party to the foreclosure proceeding. The parties at the trial made this admission:

"It was admitted by both parties to this action that the common source of title to the real property in controversy was A. F. Kull and his wife; that Kull and his wife executed a mortgage to the defendant, Emma Dahlke, said mortgage being dated November 7, 1893, and being given to secure a loan of \$400 that they borrowed from said defendant, and due one year after date; that on April 23, 1895, A. F. Kull and L. E. Kull, his wife, conveyed by warranty deed the property in question to John D. Jackson, subject to said mortgage; that on May 13, 1895, said John D. Jackson and wife, Ada, conveyed by warranty deed said property to Jacob Bird, subject to said mortgage; that on November 19, 1895, said Jacob Bird, single, conveyed by warranty deed said property to Louis Seifert, subject to said mortgage."

Plaintiff then offered a quitclaim deed from Louis Seiffert and wife, Cassie, to himself, in consideration of the sum of \$50. Defendant offered her petition and judgment in the foreclosure proceeding, which shows that it was only foreclosed as to the two Kulls. This proceeding was after Seiffert became the record owner. From this foreclosure sale thenceforward defendant was claiming the land and paying the taxes thereon; but as the land is wild, uncultivated land, no one was in the actual possession thereof.

[1-3] We think it clear that the pure record title is in the plaintiff, so that, unless defendant is aided by some one of her other defenses, she has lost rightfully on the trial below. There is sufficient pleaded in the answer to carry the case to the equity side of the court. This matter is determined by the pleadings. *Lee v. Conran*, 213 Mo. 404, 111 S. W. 1151; *Brandt v. Bente*, 177 S. W. 377. Here we have a count charging that plaintiff in good conscience should be estopped from claiming title under his quitclaim deed, because he was and had been the agent of defendant as to these lands, and thereby knew all the facts.

II. The note and mortgage were given in November, 1893. In 1891 the General Assembly passed an act of two sections, Laws of 1891, p. 184. Section 1 of that act is now section 1892, R. S. 1909, and reads:

"No suit, action or proceeding under power of sale to foreclose any mortgage or deed of trust, executed hereafter to secure any obligation to pay money or property, shall be had or maintained after such obligation has been barred by the statutes of limitations of this state."

Section 2 of the act of 1891, mentioned supra, seems to have served its purpose, and has been dropped from the statutes. However it read:

"Nor shall any such suit be had or maintained to foreclose any such mortgage or deed of trust heretofore executed to secure any such obligation after the expiration of two years after the passage of this act."

[4] It will be noted that section 1 of the act of 1891 had reference to mortgages and deeds of trust executed after the passage of the act. The note and mortgage here involved were executed after the passage of the act of 1891, and fell within the purview of that law. So that, when the note was barred under the law, the right to foreclose the mortgage was likewise barred. The futile attempt to foreclose would not change the situation. The trial court was right in holding that the two counts of the cross-bill asking a foreclosure could not be sustained. The right to foreclose was gone. *Martin v. Teasdale*, 212 Mo. 611, 111 S. W. 511; *Howler v. Erwin*, 221 Mo. 93, 119 S. W. 951; *Bumgardner v. Wealand*, 197 Mo. 423, 95 S. W. 211. In other words, as to all mortgages and deeds of trust executed after the act of

1891 became effective, the right to foreclose the mortgage or deed of trust was barred whenever the note secured thereby became barred.

[5] III. Counsel for defendant seem to have a theory that, because Seiffert bought the land subject to the mortgage, he himself could not invoke the statute of limitations as to the bringing of a foreclosure suit. To be exact, here is their contention:

"Plaintiff [respondent] should not be heard to interpose the statute of limitations as a bar to the relief prayed for by defendant [appellant] in her answer and cross-petition. If Seiffert had been in possession at any time he was in no position to dispute the title of appellant because he bought and took title subject to the encumbrance held by her. His claim of title was not hostile to that of appellant and never became hostile. Respondent stepped into his [Seiffert's] shoes and cannot make any greater or more effective claim of title than Seiffert could make."

When Seiffert bought, it is true that he only bought the equity of redemption formerly owned by Kull. As a matter of fact no one has ever been in the possession of this land. The most that has been done since 1891, by any person indicating a claim of possession, is the payment of the taxes by defendant. But, even if Seiffert had gone into possession, it would not have changed the situation under this statute. Section 1892, R. S. 1909, first enacted in 1891. If the defendant permitted her note, signed by Kull and wife, to become valueless, by failing to bring action thereon within 10 years from its maturity, as she did; then by section 1892/ supra, she was prohibited from bringing an action to foreclose the mortgage. There are no qualifications to this statute. The actual possession of Seiffert cuts no figure. He had the title, subject to the mortgage which secured the debt of Kull. If the defendant saw fit to let her right to bring a foreclosure suit lapse under the terms of this statute, and thereafter she had brought such a suit and made Seiffert, the owner of the equity of redemption, a party to such suit, Seiffert would, under this statute, have had the right to plead the fact that such suit (under this statute) was barred by the lapse of time. The statute was passed for this very purpose. Prior thereto, the foreclosure action could have been brought within 20 years—a common-law bar.

The statute has no reference to a possessory action, but is one which bars the right to foreclose a mortgage lien. So that adverse possession is not really an issue under defendant's two counts, in which she asks to foreclose the mortgage.

What Seiffert could have done, the plaintiff could do in the present case, unless precluded on some other theory. So that, under all theories advanced, we conclude the trial

court was right in denying the defendant the right to foreclose her mortgage.

[6] IV. Nor is there substance in defendant's plea of the 10-year statute of limitations. She was never in the possession of this land. True, she claimed ownership after her futile foreclosure in 1896, and has paid taxes thereon, and has attempted or tried to sell the land. This is the utmost of her evidence under this plea. This is not sufficient, and the trial court was right in his judgment on this count.

V. However, with all that we have said above, the equities of this case are with this woman. The pleadings are such as to make the case one of equitable jurisdiction, and, whilst the trial court found against her upon that branch of her answer, we are authorized to review this evidence, and reach our own conclusions as to the facts. These facts may be briefly stated: B. R. Richardson, an attorney and abstractor of titles, brought the suit for foreclosure, which appears to have been futile. Defendant in good faith bought at the foreclosure sale and thought she procured title. We say she bought, because Mr. Richardson bought and took title; but, as he ought to have done, as her agent and attorney, he conveyed to her. In law she bought. Mr. Richardson died, and the plaintiff, Hubbard, acquired his business. In going over the papers in Richardson's office, he found what is called a "Present Owners List" of property in Morgan county. On that list he found the name of Mrs. Dahlke, showing that Richardson had paid taxes for her. This was in 1901, and thereupon he wrote defendant that he had succeeded to the business of Mr. Richardson, and would be glad to pay her taxes for her, as Mr. Richardson had done. She sent him the money, and he paid the taxes. Plaintiff admits writing for this business, but denies that he paid the taxes more than three or four times from 1901 to 1915. Defendant says that he was her agent to pay taxes and to sell the land for her. She said she paid him for his service in paying taxes. That he (or his firm, Hubbard & Kavanaugh) was her agent to sell this land is made clear by a letter of date May 28, 1901. In this letter, among other things, it is said:

"It is impossible for us to close trade on your 120 acres of land here; the party, after investigating, is afraid of the title, and as abstractors ourselves we have to admit that your title at present is very bad. However, we know of our own knowledge that you have a good title to an undivided one-half interest in the land, which came to you by J. P. Porth, only heir of Wm. Porth, dead. Now, the other one-half interest stands in the name of Thos. B. & C. V. Price; they obtained deed from John Logan's Adm'r. Now, if you could get Q. C. deed from them your title would then pass. The records show that the land was sold for taxes; however judgment was taken against Logan

long after his death; and judgment against dead man for taxes passes no title."

This letter shows that plaintiff was agent to sell in 1901, and defendant claims that he was such agent from thenceforward, as well as her agent to pay taxes. This letter also shows that plaintiff was advising the defendant as to the perfection of her title. It likewise indicates that he acquired knowledge of her title whilst acting as her agent and in a fiduciary capacity.

Now, that plaintiff paid taxes for defendant in 1914 is shown by the disinterested proof of the collector. Defendant says the agency both for paying taxes and selling the property continued from 1901 on, but that many of her letters were lost in the noted flood in Kansas City in 1903. What tax receipts she introduced bore evidence of the flood. They did not show that plaintiff always paid the taxes. But on July 19, 1915, is a letter from plaintiff personally, which shows that he recognized his agency. The letter reads:

"I wrote you last week in regard to a price on your land in this Morgan Co., Mo., but so far have not heard from you; please let me hear from you at once. I am expecting to make a trip over in that part of the county soon, and if I have your price before I go I might be able to make sale of same. This land is quite a distance from here and I do not get over in that part of the county very often. Hoping to hear from you at once,

"I am very truly yours,

"Geo. H. Hubbard."

Hubbard says he did not get a price on the land as requested on July 19, 1915, and for that reason bought the land himself from Seiffert. On August 25, 1915, he wrote Mr. Erhart, the Kansas City agent of the defendant, the following:

"Versailles, Mo., Aug. 25, '15.

"Mr. F. F. Erhart, Kansas City, Mo.—Dear Sir: I have bought 120 acres of land in this Co., which Mrs. Emma Dahlke, of your city, thought she owned, and have my deed of record, and have taken possession of said land. I had consultation with Mr. A. A. Knoop, 628 Scarritt Bldg., Kansas City, Mo., in regard to the title to this land, and he was the one who told me that you attended to Emma Dahlke's business. I suppose you understand the condition of this title. Mr. Knoop thought I ought to offer her something for a quitclaim deed, and by his advice will say that, if she will make me a quitclaim deed to this land, I will give her \$100 in cash for same, and will give her until September 1st to accept this offer, if she desires to accept same, she may make and execute the deed, and send it to the First National Bank of Versailles for collection, and I will attend to it at once.

"Very truly yours, Geo. H. Hubbard."

[7] In other words, up to July 19, 1915, the plaintiff recognized the defendant as the owner of the land and was trying to sell it



for her. Suddenly he concluded to pay \$50 for the title and disavow his principal. When all this evidence is considered, we think that in equity and good conscience the plaintiff cannot claim this title. It is reasonably clear that he was the selling agent of defendant from 1901 on to 1915. He says almost as much. What he learned of the title was by reason of this agency. Good conscience will not permit an agent to buy up an outstanding title as against his principal, and assert it against the principal. Plaintiff's only excuse for so doing is that defendant did not answer his letter of July 19, 1915. Whether she did or did not may be debatable, but this does not go to the root of the matter. He waited only a short time, and procured the adverse claim of title, as against his principal. This he secured for \$50.

In our judgment, the trial court should have held that in equity the title which Hubbard acquired from Seiffert was for the benefit of the defendant, and that he should have decreed title in defendant, upon the condition that she pay to Hubbard what he had been out in procuring the outstanding title. In other words, on the evidence, the trial court was in error in finding against the defendant upon the question of agency between defendant and plaintiff. This result meets with the judgment of good conscience, and ought to be written into the law of this case.

Judgment reversed, with directions to enter up a decree for defendant, conditioned as aforesaid.

BLAIR, P. J., and WOODSON, J., concur. BOND, J., concurs in paragraph 5 and in result.

#### DONEGHY et al. v. ROBINSON. (No. 19506.)

(Supreme Court of Missouri, Division No. 1. Dec. 30, 1918. Rehearing Denied March 1, 1919. Motion to Transfer to Court in Banc Overruled March 28, 1919.)

#### 1. EVIDENCE ⇐11—JUDICIAL NOTICE—HISTORICAL EVENTS—CIVIL WAR.

Court will take judicial notice of the bitter border warfare along Kansas-Missouri border during Civil War.

#### 2. WILLS ⇐598—CONSTRUCTION—LIFE ESTATE—INTENT.

In view of Rev. St. 1909, §§ 579 and 588, whether devise without use of word "heirs" creates fee or only life estate is determined by intent of testator, a further devise to take effect on devisee's death defeating presumption that a fee was intended.

#### 3. WILLS ⇐470—CONSTRUCTION—INTENT OF TESTATOR.

Intention of testator is to be gathered from all the provisions of the will.

#### 4. WILLS ⇐441—CONSTRUCTION—INTENT—SURROUNDING CIRCUMSTANCES.

In ascertaining intent of testator, the conditions which surrounded him at the time of the execution of the will must be considered.

#### 5. WILLS ⇐535—CONSTRUCTION—LIFE ESTATE.

Will directing that "should my children all die my wife is still to have the use and management of my property as long as she remains my widow," held insufficient to give wife inheritable interest in property to exclusion of children.

#### 6. EXECUTORS AND ADMINISTRATORS ⇐138(1)—POWER OF SALE.

Will directing that "should my wife prefer living near a town in this or any other state, the land may be sold," etc., and that wife be made executrix "with full power to carry out" will, held to give wife power of sale.

#### 7. POWERS ⇐88—EXECUTION—SUFFICIENCY.

In sale of land pursuant to power of sale, the conveyance of the fee is a sufficient reference to the power, although its donee, the grantor, may himself be seised of a lesser estate.

#### 8. WORDS AND PHRASES—"PROVIDED."

The word "provided" is a simple English conjunction, which, even in legislation, has necessarily no other or greater significance than the words "but" or "and."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Provided.]

#### 9. POWERS ⇐44—EXECUTION—APPLICATION OF PROCEEDS.

In view of Rev. St. 1909, § 11927, purchaser of land from donee of power of sale is required merely to ascertain if donee is authorized to receive purchase money, and is not responsible for investment of money pursuant to instructions of will creating power.

#### 10. WILLS ⇐693(1)—POWER OF SALE—USE OF PROCEEDS—PAYMENT OF DEBTS.

Where testator gave wife power to sell land, "provided the money for which it is sold shall be invested \* \* \* for the support of my wife and children," the proceeds of sale were properly used for payment of husband's debts in excess of personal estate.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by A. Doneghy and others against Frank G. Robinson. Judgment for defendant, and plaintiffs appeal. Affirmed.

Higbee & Mills, of Lancaster, and Campbell & Ellison and A. Doneghy, all of Kirksville, for appellants.

John H. Lucas and Ingraham, Guthrie & Durham, all of Kansas City, for respondent.

BROWN, C. Ejectment instituted August, 1914, in the Jackson circuit court to recover 352 acres of land in that county. The ouster is laid as of August 1, 1914.

The defendants answered (1) by general denial; (2) a plea of the statutes of limitations apparently intended to cover all the provisions of sections 1879, 1881, and 1884 of the Revised Statutes 1909; (3) a plea of estoppel by certain matters in pais; and (4) a count in the nature of a counterclaim to quiet and adjudge title under the provisions of section 2535 of the same Statutes. The particulars so specially pleaded may be set out more fully if necessary.

The plaintiffs replied, admitting their claim of title as remaindermen under the Doneghy will, which, with the proceedings and conveyances thereunder, were fully set out, and denying all the controverted allegations of the answer.

The land in question lies near the southwest corner of Jackson county, about 18 miles south of Kansas City as its limits existed in 1865, 22 miles southwesterly from Independence, and 2 miles east of the Kansas-Missouri state line. It is a part of a tract of 500 acres owned and occupied as a family residence at the time of his death by James Doneghy, who is the common source of title. The family consisted of himself, his wife, Kate S. Doneghy, and their six sons, the eldest of whom was then but 12 years of age. All of these are now living. One of them, A. Doneghy, conveyed his interest to his wife, a coplaintiff, while two of the others have, since the death of their mother, conveyed their interests to A. Doneghy and the two other female plaintiffs. It is therefore correct to say that four of these sons and the representatives in title of the other two are the plaintiffs in this suit.

On October 23, 1860, James Doneghy, with his own hand, wrote and properly executed his will in words and figures following:

"I make this my last will and testament.

"I first desire all of my debts paid out of the proceeds of my personal estate or as much of it as will satisfy the debts. I wish my land to remain unsold until my oldest child living shall become twenty-one years of age or should my wife prefer living near a town in this or any other state the land may be sold provided the money for which it is sold shall be invested in other property or bank stock the interest of which shall be for the support of my wife and children. My wife is to have the management of my property but shall not divide any between the children until the oldest living child shall become twenty-one years of age, she may then divide it as she thinks best, or not at all if she desires it. I do not mean by this that she shall not give any of them a horse, cow or hogs or furniture, but has reference to my land and negroes. She may sell at any time any of my negroes and invest the money in other property or stocks or loan it out using only the interest. Should she marry at any time all of my property shall be divided equally between my children except one-third, which shall be allotted to my wife to have the use of during her life,

then to be divided between the living children.

"Guardians shall be appointed over my children by the court after she becomes another man's wife, and shall be sent to such schools as their guardians may choose. Should my children all die my wife is still to have the use and management of my property as long as she remains my widow then she shall have one-third allotted to her to have as before mentioned, the remaining two-thirds shall be given to my brother's (John T. Doneghy) children, should he have any, if not, it shall belong to him. The other third after my wife's death shall be divided between Amelia Irving's and Lucinda Caldwell's (my sister's) children.

"I make my wife Kate S. Doneghy my executor with full power to carry out this my last will and testament with a request that she shall not be required to give security for the faithful performance of it. In testimony of which I have hereunto set my hand and affixed my seal Oct. 23rd, 1860.

"Jas. Doneghy. [Seal.]"

[1] This was something more than a year before his youngest child was born. From this time on the lives of the Doneghys became inextricably tangled with great historical events in the little community where they resided, of which events we take judicial notice. Much of it is indicated by the statement that the home was near the Kansas-Missouri border, where the seed was sown from which a crop of trouble was to be harvested during the succeeding years. The Civil War began early in the next year, and this region, as appears in the evidence, became the theater of bitter border warfare between those whom a Missouri historian has designated as "Jayhawkers" and "Bushwhackers." Mr. Doneghy entered the Confederate army in 1861, leaving his family in the home on this tract of land. On October 23, 1862, the house was burned by the federal soldiers, leaving them homeless, and only a few days afterward (November 5, 1862) he was killed in battle, leaving this will in force. When the house was burned Mrs. Doneghy took her children to a neighbor's house, where she remained three days, and then found a little home in the same neighborhood, in which she and her children resided until the following August, when General Ewing, the military commandant of the district, issued the famous General Order No. 11, which drove her away. She went to Kentucky, where she remained, with her children, until the revocation of the order in the following year. In the meantime the will had been admitted to probate in Jackson county and she had qualified as executrix. She prepared her inventory, which was verified in Kentucky on May 4, 1864. It included five slaves, who had been removed from this state—two to Arkansas and three to Kentucky. These do not appear in any form in her settlements subsequently made. During the two years of border warfare that had preceded her departure from the state both the schools and

churches had been eliminated from the old neighborhood, and upon her return from Kentucky she leased a small farm near Independence, which was then not only the county seat but the principal and largest town in Jackson county, and contained excellent private schools as well as public schools in the vicinity, one of which was in the neighborhood of the farm upon which she moved with her children. She borrowed a horse and oxen with which she cultivated the place, and sent the children to school. While there she received some money from her father's estate in Kentucky, but the amount does not appear. While she was living on this rented place she sold the tract of 500 acres, which includes the land in controversy, to John S. Anderson, of Belmont county, Ohio, for \$8,000, and executed the conveyance to him the effect of which is in dispute. It is dated the 18th day of December, 1865, and in its introductory part designates the grantor as "Kate S. Doneghy, executrix of the last will and testament of James Doneghy, deceased." In other respects it is a general warranty deed with the usual covenant of warranty. The defendant claims through this deed. Upon its execution and the payment of the purchase price the executrix charged the entire amount of \$8,000 to herself as executrix, and used it all, together with the entire proceeds of the personal estate, in the payment of debts which were duly allowed by the probate court, leaving a balance unpaid of \$761.50 as shown by her final settlement duly approved by the Jackson county probate court at the February term, 1872. This balance she paid out of her own funds. We agree with the finding of the circuit court that the sale was a fair one, realizing the full market value of the land at the time at which it was made. This does not seem to be seriously disputed. Although there was some evidence that it was worth more, the difference is not sufficient to effect the question upon which the case stands.

About four years after the sale to Anderson, Mrs. Doneghy purchased a farm of 120 acres near Independence, for which she paid \$40 per acre, and within about a year sold it at a profit of \$2,400, and purchased a house in the town, into which she moved, and there continued the education of the children, the youngest of whom was about 10 years old, until 1875, when she sold the house and removed to Macon county, where she resided until her death, which occurred June 24, 1914, after which this suit was promptly instituted. She never remarried. No dower was ever assigned her.

1. It sufficiently appears from the foregoing statement that both parties claim title in fee to the land in question under the will of James Doneghy, which we have set out in full. Its construction is the principal

question with which we have to deal. The plaintiffs contend that it gave Mrs. Doneghy, now deceased, an estate for her own life (subject to be determined by her remarriage, which never occurred), with remainder to her children, who are all represented by them, in fee. The defendant asserts that the will gave the land to her in fee (subject only to be determined by her remarriage) and that the same title passed to Anderson by her conveyance. They further contend that if the estate she acquired under the will was a life estate only, the deed to Anderson operated as an execution of the power of sale conferred on her by the will, so that the grantee, by its operation, became vested with the fee.

The circuit court found that Mrs. Doneghy took the fee by the terms of the will, and adjudged accordingly, and the correctness of that judgment, irrespective of the ground upon which it was placed, is the matter involved in this appeal.

The terms of the will are such that it is helpful to bear in mind that the title in fee simple includes not only the right of voluntary disposition, including transmission by devise, but also the quality of transmission by inheritance, which is effected, not by the act of the owner, but by act of the law. This affords a simple test in this case. The testator was careful to provide for the contingency of the death of all his children during his lifetime. If the wife took an absolute fee under his will, then upon her death intestate, without having made voluntary disposition of the land, it would descend to her heirs to the exclusion of his own. We find nothing in the grammatical construction or theory of the will consistent with this intention.

Our statute, which has been in force since long before the execution of this will (R. S. 1909, § 579), had abolished the common-law rule that the inheritable quality could only be transmitted by the use of the word "heirs," and it provided that where such word is omitted,

"and no expressions are contained in such will whereby it shall appear that such devise was intended to convey an estate for life only, and no further devise be made of the devised premises, to take effect after the death of the devisee to whom the same shall be given, it shall be understood to be the intention of the testator thereby to devise an absolute estate in the same, and shall convey an estate in fee simple to the devisee, for all such devised premises."

[2] This left the meaning of the will in this respect as well as in all others to be ascertained according to the true intent and meaning of the testator as provided in the subsequent section 583, with the qualification that a devise, to take effect on the death of the devisee, would defeat the presumption that a fee was intended.

[3, 4] We must gather the intention of the testator from all the provisions of the will.

To ascertain this, we must consider the conditions which surrounded him at the time of its execution and with particular reference to which it was executed. It was written by his own hand, and contains none of those technical expressions used by lawyers in such instruments. It evades so effectually as to suggest a purpose all those expressions ordinarily used to accomplish a transfer of property, real or personal, under such circumstances. The nearest approach to such technical accuracy is in that clause which directs:

"Should my children all die my wife is still to have the use and management of my property as long as she remains my widow."

There is something very expressive in this provision. At the time of writing they had five little children. The next year the number was increased to six. His death would cast upon her alone the duty of their nurture, support, and education until their maturity, and this provision, with its use of the word "still," indicates that he appreciated the injustice of depriving her of the use of any part of this home while she should live.

[8] We see nothing in any expression in the will indicating that it was the intention of the testator to give her an inheritable interest in the land to the exclusion of his children. Even the third that was to go to her in case of her remarriage was limited to the period of her life.

2. When Mr. Doneghy made his will his wife was young, his family, consisting of little children, was large and still growing, and the country in which this home was situated was wild and inhabited to some extent, as appears from the evidence, by those who afterward became bushwhackers and some of them outlaws. The Kansas trouble had then been long brewing, and the political campaign which culminated in the Civil War was at its height. It is natural that one in his circumstances, with his domestic responsibility, should turn seriously to making a will which should leave her an opportunity to escape, with her children, from what must have seemed calamity, instead of tying her hand and foot to the locality upon which it afterward fell. He believed that, even without his negroes, he would have sufficient personal property to pay his debts. Whether the deficiency in this respect was the result of miscalculation or the destruction incident to the border warfare that finally devastated that locality does not appear, but it does appear from the records of the probate court that there was a large amount of indebtedness with very little personality for application to its payment. The seeds of this danger had undoubtedly been sown when he provided, in substance, that the land might be sold when she should prefer to live near a town in

this or any other state. The words of this provision indicate that he had in mind not only that the land might become undesirable as a residence for herself and her children, but that in such a case she should be free to take them among her own people in Kentucky. Even before his death the first of these fears was fully realized. The house, which was her only shelter, was destroyed from causes which continued to exist, so that an attempt to replace it would have been simple madness. She found shelter for a while in a home near the ruins. When finally driven from the neighborhood by the terms of General Order No. 11 all grain and hay which she had raised on her farm was confiscated or destroyed by the terms of the order, and she took refuge in Kentucky among her own kindred, where she found shelter for herself and her children until permitted to return to a place from which she could watch, and so far as was possible manage the naked land, which, by that time, must have been all that was left of the property of the estate. She no longer had a choice as to where she might live. She was evidently driven to make her residence near Independence, and rented a little farm near that place, upon which she supported her children and sent them to school. All the conditions of the power of sale contained in the will were then fully accomplished. She not only preferred to live near the town of Independence, but her preference was dictated by circumstances from which there was no escape. The remarkable woman was making the fight for his children in the face of difficulties which might have overwhelmed her husband had he been living, and the history of her little brood, as detailed in the evidence, is an eloquent tribute to her ability, courage, and success.

3. That the will gave her the power to sell the land under these circumstances is not, of course, disputed. This power is contained in the following provision:

"I wish my land to remain unsold until my oldest child living shall become twenty-one years of age, or should my wife prefer living near a town in this or any other state the land may be sold provided the money for which it is sold shall be invested in other property or bank stock the interest of which shall be for the support of my wife and children;" and, "I make my wife Kate S. Doneghy my executor with full power to carry out this my last will and testament with a request that she shall not be required to give security for the faithful performance of it."

[9] These words, although written by a layman, leave no doubt of his intention to create the power, nor as to the person by whom it might be executed. As we read the will, with its flexible provisions for the division of the land as well as its sale for this particular purpose, we are struck with what seems to be the studious care with

which the testator avoids all direct reference to the person by whom it is to be conveyed. When we arrive at this clause we are equally impressed with the clearness and inclusiveness of the words by which this duty is placed where the natural duty of nurture of his children as well as his own confidence was already well vested.

That the exercise of this power was called for by circumstances even more compelling than could have been pictured in the most forboding imagination at the time the will was prepared is evident. She recited the power in her deed to Anderson by reference to the will which created it and by describing herself as its executrix. She did not cast doubt upon the effect of this recital by a covenant of seisin in herself. She had no title which she could convey except her qualified life estate determinable by a subsequent marriage, and even this base freehold she held to the use of her children as well as for herself.

[7] There is no rule of law more firmly settled in this state than that in such cases the conveyance of the fee is a sufficient reference to the power, although its donee, the grantor, may himself be seised of a lesser estate. Our many authorities to that effect are thoroughly discussed by this court in *Grace v. Perry*, 187 Mo. 550, 95 S. W. 875, 7 Ann. Cas. 948, which was lately approved by us with a further citation of authorities in *Ricketts v. Bank*, 196 S. W. 26.

We are called upon to construe the words we have just quoted, "provided the money for which it is sold shall be invested in other property or bank stock the interest of which shall be for the support of my wife and children." The plaintiffs say, in substance, that this investment of the purchase price is a condition precedent to the passing of the title. We have here used the words "condition precedent," not because they are used by these plaintiffs, but because we do not think it entirely respectful to attribute to them the theory that it is a condition subsequent which charged the purchaser with the function of the executor to not only invest, but to keep invested, this portion of the estate as a muniment of his title. The support of the children was charged upon her, and there is nothing in the will to indicate a want of confidence that she would discharge her duties as executrix and mother as only a mother could. She more than justified this confidence by paying a considerable balance of his indebtedness from her own earnings as a final tribute to his memory.

[8] There is nothing in the will to justify the imputation that Mr. Doneghy was unwilling to trust his wife with the investment of the purchase money received from this land, unless it be the use of the word "provided" in the clause we have quoted. It is a simple English conjunction, which,

even in legislation, has necessarily no other or greater significance than the words "but" or "and." *Bouv. Law Dic.* As was said by the Supreme Court of Kansas in *Safes Deposit Co. v. Thomas*, 59 Kan. loc. cit. 472, 53 Pac. 473, "There is no magic in the term, but the clause is to be construed from the words employed and from the purpose of the parties, gathered from the whole instrument." She was, as executrix, charged with the duty of receiving and expending all money which should come into her hands by the direct operation of the terms of the will, but of all which the law might require her to handle in that capacity, and the testator had requested that she be permitted to do this without bond. Had the testator desired that the purchase price of this land should be placed in her hands in the form of bank stocks and other property, he could have easily so nominated in the will. He charged her, in the terms by which she was constituted executrix, with the duty of investing the price in property and securities of which she should be the sole judge, and from which she should collect the income, and use it for the purpose named in the will.

[9] When the purchaser paid into her hands the money to be invested his duty ended and hers began. Acting in good faith, he had only to inquire whether she was authorized to receive the money. If so, he might pay it to her without responsibility for its investment, and, having received the deed and paid the money, the transaction would, upon the instant, be closed, and his responsibility cease. This was settled by the statute. R. S. 1855, p. 1556, § 9; *Id.* 1909, § 11927. This section provides:

"No person who shall in good faith pay money to a trustee, or other person acting in a fiduciary capacity, authorized to receive the same, shall be responsible for the proper application of such money; nor shall any right or title derived by him from such trustee or other fiduciary in consideration of such payment, be called in question in consequence of any misapplication."

This section is broad in its terms, and this case comes directly within them. The will contemplates that the purchase price is to be paid in "money," for it directs how the "money" shall be invested. That it was paid to her, and that she received it as trustee by virtue of her power as executrix under the will, is plain, and we do not understand that it is questioned. It was the purchase price of the land, in consideration of which the purchaser received the title, which is now "called in question."

4. There is another principle which just as effectually and clearly disposes of this point. While the testator contemplated that the money received for the land might and would be used to create a fund for the support of his wife and children, the primary

purpose of the power was to enable her, unembarrassed by this land, to go to some place where she might, in safety and comfort, raise and educate his children. When driven from the vicinity of the land by forces as compulsory as those which drove Lot and his estimable lady from their home in the city of the plain, the contingency had arisen upon which the exercise of the power depended, the land was sold, the purchase price paid, and the deed executed, upon which, as we have seen, the title was instantly vested in the purchaser.

The interest of the wife and children in the land had been subordinate to the interest of the creditors. It is not necessary to speculate as to what these creditors might have done had the sale been in bad faith, for an inadequate consideration, or even had they chosen arbitrarily to take their own course in subjecting the land to their legal rights in the assets of the estate. Their mouths were closed. The executrix and trustee, in the capacity of wife and mother, had voluntarily devoted her entire marital interest to their satisfaction, and had used other funds of her own to make up the deficiency. They were paid and the interest of the creditors extinguished.

[10] The transaction then stood thus: The

executrix had sold the land and collected the purchase price upon the contingency specified in the power and in exact accordance with its terms. With the money received, together with her own, she paid a paramount claim upon the fund realized. "Though the power given be not given to pay debts, yet if it has in fact been duly exercised, irrespective of the purpose for which it was given, the resulting proceeds are in the executors' hands for use in paying debts in excess of the personal estate, and may also be used by the executors to reimburse themselves for any such excess paid by them." Chaplin on Express Trusts and Powers, § 603; Matter of Bolton, 146 N. Y. 287, 40 N. E. 737. This is a reasonable and honest doctrine, and flows naturally from the provisions of our own statutes relating to the marshaling of assets in the settlement of the estates of decedents and defining the duties of executors and administrators.

The judgment for defendant is for the right party and is therefore affirmed.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

(128 Ky., 712)

## LOUISVILLE &amp; N. R. CO. v. COOK.

(Court of Appeals of Kentucky. Feb. 7, 1919.  
Rehearing Denied April 22, 1919.)

## 1. RAILROADS. C=400(1) — CROSSING ACCIDENTS—EVIDENCE.

In an action for injuries to plaintiff, received while so intoxicated as to be insensible on a public street, on which ran defendant's tracks, evidence held insufficient to take to the jury the question of defendant's negligence; there being no direct testimony, and the matter resting in conjecture.

## 2. NEGLIGENCE C=124(1) — EVIDENCE — SURMISE.

Where an injury may as reasonably be attributed to a cause that will excuse defendant as to one that will subject it to liability, there can be no recovery, for a recovery cannot be allowed on mere surmise of the jury.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by Edward R. Cook against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Moorman & Woodward, Benjamin D. Warfield, and James J. Donohue, all of Louisville, for appellant.

Elmer Underwood, of Louisville, for appellee.

CLAY, C. In this action for personal injuries, plaintiff, Edward R. Cook, recovered of the defendant, Louisville & Nashville Railroad Company, a verdict and judgment for \$5,500. Defendant appeals.

[1] The only question we deem it necessary to consider is whether the trial court should have sustained defendant's motion for a peremptory instruction. The evidence is as follows:

Plaintiff lived on Dumesnil street, in the western part of the city of Louisville. On Saturday evening, November 4, 1917, plaintiff left his home and reached Eighteenth and Dumesnil streets about 7:30 o'clock. There he caught a car for Eighteenth and Market streets. He then went to a saloon at Fifteenth and Market, where he was joined by Joe Thorp. After stopping at certain saloons and taking several drinks of beer, they went to a flat at 136 West Market. According to Thorp, it was then about 10:20 p. m. They were invited into the kitchen, and Cook drank two bottles of beer. Later on they went into the parlor, where Cook drank some whisky. In about 30 minutes, Cook became so intoxicated that he did not remember anything that subsequently occurred. Thorp says that they left the house about 12:20 a. m. After going down

stairs, Thorp asked Cook to wait until he went back to say something to one of the women. Thorp was gone for only a minute or two, and when he returned Cook had disappeared. At that time, Cook was drunk and staggering. Failing to find Cook, Thorp assumed that he had taken a car and gone home. About 5 o'clock the next morning Cook was found by some railroad men on Fulton street, between Jackson and Preston streets. Fulton is a public street of the city, and is paved with granite blocks from curb to curb. Defendant's track is on the north side of the street. Though there is no paved sidewalk on this side of the street, there is a beaten path lying between the curbstone and the defendant's track. There were weeds along this pathway, and also along the defendant's track.

Only two engines are shown to have passed over this track on the night of the accident. Engine No. 341 passed by itself about 11:05 p. m. en route to the Barrett Manufacturing Company, and returned about 11:15 p. m. with two cars attached. Engine No. 2023, with seven cars attached, passed some time between 2 a. m. and 2:30 a. m., and returned with several cars some time between 4:30 a. m. and 5 a. m. On their return the crew heard some one call. The engine was stopped, and they discovered Cook lying between the track and the north fence, with both legs badly mashed and some cuts on his head. Cook was then taken to the city hospital, where his legs were amputated. On the first trip made by engine No. 2023, the headlight was burning and the speed of the engine was from four to six miles an hour. There was some evidence that the bell was not ringing, and very slight evidence that a proper lookout was not kept. Plaintiff was not seen by anybody after he left Thorp at 136 West Market. He did not remember how he got to the place of the alleged accident, or where he was, or under what circumstances he was struck. Prior to the time he was found, he regained consciousness several times, but only for a short period. The last time he became conscious he threw out his arm and struck one of the cars attached to engine No. 2023. The car was standing still. He then called for help and was discovered by the train crew. A physician testified that his legs had been run over by a train, and that if he was unconscious he could not have attempted to board the train. There was further evidence that there was a circular wound behind plaintiff's ear, and that beneath the tender of the engine there was a brake rigging or iron bar, the end of which corresponded in size and shape to the wound. There was no proof, however, that any blood was found on this iron bar, or any other part of the engine. On the con-

trary, there was evidence that the engine was examined, and no blood was found thereon. Defendant also showed that a proper lookout was kept, and that the bell on the engine was being rung.

It may be conceded that, as the place of the accident was in a public street, defendant was charged with the duty of giving reasonable warning of the engine's approach and of keeping a proper lookout; and, though we further concede that there was sufficient evidence to make defendant's failure of duty in these respects a question for the jury, this would not be sufficient to make out a case, unless the plaintiff further showed that such negligence, if any, was the proximate cause of his injury. To meet this requirement, plaintiff offers the theory that he was lying unconscious on the track, and therefore in a position to have been seen, if a proper lookout had been kept. It is argued that this theory finds support in the fact that plaintiff was unconscious, and could not have been injured in an attempt to board the train or to pass between the cars, and the fact that the brake rigging corresponded in size and shape to the wound on plaintiff's head was an additional circumstance showing that he was run over by the engine. The argument that plaintiff was not in condition to attempt to board or pass between the cars loses its force, when it is remembered that he had sufficient power of locomotion to go for a distance of a half mile before the place of accident was reached, and the mere fact that the brake rigging corresponded in size and shape to the wound on plaintiff's head, without further proof that such rigging bore external evidence of having come in contact with some one, carries with it no probative force whatever. It merely shows a bare possibility that plaintiff was run over by the engine, without carrying with it that quality of proof sufficient to induce conviction. Doubtless, if the wheels and other portions of the machinery and rigging under the cars had been examined with the same care, and with the same end in view, other rigging or machinery would have been found which might have produced the injury.

[2] In cases like this, a recovery cannot be had on mere surmises, or speculation, as to how the injury might have happened. If the injury may as reasonably be attributed to a cause that will excuse the defendant as to a cause that will subject it to liability, then the plaintiff cannot recover. For aught that appears, plaintiff may have been riding on the train, or he may have attempted to board the train, or pass between the cars, and have thus been injured. The proven facts are as consistent with this theory as with the theory that he was on the track when the engine approached. Under these circumstances there was nothing to submit

to the jury, and the trial court erred in refusing the peremptory asked by the defendant. *Stuart's Adm'r v. Nashville, O. & St. L. Railway Co.*, 146 Ky. 127, 142 S. W. 232.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

(188 Ky. 785)

BEST et al. v. MELCON et al.

(Court of Appeals of Kentucky. March 7, 1919. Rehearing Denied April 23, 1919.)

1. FRAUDULENT CONVEYANCES  $\S$  298(3)—EVIDENCE—SUFFICIENCY.

Evidence held not to warrant setting aside of a deed from husband to wife on the ground that it was an attempt to defraud creditors of the husband, claimed to be heavily involved in debt at the time.

2. FRAUDULENT CONVEYANCES  $\S$  48(2) — WHAT CONSTITUTE — CONVEYANCE TO TRUSTEE.

Where, under deed from husband, wife became absolute owner, she had right to convey in trust for purpose of liquidating debts of husband, and where conveyance to trustee, and by him to husband, was in furtherance of trust, creditors of husband could not complain, and deed by husband and wife to the purchaser of the property would not operate as an assignment for benefit of husband's creditors, under Ky. St.  $\S$  1910.

3. TRUSTS  $\S$  20—EXPRESS TRUST—STATUTE.

Where purpose of trust was not disclosed in deed, the trust was an express parol trust; resulting trusts having been abolished by Ky. St.  $\S$  2353.

4. TRUSTS  $\S$  119 — PURPOSE AND NATURE — PAROL EVIDENCE.

It is competent to introduce parol evidence to show purpose or nature of a trust.

5. APPEAL AND ERROR  $\S$  930(1)—NATURE AND CHARACTER OF TRUST—PRESUMPTION.

Testimony of husband and wife as to purpose and nature of trust not being successfully attacked, court on appeal must presume that it is as stated by them.

Appeal from Circuit Court, Laurel County.

Consolidated action by A. H. Melcon and others against Elizabeth H. Catching and others. From the judgment rendered, John A. Best, as receiver, and others, appeal. Judgment modified, and, as modified, affirmed.

Hazlewood & Johnson, of London, for appellants.

Metcalf & Jeffries, of Pineville, and A. T. Siler, of Williamsburg, for appellees.

H. C. Clay, of London, for appellee Boring.

Sam O. Hardin, of London, for appellees Catching.



QUIN, J. Prior to 1903 W. B. Catching was interested in certain mail contracts, having been engaged in this business for a number of years. The mail carrying service of the United States at one time was divided into four sections, and each year bids were opened for the carrying of the mail in these several sections; the successful bidder being required to give bond for the faithful performance of his duties. W. B. Catching and Vincent Boreing had been the successful bidders under these lettings for a number of years, and each made a large sum of money until the manner of letting was changed and contract given to local people.

W. B. Catching was interested in the First National Bank of London, Ky., as a stockholder, director, and later as president. Between his marriage, in 1881, and 1907, he lived for 10 or 12 years in Washington, D. C. This was because of his work on the mail contracts, although he always retained a home in London.

On June 1, 1903, he conveyed his London property, consisting of seven pieces of land and improvements thereon, to his wife, Elizabeth H. Catching—the consideration being that his wife would assume and liquidate his entire indebtedness at that time, the amount thereof being stated in the deed. This deed was delivered to Vincent Boreing, and was never recorded. Some correspondence passed between Mrs. Catching and Mr. Boreing relative to this deed, from which it seems that Mr. Boreing told Mrs. Catching that he was holding the deed subject to her instructions, and that if she instructed him to record it he would do so; but it appears that W. B. Catching did not want the deed recorded. In a letter to Vincent Boreing, dated July 1, 1903, he said:

"You must not think of filing that deed. After mature deliberation, that would ruin me. I can't think of it. Not only ruin me, but follow my children. I would rather die without a cent."

It is claimed by the appellant that W. B. Catching was drinking heavily at the time of the execution of this deed, and, fearful that he would lose all of his property, his wife and Mr. Boreing prevailed upon him to make this deed, which he did. On the other hand, there is proof to the effect there was some marital trouble in the Catching family, and this was the reason for the execution of the deed.

Vincent Boreing died September 16, 1903. John R. Boreing, a son of the decedent and administrator of his estate, in looking over his father's papers, discovered this deed, and it was sent to Mr. and Mrs. Catching. January 10, 1905, a new deed was executed by Mr. Catching, in which he conveyed to his wife the same property embraced in the earlier deed, but the amount of the indebtedness was not stated in the later deed; it

being explained that some of the indebtedness existing in 1903 had been paid. This deed was acknowledged August 4, 1905, and recorded in the Laurel county clerk's office the next day. Besides the property owned by W. B. Catching in London, Ky., he owned a residence in Washington, D. C., and this he conveyed to his wife about the same time that he conveyed the London property.

Notwithstanding the deed of 1905, the property continued to be assessed in the name of W. B. Catching, and he seems to have had something to do with the management thereof, although the insurance on the property was carried in the name of the wife. The taxes were paid through the First National Bank, and it is not clear whether they were charged to Mr. Catching or his wife; she testifies that she paid the premiums on the policies. Part of the property was destroyed by fire in November, 1910, and the proceeds of the policies were paid to Mrs. Catching.

Between 1905 and 1914, W. B. Catching became heavily involved in debt, a great deal of this apparently being due to the rebuilding of the property destroyed by fire, and being a portion of the property embraced in the deed of January 10, 1905, and, as result of this indebtedness several suits were filed in the Laurel circuit court, and the present appeal is in the consolidated suits filed against W. B. Catching et al.

The doors of the First National Bank of London were closed on April 19, 1911, at the instance of the Comptroller of Currency of the United States, and Fred W. Weitzel was placed in charge as receiver. About 1905 W. B. Catching owned 65 shares of stock in the first National Bank of London, the market value of which was about \$200 a share, and by 1911 he and his wife had increased their holdings, so that they owned 91 shares of the stock.

March 16, 1914, Mrs. Catching, her husband joining her, conveyed to Sam C. Hardin, her cousin and an attorney in London, as trustee, four parcels of land. Thereafter on March 26, 1914, Sam C. Hardin, trustee, conveyed said property to W. B. Catching. A portion of the land included in the deeds above referred to was conveyed to R. M. Catching, a son, for a consideration of approximately \$2,000. On April 27, 1914, W. B. Catching and his wife conveyed to S. A. Lovelace the remainder of the property embraced in the deeds above referred to for a consideration of \$6,500; the consideration being evidenced by two notes of \$2,000 each and one of \$2,500, payable in 6, 9, and 12 months, respectively, after date, and to secure the payment thereof a lien was retained on said property. Around this deed centers most of the controversy of these suits. W. B. Catching had endeavored to dispose of this property before the conveyance to Lovelace, and after the conveyance he endeavored to dispose of the

notes, and finally assigned and transferred them to the receiver of the bank. Failing to pay the first two notes, S. A. Lovelace, in an endeavor to be relieved of liability on account of said notes, conveyed the property to the receiver; but he was told by the receiver that the latter could not release him from his liability thereon without the consent of the Comptroller of Currency.

December 28, 1908, Elizabeth H. Catching, for a consideration of \$18,000, conveyed to the First National Bank a portion of the property received under the deed of 1905. December 3, 1913, she conveyed another lot to said bank in consideration of \$1 and other valuable consideration. In an endeavor to help the bank, then in an insolvent condition, Mrs. Catching on April 1, 1914, borrowed from R. R. Hardin, a nephew, the sum of \$10,000 and executed a mortgage on her property to secure the payment thereof. On April 17, 1914, she borrowed the further sum of \$5,000 from said nephew, secured by mortgage on her property, the purpose being to use this as a credit on the indebtedness of Mrs. Catching and her husband at the bank, and a part of it was so applied. On the 24th day of April, 1914, for the same purpose, Mrs. Catching borrowed from Lena Beutler \$1,080, executing to said Lena Beutler a mortgage to secure the payment thereof.

August 20, 1914, John R. Boreing filed this suit against W. B. Catching and his wife, Elizabeth H. Catching, S. A. Lovelace, Lena Beutler; R. R. Hardin, and the Bank of Williamsburg, alleging that he had become surety on a note of W. B. Catching, in the First National Bank of Corbin, in the sum of \$8,000. Said note was not paid at maturity, and the bank brought suit against said Boreing and Catching. Judgment was entered and execution levied on certain property alleged to belong to W. B. Catching, as well as on property of said Boreing. The property of the said Boreing was advertised for sale, and same was sold to satisfy said execution. Boreing paid the amount of said judgment and execution, including the cost of sale, amounting to \$3,160.84, and took an assignment from the First National Bank of Corbin of all its rights under said judgment and execution. Boreing thereafter caused an execution to be issued, and sought to have it levied on the property of W. B. Catching. It was returned by the sheriff of Laurel county with the indorsement:

"Within execution returned. No property found to satisfy this execution or any part thereof."

Boreing alleged that the deed of 1905 from W. B. Catching to his wife was for the purpose of defrauding the creditors of W. B. Catching; that W. B. Catching, since said conveyance, had put vast improvements on the property, and set up the mortgages to R. R. Hardin, Lena Beutler, and the mortgage

to the Bank of Williamsburg, to secure a note for \$1,500; also alleged that the conveyance by the Catchings to Lovelace was without consideration, and for the purpose of defrauding the creditors, and asked that the conveyance of 1905 be canceled, as likewise the deed to Lovelace; and asked for a general order of attachment, and that he be given a superior lien on the property or any proceeds thereof.

December 28, 1914, the Southern National Bank of Louisville brought suit against the same defendants, on a note for \$3,000 executed by W. B. Catching, March 5, 1914, pledging as collateral security 30 shares of the capital stock of the First National Bank of London, and asking for practically the same relief as the plaintiff in the preceding action. The Kosmos Portland Cement Company also brought suit against W. B. Catching for a balance of \$155.55 due for cement furnished said Catching. January 9, 1915, the Bank of Williamsburg brought suit on a note for \$1,000 executed by W. B. Catching, dated August 7, 1914. June 25, 1915, A. H. Melcon filed suit, seeking judgment for \$650 on account of a duebill executed October 10, 1901, to Vincent Boreing, which Melcon had purchased for the sum of 10 cents from the estate of Vincent Boreing.

These five actions were consolidated and heard together, and proof taken in the consolidated actions. A vast amount of proof was taken and the case submitted before Hon. Sidney Gaines, as special judge, and on March 24, 1917, he entered a judgment in 13 paragraphs; those involved in this appeal being as follows:

"(1) That the petition of the plaintiffs herein as against the defendant Elizabeth H. Catching, in so far as they seek to cancel or set aside the deed dated January 10, 1905, and executed by W. B. Catching to said Elizabeth H. Catching on August 4, 1906, which deed is recorded in the county court clerk's office of Laurel county, Kentucky, in Deed Book No. 27, at page 134, be and they are hereby dismissed, and defendant Elizabeth H. Catching is adjudged to recover of the five plaintiffs herein her cost herein expended.

"(2) That the attachment Men of the plaintiff John R. Boreing, and the vendor's lien claimed by John A. Best, the present receiver of the First National Bank of London, Kentucky, against the real property conveyed by W. B. Catching and wife to S. A. Lovelace on April 27, 1914, the deed for which is recorded in Deed Book 45, at page 517, records of Laurel county clerk's office, be and the same are disallowed and refused, to which said John R. Boreing and John A. Best, as receiver, except."

"(4) That the plaintiff John R. Boreing, as assignee of the First National Bank of Corbin, Kentucky, is the owner of, and entitled to collect from the defendant W. B. Catching, a judgment heretofore rendered in this court in favor of said bank and against said W. B. Catching amounting to the sum of \$3,160.84, with interest thereon from July 14, 1914, until

paid, subject, however, to a credit of \$40 paid August 7, 1914.

"It is further adjudged that said John R. Boreing is not entitled to any of the relief sought in his petition, and said petition is now dismissed, and the defendants therein, W. B. Catching and Elizabeth H. Catching, S. A. Lovelace, Lena Beutler, and R. R. Hardin and John A. Best, as receiver of the First National Bank of London, Kentucky, are adjudged to recover of said John R. Boreing their costs expended in suit, which is No. 2293."

"(9) That the defendant John A. Best, as receiver of the First National Bank of London, Kentucky, have and recover of the defendant W. B. Catching the following sums, to wit: \$100, with interest thereon at the rate of 6 per cent. per annum from the 24th day of September, 1913, until paid; the further sum of \$1,200, with interest thereon at the rate of 6 per cent. per annum from February 28th, until paid; also the further sum of \$3,000, with interest thereon at the rate of 6 per cent. per annum from the 8th day of March, 1914, until paid; also the further sum of \$550, with interest thereon at the rate of 6 per cent. from the 4th day of May, 1914, until paid; also the further sum of \$2,250, with interest thereon at the rate of 6 per cent. per annum from the 28th day of February, 1914, until paid; also the sum of \$900, with interest thereon at the rate of 6 per cent. per annum from the 4th day of March, 1914, until paid, and his costs herein expended on said cross-petitions. And said cross-petition of the defendant Fred W. Weitzel is dismissed as to the defendant W. B. Catching without prejudice as to all other claims mentioned therein."

"(11) That the execution of the deed from W. B. Catching and wife to S. A. Lovelace on April 27, 1914, for the following described real property, and the assignment by said S. A. Lovelace to Fred W. Weitzel, then receiver of the First National Bank of London, Kentucky, and the execution of the deed on February 2, 1915, from S. A. Lovelace and wife to Fred W. Weitzel, receiver of said real property, operated as an assignment and transfer of all the property and effects of the defendant W. B. Catching for the benefit of all his creditors pro rata, under and pursuant to the provisions of section 1910 of the Kentucky Statutes. Said real property so embraced and conveyed by said two deeds is lying in the town of London, Laurel county, Kentucky, and described as follows: [Here follows description of property.]

"And that the proceeds of the two above-described tracts of real property, when sold, shall be applied first to the payment of plaintiff's cost herein, and then to the payment of the foregoing judgments against W. B. Catching and such other valid claims against him as hereafter be filed herein, properly proven and allowed by the court—no further proof of the judgments herein rendered against W. B. Catching being required. It is further adjudged that the plaintiffs Southern National Bank of Louisville, Bank of Williamsburg, Kentucky, and A. H. Melcon recover of John A. Best, receiver of the First National Bank of London, Kentucky, their cost in this behalf expended upon this branch of these causes.

"To all of this eleventh paragraph of this judgment the defendant John A. Best, the pres-

ent receiver of the First National Bank of London, excepts, and prays an appeal to the Court of Appeals, which is granted."

John A. Best, receiver, has prayed an appeal from paragraphs 2 and 11 of the judgment, appellees A. H. Melcon, Southern National Bank of Louisville, and Bank of Williamsburg have been granted an appeal by the clerk of this court from paragraph 1 of the judgment; John R. Boreing was not a party to these appeals, but he has filed a supplemental record, and has made a motion for an appeal from paragraphs 1, 2, 4, and 9 of the judgment, together with a statement of appeal, and this motion was passed to the hearing on the merits.

[1] *The Deed of 1905*.—A reversal of paragraph 1 of the judgment, which sustained the deed of 1905, is sought by appellees on the ground that it was an attempt to defraud the creditors of W. B. Catching; it being claimed that he was heavily involved in debt at the time, not only on notes and other obligations, but by reason of certain liabilities on the mail contracts. There is some evidence to support this theory of the case, but we think the weight of the evidence sustains the decision of the chancellor as to this paragraph, because at time of this conveyance of the Laurel county property W. B. Catching had 65 shares in the First National Bank in London, which was worth approximately \$200 a share, besides a residence in Washington, valued at from \$7,000 to \$8,000, subject to a mortgage of approximately \$3,000. According to the evidence of his wife and others, Mr. Catching was never compelled to pay anything on account of bonds executed in connection with his mail contracts. None of the debts sued on were contracted prior to the execution of this deed, with the exception of the Melcon duebill, and according to the testimony this was in reality an indebtedness of the Union Contracting Company, which was one of the companies organized to care for some of the mail contracts, and is fully explained by Mrs. Catching.

Without going into further details as to the testimony relative to the deed of 1905, we think it sufficient to say that the evidence sustains the chancellor, and we see no cause or reason to set it aside.

[2] *The Lovelace Deed*.—This court reached the conclusion that this deed operated as an assignment for the benefit of the creditors of W. B. Catching under section 1910 of the Kentucky Statutes. With this ruling we cannot agree. Under the deed of 1905, the ownership in the property embraced within said deed passed to the grantee, Mrs. Elizabeth H. Catching, and became her absolute property; and she was privileged to do with it as she might see fit. She testifies that it was their endeavor to do what they could to decrease their indebtedness at the bank, as shown by the money she borrowed from her

nephew, R. R. Hardin, and from Lena Bentler, and the payments of the indebtedness referred to in the deed of 1908, wherein she assumed the indebtedness of her husband, the assumption of which, it appears from the record, was accepted by the then existing creditors.

She testifies that she deeded this property to Sam C. Hardin, in order for him to convey it to W. B. Catching, the money to be applied on the indebtedness of W. B. Catching at the First National Bank of London; that is, he was to sell the property and raise money on it to be paid to the First National Bank, to be applied on his then existing indebtedness. Carrying out the instructions of Mrs. Catching, and in obedience to what she claims the purpose of the deed to Hardin, the proceeds of the lot sold to Mrs. Catching's son were turned over to the bank, and the three notes executed by Lovelace for the remainder of the property included in the Hardin deed were assigned and transferred to the bank's receiver. That Mrs. Catching had the right to direct just how the proceeds of this property should be applied goes without saying. She was the lawful owner, and since it was her purpose, in conveying the property to the trustee, to have the property used for the purpose of liquidating an indebtedness, not of Mrs. Catching, but of her husband, we fail to see what right the creditors of W. B. Catching would have to object.

[3] The purpose of the trust was not disclosed in the deed, but the conveyance is to Sam C. Hardin, trustee; hence we have what might be termed an express parol trust, or, as has been expressed in some cases, a latent trust. Resulting trusts have been abolished in this state. Ky. St. § 2363. Nor has the seventh section of the English statute of frauds ever been adopted here. The original statute provided:

"That all declarations or creations of trust or confidences in any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law to declare such trust, or by his last will in writing, or else they shall be entirely void, and of none effect."

[4] It is competent under the laws of this state to introduce parol evidence to show the purpose or nature of a trust and this has been done by Mrs. Catching, the trustor; and if the conveyance to Hardin and the conveyance by the trustee to W. B. Catching was in furtherance of this trust, as we believe it was, then the court erred in setting aside that conveyance. This is not what would be termed a "resulting trust," which is a trust raised by implication or construction of law, and is presumed to exist from the supposed intention of the parties to the transaction, apart from any contract. It is an express trust, the nature of which is undisclosed; but we are not left to conjecture as to its objects and purposes.

In *Caldwell et al. v. Caldwell*, 7 Bush, 515, we find that one Alexander Caldwell was desirous of leaving his property by will to his six children; in equal parts; but James, one of his sons, being at that time a soldier in the Confederate Army, and the testator being in doubt as to said son's right to hold property, he devised the home place to his remaining children on what the court says was a latent trust, that if James should ever return and be capable of holding the title they should convey it to him, "and this," says the court, "according to satisfactory oral testimony, they understood and tacitly agreed to fulfill." Upon his return from the war two of his brothers, true to the trust, conveyed him one-fifth of the land; the others refused to convey. In this opinion, by Chief Justice Robertson, the court says:

"Implied trusts being excepted from the statute of frauds and perjuries, if the facts establish such a trust in this case, no written memorial of it was necessary for enforcing it, nor was the oral testimony incompetent on the alleged ground that it contradicts the will. \* \* \* The competency of oral testimony for establishing and enforcing such trusts as that claimed in this case is prescriptively recognized by undeviating authorities, among a great multitude of which we only cite the following: *Drakeford v. Weeks*, 3 Atkins, 639; *Barrow v. Greenhough*, 3 Vesey, 152; *Strickland v. Aldridge*, 9 Vesey, 519; *Maislar v. Gillespie*, 11 Vesey, 639; 2 *Powell on Devises*, 415."

See, also, *Smith v. Smith*, 121 S. W. 1002; *Sherley v. Sherley*, 97 Ky. 512, 31 S. W. 275, 17 Ky. Law Rep. 450.

[5] The testimony of Mrs. Catching and her husband as to the nature and purpose of this trust not being successfully attacked, we must presume that it is as stated by them; hence the record does not present sufficient grounds for setting aside the deed from W. B. Catching and wife to S. A. Lovelace, and it will have to be upheld.

Many other points are discussed in the briefs of counsel, among others, whether or not suits or pleadings attacking the Lovelace deed were in time under section 1911 of the Statutes. It will be unnecessary, however, to discuss or decide these points.

The motion of John R. Boreing for an appeal is objected to, because he was not a party to the original appeal; his motion will have to be overruled, because of the conclusions we have reached.

Wherefore the judgment of the lower court as to paragraph 11 is reversed, and the court will enter a judgment dismissing the petition and all other pleadings, in so far as they seek to cancel or set aside the deed of April 27, 1914, from W. B. Catching and wife to S. A. Lovelace, and the deed from S. A. Lovelace and wife to Fred W. Weitzel, receiver, dated February 2, 1915. In all other respects the judgment is affirmed.

(183 Ky. 677).

LYLE et al. v. PURDY et al.

(Court of Appeals of Kentucky. March 25, 1919.)

**RELIGIOUS SOCIETIES — 21 — CONDITION AS TO USE OF PROPERTY.**

Where land was deeded "for the purpose and the use of a Presbyterian meeting house and for no other purpose whatsoever," obliging the church trustees or their successors to reconvey to grantor when such use ceased, grantor's heirs could not recover the land, where a part of a meeting house used by such church was located thereon.

Appeal from Circuit Court, Marion County.

Suit by R. L. Purdy and others against R. B. Lyle and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded, with directions.

T. L. Edelen, of Frankfort, and S. A. Russell, of Lebanon, for appellants.

Proctor K. McElroy and C. C. Boldrick, both of Lebanon, for appellees.

CLAY, C. In the year 1804, William Purdy, for the consideration of five shillings, conveyed to John McElroy, John Muldraugh, and George Ewing, trustees for the Presbyterian congregation on the head of Hardin's creek, two acres of land now in Lebanon, "for the purpose and the use of a Presbyterian meeting house and for no other purpose whatsoever." The deed further provided that when—

"the said Presbyterian meeting house ceases to be continued for the aforesaid purpose, the said trustees, or their successors, do oblige themselves to convey the aforesaid two acres to the said William Purdy, or his heirs, for the same sum they now pay for the land."

At the time of the conveyance there was a meeting house on the land, and two other meeting houses were subsequently erected. In the year 1854, the church purchased two adjoining lots on another street, and in the year 1855 the present church building was completed. Nearly all of this building is located on the two adjoining lots.

In the year 1916, R. L. Purdy and others, heirs of William Purdy, the grantor, brought this suit against the trustees of the church to recover the two acres of land, on the ground that the land had ceased to be used for purposes of a meeting house. On final hearing, the chancellor granted the relief prayed for, and the trustees appeal.

It was not contemplated by the parties to the original conveyance that the entire two acres of land should be occupied by a meeting house. The trustees had the right to locate the meeting house and to use such portions of the land for that purpose as they

desired. So long, therefore, as any portion of the lot is occupied by the meeting house, it cannot be said that the lot has ceased to be used for the purpose of a meeting house. In order for plaintiffs to recover, it was necessary to show that the present meeting house was located entirely on the adjoining lot. The evidence that this is the case is by no means satisfactory, and upon a consideration of all the evidence we are inclined to the opinion that a portion of the church building erected in 1858 is located on the land in controversy. Under these circumstances, the land did not cease to be used for the purposes of a meeting house, and it was error to adjudge that the title had reverted to plaintiffs as the heirs of the original grantor.

Judgment reversed, and cause remanded, with directions to enter judgment in conformity with this opinion.

(184 Ky. 484)

**HOEFFLIN v. WILKERSON.**

(Court of Appeals of Kentucky. March 14, 1919.)

**1. CONTRACTS — 819(1) — DAMAGES — 124(1) — ACTION FOR BREACH — MEASURE OF DAMAGES.**

Where plaintiff has performed the contract in part, and its further performance has been prevented by defendant's act, he may either sue for the breach and recover the difference between the contract price and what it would have cost plaintiff to complete the contract, or he may sue for compensation for work actually performed as measured by its reasonable value.

**2. WORK AND LABOR — 28(1) — EVIDENCE — SUFFICIENCY.**

In an action for a balance due for filling a lot and digging a cistern, where performance of the work had been stopped by defendant, evidence as to the amount of work accomplished by plaintiff held sufficient to support the verdict.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by Walter Wilkerson against W. C. Hoefflin. Judgment for plaintiff, and defendant appeals. Affirmed.

B. F. Washer and Fred Forcht, both of Louisville, for appellant.

W. S. Heidenberg, of Louisville, for appellee.

CLAY, C. Claiming that he entered into a contract with the defendant to fill defendant's lot and to dig a cistern there-

on for the sum of \$1,307, and that he had performed services under the contract of the value of \$1,200, when defendant stopped him from work, and that no part thereof had been paid, except the sum of \$200, plaintiff, Walter Wilkerson, brought this suit against the defendant, W. O. Hoeflin, to recover the sum of \$1,007, the balance due for work performed under the contract. Defendant denied the allegations of the petition, and pleaded that the only contract he had with plaintiff was that plaintiff was to haul the dirt for 65 cents per yard, that the amount of dirt hauled by plaintiff was only \$300, and that he paid to plaintiff and his laborers, and to others because of the negligent manner in which plaintiff did the work, the sum of \$470.55, or \$170.55 more than the value of the work performed by plaintiff. He asked that plaintiff's petition be dismissed, and that he recover on his counterclaim the sum of \$170.55. The trial before a jury resulted in a verdict and judgment for plaintiff in the sum of \$585.90. Defendant appeals.

Plaintiff testified that he was to do the work under the contract for the sum of \$1,307, while defendant testified that plaintiff was to receive only 65 cents per yard for the dirt hauled and spread, but the whole amount was not to exceed \$1,307. Each of these theories was submitted to the jury, who were told in substance, that, if they found the contract to be as claimed by plaintiff, they should find for him the reasonable value of the work performed under the contract, less the sum of \$460.55, but, if they believed the contract was as claimed by defendant, they should find for the plaintiff at the rate of 65 cents per cubic yard for the amount of work done, less the \$460.55. Other instructions were given which are not material.

[1] It is first insisted that the court did not give the correct measure of damages for the breach of the contract as claimed by plaintiff. In a case like this, where plaintiff has performed the contract in part, and its further performance has been prevented by the act of the defendant, he may either sue for the breach and recover damages, in which event the measure of damages is the difference between the contract price and what it would have cost plaintiff to complete the contract, or he may sue and recover compensation for the work actually performed, in which event the measure of his recovery is the reasonable value of such work. 6 R. C. L. § 348, p. 978; 9 Cyc. 688; Langstaff-Orm Mfg. Co. v. Wilford, 160 Ky. 737, 170 S. W. 1; Stearns Lumber Co. v. Inman, 154 Ky. 253, 157 S. W. 23; Foster v. Watson, 16 B. Mon. 377; Runyan v. Punxsutawney Drilling & Contracting Co., 102 S. W. 854, 31 Ky. Law Rep. 588. Here plaintiff elected to sue for the work done under the contract. Hence,

the measure of recovery given by the trial court was not erroneous.

[2] It is further insisted that the evidence of the amount of work done by plaintiff was too indefinite to support the verdict. It appears that numerous teams were employed for several days in hauling dirt. Plaintiff says that all the dirt had been hauled, that there remained nothing to do except to level it off, that more than three-fourths of the work had been done, and that the work could have been completed in about a day and a half. Another witness testified that more than two-thirds of the work had been done. While this evidence may be somewhat lacking in certainty, it is sufficient, we think, to sustain the verdict.

Judgment affirmed.

(183 Ky. 780)

### MORRIS et ux. v. DANIEL

(Court of Appeals of Kentucky, March 4, 1919.  
Rehearing Denied April 22, 1919.)

#### 1. VENDOR AND PURCHASER $\Leftrightarrow$ 231(3) — REPORT OF COMMISSIONERS—NOTICE TO SUBSEQUENT GRANTEE.

Where roadway described and recommended in report of commissioner in partition suit was not provided for in judgment of division, and deeds made by commissioner did not refer to it, the description did not become such part of proceedings and link in chain of title that all grantees were required to take notice thereof.

#### 2. EASEMENTS $\Leftrightarrow$ 80(2)—ROAD RESERVATION—RIGHTS OF SUBSEQUENT GRANTEE.

Where right to a roadway is vested by grant or judgment in a partition proceeding, all subsequent purchasers who hold under the grant or judgment are bound by the road reservation, and the servient estate cannot avoid the burden by pleading and proof of nonuser, or in any manner except by adverse holding for the statutory period.

#### 3. EASEMENTS $\Leftrightarrow$ 32—LIMITATIONS.

Nothing less than an adverse and hostile use, of the servient estate, wholly inconsistent with the right of the owner of the easement, will start the statute of limitations running.

#### 4. PARTITION $\Leftrightarrow$ 94(1)—RIGHT TO EASEMENT—COMMISSIONER'S REPORT.

Mere filing of commissioner's report of partition, designating road to be used as passway, would not give one to whom the tract was allotted an easement in the roadway.

#### 5. PARTITION $\Leftrightarrow$ 94(3) — REPORT OF COMMISSIONER—BINDING EFFECT.

A report of commissioner filed in partition suit is only the recommendation or suggestion of the commissioner, which the court may or may not accept and confirm.

Appeal from Circuit Court, Campbell County.

Action by G. G. Daniel against E. J. Morris and wife. Judgment for plaintiff, and defendants appeal. Reversed.

Wesley M. Rardin, of Butler, for appellants.

Otto Wolff, of Newport, and V. O. Williams, of Alexandria, for appellee.

SAMPSON, J. Edward Morin died in 1878 or 1879, the owner of 370¼ acres of land on the Flag Spring and Alexandria turnpike, in Campbell county. He left surviving him three children and seven grandchildren by a fourth child. Shortly after his death a suit was instituted in the Campbell circuit court for a division of the lands into four parts, in kind, among the three children and grandchildren, and commissioners were appointed, who made a report in writing, accompanied by a plat, to the court, subdividing the 370¼ acres into four tracts. In making this division, lots Nos. 1 and 2 fronted on the turnpike, and lot No. 4 was directly behind lots Nos. 1 and 2, and 203 poles away from the pike. The report of the commissioner, after describing tract No. 4, adds this:

"The whole lot No. 4, being 157 acres and 11 poles. There is to be a road used as an outlet from lot No. 4, as represented on the plat, along the division line between lots Nos. 1 and 2, whose bearing is N. 69¼° E.; said road is to be 20 feet in width, beginning at a stone in the northeast line of lot 4, second corner to lot No. 1, and fourth corner to lot No. 2; thence running with said division line a distance of 203 poles, to the Flag Spring and Alexandria turnpike, 10 feet being granted on each side of the division line. All of which is respectfully reported."

This report appears to have been duly lodged by the commissioner with the papers of the case, and filed by the clerk and made a part of the record in the case; but it was never confirmed by the court, or recorded in the manner provided by law. No copy of the judgment in the partition suit, or deeds made by the commissioner to the heirs, is made part of this record. So far as this record shows, the judgment did not follow the report of the commissioner with respect to the roadway contained in the report copied above, nor did either of the deeds made by commissioner contain any reference to said road or passway.

Immediately after the division was made, the parties to whom the tracts were allotted took actual possession and inclosed the tracts by fencing, and placed other improvements on the land. There was no roadway or traveled way along the line described in the report at the time the report was made, the judgment entered, and deeds executed by the commissioner, and there has never been a travel way along the line designated for the road from the time of the making of the report to the present day, but there was a

travel way which zigzagged over lot No. 1 from the line of lot No. 4 to the pike, and which was some 200 feet or more away from the road designated in the report. The owner of lots Nos. 1 and 2 built various cross-fences through their lands, which obstructed the proposed roadway at different points, and a fence was built from lot No. 4, at the point where lots Nos. 1 and 2 joined, along the divide between lot No. 1 and No. 2, 203 poles, to the pike, thus dividing in the middle the proposed 20-foot right of way from end to end, and that fence stood there for a number of years, without objection or complaint from the owners of lot No. 4. Lot No. 4 was given to a daughter, Margaret Morin; lot No. 1 to the heirs of Mariah Briggs, a deceased daughter of Marlon; and lot No. 2 to another daughter, Cynthia Morin, in the original division between the heirs of Edward Morin; but each of these persons have sold and conveyed their lands, and appellants, E. J. Morris and Sammie Morris, are the owners of tract No. 1, and John R. Nelson and Rob. Daniel own lot No. 2, while G. S. Daniel owns lot No. 4, having acquired title to it in 1910.

[1] This action was instituted by Daniel against Morris and his wife, praying a mandatory injunction, commanding the defendants to open the roadway along the line between lots Nos. 1 and 2, from lot No. 4 to the turnpike, by removing all obstructions thereon, such as fences, and praying that they and their privies in estate be perpetually enjoined from thereafter obstructing or interfering with appellee's use thereof. It is admitted that the roadway, which appellee now seeks to open, was not provided for in the judgment of division which allotted the lands of Edward Morin, and that the deeds made by the commissioner under said judgment did not refer to said passway from lot No. 4 to the pike, and further that none of the mesne conveyances from Marlon Briggs and Cynthia Morin to the present owners contain any reference whatever to said right of way as designated in the commissioner's report.

It would therefore appear that appellee, Daniel, rests his claim of right to the roadway solely and alone upon the provisions and description set forth by the commissioners who divided the land, in their report to the Campbell circuit court, and such report, in so far as it effects the roadway, is copied above. The question is: Can a description and recommendation in a report of a commissioner in a suit for partition of land, which report is neither confirmed by the court nor recorded, become such a part of the proceedings in the partition suit and link in the chain of title of which all subsequent grantees must take notice?

[2] It is well settled that, where a right to a roadway is vested by grant or judgment

in a partition proceeding, all subsequent purchasers who hold under the grant or judgment are bound by the road reservation, and the servient estate cannot avoid the burden by pleading and proof of nonuser of the easement acquired by the grant, or in any manner, except by adverse holding for the statutory period. In the case of *Johnson v. Clark et al.*, 57 S. W. 474, 22 Ky. Law Rep. 418, this court held that nonuser of a passway acquired by grant does not destroy the easement, in the absence of any act on the part of the owner of the servient estate which is inconsistent with the existence of the easement; and the acquiescence by the owner of the easement in temporary changes in the passway from one route to another for the convenience of the owner of the servient estate does not operate as an abandonment of the original way granted. See, also, *Dotson v. Merritt*, 141 Ky. 155, 132 S. W. 181; *Speers v. Weddington*, 146 Ky. 434, 142 S. W. 679; *N. P. B. & S. Co. v. Plummer*, 149 Ky. 534, 149 S. W. 905; *Last v. Jacoby*, 61 S. W. 855, 22 Ky. Law Rep. 1757; *Boyd v. Morris*, 106 S. W. 867, 32 Ky. Law Rep. 845.

[3] It therefore appears that nothing less than an adverse and hostile use of the servient estate, wholly inconsistent with the right of the owner of the easement, will start the statute of limitation running, which will, when the period has elapsed, extinguish the right. Certainly nothing short of the continuous adverse use for the statutory period will establish a right by prescription in the adverse claimant.

[4] But did Margaret Morin, to whom was allotted lot No. 4 in the division of her father's estate, acquire an easement in the roadway in controversy in this action by the mere filing of the commissioner's report of partition, which designated and described the passway? We think not. If the report had been confirmed by the court and recorded in the proper office, no doubt it would have become a link in the chain of title which would have impressed itself upon the muniments thereof, in such a way as to have given notice to all subsequent holders of the servient estate that the right to the road existed and was an incumbrance thereon, which right could not have been defeated, except by an adverse user or holding for the statutory period. But so far as this record shows the court did not confirm or even cause to be recorded the report of the commissioners. It would appear that the court rejected the report in so far as it designated a road from lot No. 4, over lots Nos. 1 and 2, to the pike, because the judgment, so far as this record shows, did not describe the passway, refer to it, or even mention a passway.

Neither did the deeds, made by the commissioner of the court, pursuant to the judg-

ment mentioned, describe or give to the grantee of lot No. 4 any right of way or easement in a roadway over lots Nos. 1 and 2. Hence we conclude that the court rejected at least so much of the report of the commissioners as recommended a passway from lot No. 4, over lots Nos. 1 and 2, to the pike, because if the judgment had adopted the report, it would have followed the same in the establishment of the road, and some mention would have been made thereof in the judgment, and the deeds of the commissioner, following the judgment, would also have mentioned and described the right of way.

[5] A report of the commissioner filed in a suit is only the recommendation or suggestion of the commissioner, which the court may or may not accept and confirm. Often the report is wholly rejected or disregarded; sometimes only partly adopted. This report may have been adopted in all respects, except that recommending the road; but, since the road is the only thing in controversy in this action, it is not important to inquire what else may have been disregarded or rejected by the judgment. If lot No. 4 did not acquire the roadway in and by the partition proceedings in the Campbell circuit court, as appears to be true, no such right exists or ever existed.

We therefore conclude that the trial court erred to the prejudice of appellants in sustaining the prayer of the petition, granting the mandatory injunction against the present owners of lot No. 1, requiring them to remove the obstructions from the alleged passway, and perpetually enjoining them from obstructing the same in the future. Upon the record, the judgment should have been for appellants, and the petition dismissed.

Judgment reversed, for proceedings consistent with this opinion.

(183 Ky. 695)

#### TAYLOR v. WILSON.

(Court of Appeals of Kentucky. March 25, 1919.)

#### JUDGMENT $\Leftrightarrow$ 570(5)—RES JUDICATA.

Where a judgment did not go to the merits, but only dismissed plaintiff's petition in an action to quiet title, because she was not in possession of the property, plaintiff may still institute and maintain an action in ejectment.

Appeal from Circuit Court, Carlisle County.

On petition for rehearing. Original opinion supplemented.

For former opinion, see 182 Ky. 592, 206 S. W. 865.



John K. Hendrick, of Paducah, and Shelbourne & Shelbourne, of Bardwell, for appellant.

John E. Kane, of Bardwell, for appellee.

**SAMPSON, J.** The judgment of the circuit court dismissed the petition of the plaintiff, Taylor, appellant here, for the reason that she was not in the actual possession of the land at the time of the commencement of the action, following the rule of this court, often announced, that an action to quiet title does not lie against a defendant who is in the actual possession of land, claiming it as his own. As the evidence conclusively proved that appellee, Wilson, was in the actual possession of the land in controversy at the time the suit was instituted, and the appellant virtually admitted that she was not in the actual possession, the judgment was affirmed by this court. The proper remedy in such cases is by ejectment.

While Mrs. Taylor was not entitled to maintain an action to quiet title, she could have maintained an action in ejectment. The judgment below did not go to the merits, but only dismissed plaintiff's petition. Such a judgment, though affirmed by this court, does not prejudice the right of Mrs. Taylor to institute and maintain the proper kind of action. "A judgment given against a plaintiff on the single ground that he has mistaken his remedy or form of action, is no bar to his subsequent action brought in the proper form." 2 Black on Judgments, 715; 1 Freeman on Judgments, §§ 260, 265; City of Covington v. Chesapeake & Ohio Ry. Co., 112 S. W. 862; Rice v. West, 42 S. W. 116, 19 Ky. Law Rep. 832.

If appellant, Mrs. Taylor, would otherwise have a right of action in ejectment to recover the land in controversy, that cause is not prejudicially affected by the judgment in the preceding case to quiet title for the reasons above stated, and that judgment cannot be pleaded as *res judicata*.

(183 Ky. 749)

**BOSWORTH, Auditor, et al. v. KENTUCKY HIGHLANDS R. CO.** (Nos. 26761, 26999, 28160, and 28563.)

(Court of Appeals of Kentucky. March 28, 1919.)

**1. APPEAL AND ERROR** §125—DECISIONS APPEALABLE—CONSENT TO JUDGMENT.

Judgment entered by agreement or consent of the parties is not appealable.

**2. PLEADING** §214(1)—ADMISSIONS — DEMURRER.

A general demurrer to petition confesses the truth of its allegations.

**3. TAXATION** §376(2)—RAILROADS—VALUE OF FRANCHISE.

Under Ky. St. §§ 4079, 4080, the value of a railroad franchise subject to taxation will be determined by deducting, from the value of the capital stock fixed by the board of valuation by capitalizing the net income derived from the business in the state, the assessed value of all tangible property assessed in the state.

**4. TAXATION** §498—ACTION TO ENJOIN ASSESSMENT—RAILROAD FRANCHISE—SUFFICIENCY OF PETITION.

In railroad's action to restrain board of valuation and assessment from assessing its franchise and capital stock at a greater sum than fixed in the petition, the petition was sufficient in alleging the value of the franchise, though the method of ascertaining value was not set forth.

**5. TAXATION** §498—ACTION TO ENJOIN ASSESSMENT—RAILROAD FRANCHISE—SUFFICIENCY OF PETITION.

In railroad's action against board of valuation and assessment to restrain assessment of its franchise at a greater sum than named in petition, petition held to state cause of action entitling railroad to such relief.

Appeal from Circuit Court, Franklin County.

Four separate actions by the Kentucky Highlands Railroad Company against H. M. Bosworth, Auditor, and others. Judgments for plaintiff, and defendants appeal. Affirmed.

Chas. H. Morris, Atty. Gen., and Jno. C. Duffy, Asst. Atty. Gen., for appellants.

T. L. Edelen, of Frankfort, for appellee.

**SAMPSON, J.** [1] These four actions were instituted in the Franklin circuit court by the Kentucky Highlands Railroad Company to obtain injunctions against the board of valuation and assessment and its members, restraining it and them from assessing its franchise and capital stock at greater sums than those fixed in the four petitions. The first action was brought on October 31, 1913, to enjoin Auditor Bosworth and the other members of the board of valuation and assessment from fixing the value of its franchise at \$473,755, or any sum in excess of \$64,536, which the petition alleged was the fair cash value thereof. A general demurrer was interposed to the petition and, after hearing, was overruled, and, the defendant board of valuation and assessment declining to plead further, a decree was entered in favor of the plaintiff perpetually enjoining the board from fixing the franchise of the plaintiff company at any amount in excess of \$125,000, and fixing said amount as the value of plaintiffs' franchise for the purposes of taxation for the year 1913. No objection was made to or exception taken or saved by

either party to this judgment, which was entered January 28, 1916. As the alleged value of the franchise was only \$64,635, and there was no answer or other response to the petition except the general demurrer, we are at a loss to understand how the court entered a judgment fixing the value of the franchise at \$125,000, unless it was by agreement or consent of the parties, and this we are assured is the fact by appellee railroad company. If that be true, then this appeal should not have been prosecuted by the special attorney for the commonwealth.

The second case was instituted July 24, 1914, and the allegations of the petition are in substance the same as those in the first action; but this suit seeks to enjoin the board from making a final assessment of plaintiff's capital stock at \$700,000, or any sum in excess of \$125,000, which the petition avers is the actual cash value thereof. A general demurrer was also interposed to this petition and overruled, and, the board again declining to plead further, a decree was entered in favor of the railroad company, enjoining the defendant board of valuation and assessment from fixing the franchise of the plaintiff company at any amount in excess of \$125,000, and that amount was adjudged to be the value of said franchise for the year 1914 for the purposes of taxation. No objection or exception was saved to this judgment by either party.

The third suit was commenced on June 19, 1915, and the prayer is for a perpetual injunction restraining the board of valuation and assessment from fixing the value of its capital stock at \$700,000, or any amount in excess of \$125,000, which it alleges is the fair cash value of its franchise. While no general demurrer to the petition was offered or filed, the decree treats the proceedings as though one had been so filed and overruled, and, the defendant board for the third time declining to answer or plead further, a decree was entered granting the relief sought, and enjoining the board from fixing the valuation of the capital stock at any sum in excess of \$175,000. No objection was made or exception saved to this judgment by appellant.

The fourth action was instituted on September 18, 1916, and is in substance the same as the other three. The prayer, however, asks an injunction, restraining the board from fixing the value of the capital stock of the railroad company at "\$898,294, or any amount in excess of that which deducting the value of its tangible property will leave the value of its franchise at \$175,000, which plaintiffs aver is in excess of the actual value of its franchise, but upon which plaintiff is willing for the assessment to be made." No demurrer or answer was filed by the board to this petition, and, the board failing to plead, the petition was taken for confessed,

and a decree entered in accordance with the prayer of the petition, fixing the value of the franchise at \$175,000, and enjoining the board from fixing the value of the franchise at \$898,294. The appellants objected and excepted to this judgment and prayed an appeal to this court which was granted. This is the only decree in the four to which objection was made or exceptions saved by appellants and the only one granting an appeal.

Appellee company has filed its written motion in each of said cases to dismiss the appeals on the ground that—

"The judgments rendered herein were rendered by consent of the appellee and Hon. M. M. Logan, representing the appellants, who was then the duly qualified and acting Attorney General of the commonwealth."

It also filed a verified "answer to the appeal" in each case, in which it says:

"That although it may appear from the judgment herein that an exception was reserved by the defendants, said judgment was rendered with the full consent of Hon. M. M. Logan, who was then the Attorney General of the commonwealth of Kentucky, after a full hearing before the Franklin circuit court, and that afterwards this appeal was prosecuted by Hon. John C. Duffy, styling himself the special assistant to the Attorney General, and without, as the appellee believes, being especially authorized therein by the Attorney General."

The judgments in the first three cases appear to have been entered by consent of all parties. There is no objection or exception to the decrees, and no appeal asked or granted. Then, too, it appears that the amount at which the value of the franchise was fixed in the first suit was \$125,000; whereas, the allegations and prayer of the petition would have justified a judgment for only \$64,635. From these facts we are persuaded that the judgment must have been entered by consent of the parties, although this is denied by special counsel for the commonwealth; but we find no denial by Hon. M. M. Logan, who was Attorney General of the commonwealth at the time and later chairman of the tax commission of the commonwealth, and therefore a party to this action.

Passing the motion to dismiss the appeals, and all other preliminary questions, we will consider only the main question in all of the cases: Did the petitions state cause of action? If they did, the general demurrers were properly overruled; if they did not, then the court erred to the prejudice of appellants in overruling the general demurrers. The petitions are almost identical, and what may be said of one may be said of all. Let us consider the sufficiency of the allegations therein made, and determine whether causes of action were stated thereby. After manifesting its right to sue as a corporation, and its right to sue the defendants named, appel-

laint alleged in each of the petitions that the Kentucky Highlands Railway Company is a Kentucky corporation, and that it owns 15.88 miles of railroad track and certain equipment; that it operated at the times mentioned in the four petitions only 6.46 miles of said road, and the residue of said tract was then, and had been at all times since its construction, held and operated by the Louisville & Nashville Railroad Company; and this last-named concern had returned said part of plaintiffs' tract to the taxing authorities of Kentucky for taxation as a part of its system, and had paid all taxes thereon, and at the time of the institution of these actions had declared its liability for further taxes and was ready, able, and willing to pay any additional tax due, if any, assessed on said mileage for franchise for the years named, and was in fact so assessed at each and all of the times mentioned in the petitions. The petitions also aver that the railroad begins at Cliffside, near Frankfort in Franklin county, and extends to Versailles in Woodford county, 4.21 miles being in Franklin county and the balance in Woodford county; that the company is capitalized at \$250,000; that it has a bonded debt secured by mortgage upon its railroad from Frankfort to Millville of \$250,000, which bonds become due in April, 1947; that it owes the Louisville & Nashville Railroad Company a floating debt of \$526,063.52; that the value of its tangible property did not exceed, for the years named, \$76,245; that the fair value of its entire capital stock did not exceed, for the years named \$126,000; that the board of assessment and valuation for the year 1913 proposed to fix the value of its capital stock at \$500,000, and the value of its tangible property at \$76,245, thus automatically fixing the value of its franchise at \$423,755. For the years 1914, 1915, and 1916, in which the other suits were brought, the board of valuation and assessment proposed to fix the value of the capital stock of appellee at \$700,000, and the value of its tangible property at approximately \$75,000, which would automatically fix the value of the franchise, and these facts were sufficiently alleged in the petitions. It is also alleged that the proposed assessment by the board of valuation and assessment was tentative only and not final; that while, through certain manipulations of the books of appellee, the net earnings of the road were made to appear as \$44,258.77, the said sum was not, in truth and in fact, the exact net earnings of the road, but that said sum was subject to several deductions: (1) The interest upon the floating debt of \$526,063.52; (2) a sinking fund for the extinguishment of the bonded debt; (3) such proportion of its franchise as the distance from Millville to Versailles bears to the total mileage. The board of valuation and assessment fixed the value of

its capital stock at \$500,000 for 1913, and at \$700,000 for the years 1914, 1915, and 1916; but notwithstanding appellee's protest the board sent to appellee a notice fixing the value of its capital stock at the sum aforesaid, and therefore fixing the value of the franchise by taking the value of the tangible property from the value fixed upon its capital stock, as aforesaid; that such assessment was greatly in excess of the real value of the capital stock and of the franchise, and was an assessment of at least four or five times the actual value of the stock and franchise, and, if such assessment be enforced, would result in spoliation of the property of the railroad by collection from it of taxes upon the franchise far in excess of its actual or fair value, which is alleged to be only \$64,635 for the year 1913, \$125,000 for the year 1914, \$215,000 for the year 1915, and \$175,000 for the year 1916; that the board is attempting to and will enforce the collection of taxes from appellee upon the valuation which it tentatively fixed upon its franchise, and, unless enjoined and restrained from so doing, will certify said sums as the value of said franchise and capital stock of appellee, and cause taxes to be collected accordingly. The petitions also contained the necessary allegations concerning the application for injunction, and concluded with a prayer for a perpetual injunction, restraining the board of valuation and assessment from fixing the value of the franchise and the value of the capital stock of appellee at sums greater than those named in the petitions.

[2] The general demurrers confessed the truth of the allegations, and, there being no traverse or other plea, the petitions manifested a right on the part of the railroad to the relief sought.

It is the contention of appellant that the proper mode to arrive at the value of the franchise of the railroad company is to find the difference between the net earnings and the gross earnings thereof, and capitalize that sum at 6 per cent., and the amount so found, less the value of the tangible property, will be the value of the franchise, subject to taxation. The railroad company insists that the mode adopted by this court in several cases is to find the value of the capital stock of the corporation, and from this take the value of the tangible property, and thus automatically fix the value of the franchise.

The value of the franchise of a domestic corporation is the difference between the fair cash value of the capital stock and the assessed value of its tangible property. To arrive at the value of the franchise, the value of the tangible property must be deducted from the fair cash value of the capital stock of the concern. *Kentucky Heating Co. v. City of Louisville*, 174 Ky. 142, 192 S. W. 4.

[3] By sections 4079, and 4080, Kentucky statutes, the mode of finding and fixing the

value of a franchise of a railroad, organized under the laws of this commonwealth, is pointed out, though not as clearly as it could or should have been. Reading these two sections together, we conceive the fair import to be: The board of valuation shall fix the value of the capital stock by capitalizing the net income derived from the business in this state and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this state, and the remainder thus found shall be the value of the corporate franchise subject to taxation.

[4, 5] The method of ascertaining and fixing the value of the franchise of appellee company is not set forth in the petitions, nor was it necessary to do so; but the value of the franchise is definitely alleged at so many dollars for each year. The averments of the petitions as to the value of the franchise are direct and certain. Uncontroverted these allegations were properly accepted by the trial court as the basis for the decrees entered. The petitions stated a cause of action entitling the railroad to the relief prayed, and the general demurrers were properly overruled.

Judgment affirmed.

(193 Ky. 795)

**LOUISVILLE & N. R. CO. v. BAKER'S ADM'R.**

(Court of Appeals of Kentucky. March 7, 1919. Rehearing Denied April 25, 1919.)

**1. CARRIERS §383—EJECTION FROM TRAIN—ACTION—JURY QUESTION.**

In action against railroad for death of plaintiff's intestate, caused by ejection from train, where defense was that intestate had not been on train, and was not ejected therefrom, the case *held*, under the evidence, for the jury.

**2. DEATH §103(2)—CAUSE OF ACCIDENT—JURY QUESTION.**

In action for death, where there is any evidence for the plaintiff, or any fact shown from which the inference may be plainly drawn that the accident occurred as testified to by witnesses for plaintiff, the question of how accident occurred is one for the jury, although defendant's evidence may be to the effect that accident happened in an entirely different manner.

**3. TRIAL §139(1) — PEREMPTORY INSTRUCTION—EVIDENCE.**

Defendant is entitled to peremptory instruction only if, after admitting every fact shown by plaintiff's evidence to be true, as well as all reasonable inferences that can be drawn therefrom, plaintiff has failed to establish his case.

**4. NEW TRIAL §72—INSUFFICIENCY OF EVIDENCE.**

Civ. Code Prac. § 340, subsec. 6, authorizing new trial when verdict is not sustained by suffi-

cient evidence, does not justify court in setting aside verdict merely because it is against the preponderance or weight of the evidence, or because of the numerical superiority of witnesses, but verdict to be set aside must be flagrantly against the weight of the evidence.

**5. APPEAL AND ERROR §1003—SETTING ASIDE VERDICT—DUTY OF COURT.**

Where verdict is flagrantly against the weight of the evidence, it is appellate court's duty, in view of Civ. Code Prac. § 340, subsec. 6, to grant a new trial.

**6. CARRIERS §381(4)—EJECTION—ACTION—SUFFICIENCY OF EVIDENCE.**

In action against railroad for death of plaintiff's intestate alleged to have been ejected from train, where defense was that intestate was not on train and had not been ejected, verdict for plaintiff *held* palpably against the evidence.

**7. TRIAL §114—ARGUMENT OF COUNSEL—MATTERS WITHIN RECORD.**

Argument of counsel should be limited to matters within the record, or to fair and reasonable deductions arising from the record.

**8. TRIAL §252(10) — INSTRUCTIONS — EVIDENCE.**

In action against railroad for death of plaintiff's intestate, alleged to have been ejected from train, instruction, stating "decendent was forcibly ejected from the train," was improper, where there was no evidence of forcible ejection.

Appeal from Circuit Court, Rockcastle County.

Action by Eugene Baker's administrator against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, for further proceedings consistent with opinion.

John W. Brown and C. C. Williams, both of Mt. Vernon, and B. D. Warfield, of Louisville, for appellant.

Bethurum & Lewis, of Mt. Vernon, W. T. Short, of Richmond, and E. C. O'Rear and J. B. Adamson, both of Frankfort, for appellee.

QUIN, J. Charles Baker, as administrator of Eugene Baker, instituted this action in the court below against defendant, seeking damages for the death of his intestate; it being alleged in the petition that decedent was assaulted and ejected from a train near Ford, Ky., and thereby caused to lose his life. From a verdict in favor of the plaintiff, this appeal is prosecuted.

The contention of the defendant is that a peremptory instruction should have been given in its behalf. It also complains of the instruction given and of counsel's argument to the jury.

The case is beset with some rather unusual circumstances. Defendant lived in Richmond, and it appears that in company with several companions he started in the direc-

tion of Winchester on the afternoon of December 22, 1914. According to the expression of some of the witnesses, they were "hoboing"; i. e., they had taken passage on a freight train without paying therefor—in other words, "beating their way." The time they left Richmond is uncertain. Three witnesses testified to having seen decedent get off a train at Shearer, a station north of Ford, and a like number saw him get on a train there north-bound. Five witnesses testified to having seen decedent in Winchester the evening of the accident; most of these had gone to Winchester for the purpose of getting whisky. Several of the witnesses testified they saw Baker at the depot that night, waiting for a train to take him to Richmond or Berea, and two testified that they got on a south-bound train at Winchester that night with the decedent, and were in the smoking car of defendant's train. This train is known as No. 81. One of these witnesses, Grover Neal, testified that decedent had a little argument with defendant's conductor; but there was so much noise he could not tell what they were talking about. This argument took place along about Elkin, which is a station a short distance north of Ford, and after the argument started he left decedent and the conductor, going to another part of the car, and when he returned, in 10 or 15 minutes afterwards, he did not see the decedent, but he saw a hat "lying there," which looked like decedent's hat. David Himes, the other witness, testified as follows:

"Q. How long did Eugene Baker stay on that train? A. Well, I couldn't say. Not very long, though, I shouldn't think, or I didn't see him on the train. After we got up towards Ford, towards Ford there, there come up some trouble— Q. Some trouble between him and the conductor? A. Yes, sir. Q. Will you go ahead and tell the jury the nature of that trouble? A. We were all sitting there on the seat, talking and laughing and going on, and the conductor walked up, and we were talking very loud, and the conductor walked up to Mr. Baker and told him he was going to put him off the train—was what he said—and they kind of got into a racket, and I got up and walked out of the coach. Q. What was said between them? A. The conductor says, 'G— d— you, I am going to put you off of this train.' I believe that is the words he spoke. \* \* \* Q. Tell the jury what position he was in with reference to Baker at the time he made the remark to him. A. He was standing right up in Baker's face when he made the remark. Q. What was Baker saying? A. Well, Baker was talking a little to him—wasn't talking very much, I don't think. Q. When that conversation was going on, what did you do? A. I got up and walked out of the coach and went into the ladies' car. Q. What made you do that? A. I seen there was going to come up some trouble, and I walked out and went in the other car. Q. Did anybody else go out? A. Lots of people went out. I couldn't state who all. Q. Anybody that you

knew? A. No; not that I knew, I don't reckon, at all. Q. Did you go back into the car? A. Yes, sir. Q. After you got back there, tell the jury if anything happened to the train. A. Yes, sir; the train stopped a very few moments about Ford. They said it was about Ford. Q. Did you go back into the smoker after the train stopped? A. Yes, sir. Q. Where was Eugene Baker then? A. I never saw him any more at all. Q. You mean you never saw him after you left the car? A. No, sir. Q. Did you see anything that belonged to him? A. Yes; his hat lying on the floor. Q. Now, when the train stopped, did you see anything of him? A. No; I raised the window and looked out, and they was dragging a man out from under the train: looked to me like a colored fellow, best I could tell about it."

On cross-examination witness testified as follows:

"Q. And you say that he and the conductor got to talking, and when they got to talking you went back into the other car? A. Yes, sir. Q. Had the conductor taken hold of him? A. Yes, sir; the conductor, I believe, had hold of him. Q. You believe? A. Yes, sir. Q. Well, are you sure of that? A. Yes, sir. Q. In what manner did he have hold of him? A. Just walked up and took hold of him and called him that name. Q. Called him what name? A. Said, G— d— him, he was going to put him off the train. \* \* \* Q. You went out into the ladies' coach; and what was Eugene Baker doing when you went in there? A. Standing up, talking to the conductor? Q. He was standing talking to the conductor when you went out, was he? A. Yes, sir. Q. How long did you stay in the ladies' coach? A. Well, I staid some little bit. Q. Well, how long? A. Until I thought the trouble was all over, and I seen them dragging this man out from under the train, and I went back into the smoking car."

This, in substance, is the testimony introduced on behalf of the plaintiff. For the defendant, its conductor and flagman on the south-bound train testified that decedent was not a passenger on their train, they had no difficulty of any kind, and that the events testified to by the witnesses Neal and Himes did not occur.

J. D. Johnson and his brother, Oscar Johnson, had gone to the station at Ford to meet their brother Jesse, who was coming home for the holidays. They were walking along the track to keep their blood in circulation, and the younger of the two discovered something lying between the rails, and upon examination they found it was a man, and they dragged him off the track. This was before the arrival of No. 31; seeing a light in the home of Operator Johnson, they notified him, and also Sheeler, the agent at Ford, and after reaching the latter's house they heard No. 81 whistle, and hastened back to the station, and got there just at the time the train arrived. They say it was 20 to 30 minutes from the time they first discovered this body until the train arrived, and the body was there when they reached

the station, after notifying Johnson and Sheeler.

J. F. Johnson, the company's operator at Shearer, lived at Ford. He testified that shortly after he reached his home that night, and before the arrival of No. 31, J. D. Johnson and Oscar Johnson came to his house and told him "they had found this man on the track—killed." He told them to notify Mr. Sheeler, and this it appears they did. Sheeler testifies that on that night, 15 or 20 minutes before the arrival of No. 31, and after he retired, J. D. Johnson notified him there was a dead body at the depot. Johnson reached the station shortly after No. 31 arrived; Sheeler got there just as No. 31 was fixing to leave.

E. K. Broadus, a school-teacher at Ford, and Dr. J. T. Pennington that same evening had been at a social gathering on the Madison county side of the river from Ford. They passed the station between 11 and 11:30, and they saw this body from 15 to 20 minutes before the arrival of No. 31.

The flagman on the passenger train testified that when the train reached Ford he saw the body of a man on the platform. Thus we have at least six witnesses who saw the body that was identified as that of Eugene Baker on the platform at Ford from 15 to 20 minutes before the arrival of No. 31, and four of these are disinterested witnesses, whose credibility and character is unimpeached; but as to the two witnesses for the plaintiff, who detailed the events on the train, their credibility is attacked. Hence we have two states of fact that are irreconcilable. If decedent was in Winchester and became a passenger on train No. 31, then the witnesses for defendant could not have seen his dead body at Ford some time before the arrival of that train; or, conversely stated, if the witnesses for the defendant are correct, then those who testified in behalf of plaintiff could not have seen him in Winchester at the time stated, nor could he have taken passage on No. 31.

[1-3] Counsel for the defendant, with great vigor and earnestness, insist there was no evidence to take the case to the jury. It is a close case on the facts. We understand the rule to be that where there is any evidence for the plaintiff, or any fact shown from which the inference may be plainly drawn that the accident occurred as testified to by witnesses in his behalf, the question is one for the jury, although the evidence for the defendant may be to the effect that the accident happened in an entirely different manner. To entitle defendant to a peremptory instruction, the rule in this

state is that if, after admitting every fact shown by the plaintiff's evidence to be true, as well as all reasonable inferences that can be drawn therefrom, the plaintiff failed to establish his case, a peremptory is proper. Two juries have found for the plaintiff in this case. The reason for the granting of a new trial after the first verdict is not shown by the evidence, but under the scintilla rule we are not prepared to say that a peremptory in this case was proper.

[4-6] Under subsection 6 of section 340 of the Code, a new trial is authorized when the verdict or decision is not sustained by sufficient evidence. Under this section the court will not set aside a verdict merely because it is against the preponderance or weight of the evidence, nor because of the numerical superiority of witnesses. The verdict must be flagrantly against the weight of the evidence. But when such a state of case is presented it is not only the right, but the duty, of the court to reverse and remand for a new trial. *Continental Ins. Co. of N. Y. v. Hargrove*, 131 Ky. 837, 116 S. W. 256; *Id.*, 143 Ky. 400, 136 S. W. 616; *Vincent, etc., v. Willis*, 82 S. W. 583, 26 Ky. Law Rep. 842; *C. & O. Ry. Co. et al. v. Johnson*, 145 Ky. 481, 140 S. W. 687; *Id.*, 151 Ky. 809, 152 S. W. 962; *I. C. R. Co. v. Long*, 146 Ky. 170, 142 S. W. 212; *C. N. O. & T. P. Ry. Co. v. Martin*, 146 Ky. 260, 142 S. W. 410, and 154 Ky. 348, 157 S. W. 710; *Wickliffe Mfg. Co. v. Wilson*, 169 Ky. 468, 184 S. W. 386; *North Jellico Coal Co. v. Stewart*, 173 Ky. 745, 191 S. W. 451. The verdict in this case being so clearly and palpably against the evidence a reversal must be ordered.

[7] 2. Defendant complains of the argument of plaintiff's counsel to the jury. In view of the fact that the case is reversed for other reasons, we will not extend this opinion by commenting upon this point, other than to say that the language used was highly improper, and upon a retrial of this case counsel will be careful not to make use of this or similar language. Argument of counsel should be limited to matters within the record, or to fair and reasonable deductions arising from the record.

[8] 3. Complaint is also made of instruction 1 given by the court to the jury, in the use of the expression "decedent was forcibly ejected from the train." There was no evidence to this effect, and if the evidence upon the next trial is substantially the same as that in the record before us this expression should not be used.

Wherefore the judgment of the lower court is reversed, for further proceedings consistent with this opinion.

(109 Tex. 388)

ST. LOUIS, B. & M. RY. CO. v. WEBBER.  
(App. No. 10822; Mo. No. 4405.)

(Supreme Court of Texas. March 26, 1919.)

**1. APPEAL AND ERROR**  $\S$ 544(3)—RECORD—  
BILL OF EXCEPTIONS—PLEA OF PRIVILEGE.

If judgment showing action of court in overruling plea of privilege is in the record, formal bill of exceptions is unnecessary.

**2. APPEAL AND ERROR**  $\S$ 501(1), 520(3)—REVIEW—SUFFICIENCY OF RECORD—VENUE.

Where the record does not contain an order of the court on the plea of special privilege and does not show any exception to the court's action in overruling it, the question cannot be reviewed.

**3. EXCEPTIONS, BILL OF**  $\S$ 38—TIME—TERM OF COURT.

A ruling which would have been reviewable under proper bill of exceptions filed to the term at which it was made is clearly not reviewable under a bill of exceptions filed to a succeeding term.

**4. APPEAL AND ERROR**  $\S$ 274(7)—REVIEW—TRIAL—OBJECTIONS—SUFFICIENCY.

The judgment of the court entered on a verdict of the jury in no wise reflected its action at the previous term on the plea of special privilege, and excepting to that judgment did not amount to an exception to its ruling on the plea.

On motion for rehearing of refusal of application for writ of error. Denied.

For opinion of Court of Civil Appeals, see 202 S. W. 519.

Andrews, Streetman, Burns & Logue, of Houston, for plaintiff in error.

Presley K. Ewing and L. E. Blankenbecker, both of Houston (Ewing Werlein, of Houston, of counsel), for defendant in error.

PHILLIPS, C. J. [1-3] Had there been preserved in the record the order or judgment of the trial court showing its action in overruling the defendant's plea of privilege and that exception was taken thereto, the defendant, on its appeal, would have been entitled to have considered its assignments of error challenging the court's action in that regard without further exception or addressing a motion for new trial to the ruling. With a judgment, taken from the minutes of the court, revealing the court's action, it would have sufficiently appeared of record, rendering a formal bill of exception useless and unnecessary. The hearing on the plea having been before the court and the court having acted, there was no need to again bring the matter to the court's attention by a motion for new trial. The record here, however, does not contain the order of the court on the plea, nor does it show any proper exception to the court's action in overruling

it. Attempt was made to preserve a record of the court's action by means of a bill of exception filed to the succeeding term of the court at which the trial on the merits was had. The ruling would have been reviewable under a proper bill of exception filed to the term at which it was made, but it was clearly not reviewable under a bill of exception filed to a succeeding term.

[4] The judgment of the court entered on the verdict of the jury in nowise reflected its action at the previous term on the plea of privilege, and excepting to that judgment did not, therefore, amount to an exception to its ruling on the plea. It was for these reasons that we sustained the action of the Court of Civil Appeals in its declining to consider the assignments of error touching the plea of privilege through our refusal of the writ of error.

**CLARK v. FIRST NAT. BANK OF NEW BOSTON.** (No. 63-2808.)

(Commission of Appeals of Texas, Section B. April 2, 1919.)

**1. HUSBAND AND WIFE**  $\S$ 276(1) — COMMUNITY ADMINISTRATRIX—POWERS.

A surviving wife, as community administratrix under the provisions of Rev. St. 1911, art. 3592 et seq., has no control or power to dispose of the separate property of her deceased spouse.

**2. HUSBAND AND WIFE**  $\S$ 276(3) — COMMUNITY PROPERTY—COMMUNITY DEBTS.

Community property is the primary fund for the payment of community debts, and, where there exists sufficient community property to pay community debts, no resort can be had to the separate property of a deceased husband for the purpose of paying such debts.

**3. HUSBAND AND WIFE**  $\S$ 276(1)—COMMUNITY ADMINISTRATRIX.

Where a decedent owned no property, except community property, the appointment and qualification of the surviving spouse as community administrator, under the provisions of Rev. St. 1911, art. 3592 et seq., precludes any other administration.

**4. LIMITATION OF ACTIONS**  $\S$ 83(2)—"ADMINISTRATION"—COMMUNITY ESTATE.

The qualification of a surviving wife as community administratrix, under the provisions of Rev. St. 1911, art. 3592 et seq., is an "administration," within the meaning of article 5704, which will put such statute of limitation in motion after its suspension by reason of the death of the husband, at least as far as actions to subject community property to community debts are concerned.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Administration.]

# 5. LIMITATION OF ACTIONS ~~§~~80—CAUSES OF ACTION IN FAVOR OF DECEASED PERSON.

Under Rev. St. 1911, art. 5703, limitation would be suspended as to a debt owing to a community only until such time as surviving spouse qualified as community administrator under the provisions of article 3592 et seq.

## Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Suit by the First National Bank of New Boston against L. C. Clark and another. There was a judgment of the Court of Civil Appeals (172 S. W. 747), reversing a judgment in favor of defendants, and the named defendant brings error. Judgment of Court of Civil Appeals reversed, and that of trial court affirmed.

J. Q. Mahaffey, of Texarkana, for plaintiff in error.

O. B. Pirkey, of New Boston, for defendant in error.

**MONTGOMERY, P. J.** The facts are fully stated in the opinion of the Court of Civil Appeals. 172 S. W. 747.

O. J. Daniel and Media Daniel were husband and wife, and on February 27, 1909, O. J. Daniel executed the note sued on in renewal of a vendor's lien note which he had previously assumed. He at the same time made an agreement renewing the vendor's lien. The note was payable on demand, and therefore in the ordinary course of things would have become barred by limitation on February 28, 1913. O. J. Daniel died on December 24, 1912, and left his wife surviving him. On January 6, 1913, the wife, Media Daniel fully complied with the provisions of chapter 28, title 39, arts. 2219 to 2238, of the Revised Statutes of 1897, and was by proper order of the county court authorized to control, manage, and dispose of the community property in accordance with the provisions of said chapter. No question was made as to the regularity of the proceedings. This suit was filed on October 15, 1913, against Media Daniel, individually and as community executrix, to recover on the note above referred to. L. C. Clark, a mortgagee under Daniel, was also made a party defendant.

The defendants interposed a plea setting up the four-year statute of limitation. The trial court sustained the defendants' plea of limitation and rendered judgment for the defendants. The plaintiff appealed, and the Court of Civil Appeals reversed the judgment of the trial court, and rendered judgment for the bank for its debt, with foreclosure of the lien. The writ of error in this case was granted upon application of L. C. Clark.

## Opinion.

The law now known as chapter 29 of title 52 of the Revised Statutes of 1911 is identical with chapter 28 of title 39 of the Revised Statutes of 1897, and for convenience we will refer in this opinion to Revised Statutes of 1911.

Article 5704 of the Revised Statutes reads:

"In case of the death of any person against whom there may be a cause of action, the law of limitation shall cease to run against such cause of action until twelve months after such death, unless an administrator or executor shall have sooner qualified according to law upon such deceased person's estate; then and in that case the said law of limitation shall only cease to run until such qualification."

The Court of Civil Appeals held that the statute of limitation was suspended for one year from the death of O. J. Daniel, and that the qualification of the wife, Media Daniel, as survivor, under the provisions of chapter 29, title 52, of the Revised Statutes, did not again start the statute of limitations to running, and that therefore the cause of action was not barred when the suit was instituted.

The plaintiff in error, Clark, assigns this ruling as error, and contends that, the debt being a community debt, the running of the statute was only interrupted from December 24, 1912, the date of Daniel's death, until the 6th day of January, 1913, the date of Mrs. Daniel's qualification as administratrix of the community estate and that therefore the cause of action was barred before the suit was filed.

Stating the matter abstractly, the question is: Is the qualification of a surviving wife as community administratrix under the provisions of article 3592 et seq. of the Revised Statutes of 1911 such an administration as is contemplated by article 5704 of the Revised Statutes; that is, such administration as will put the statute of limitation in motion after its suspension by reason of the death of the debtor?

The question is not free from difficulty, and we have no precedent to guide us to its correct solution. In this case the plaintiff alleges that the debt is a community debt, and Mrs. Daniel was sued individually and as community executrix. The plaintiff, however, alleges no facts which would authorize any judgment against her, except in her representative capacity. Under the petition no judgment could be rendered which would affect the separate estate of O. J. Daniel, or the separate property of Mrs. Media Daniel, if any such existed.

In this state of the record it is not necessary to decide whether the qualification of the surviving wife as community administratrix would be sufficient to set the statute of limitation in motion, so as to bar a suit



brought to subject the separate estate of the husband to the payment of the debt.

[1, 2] Chapter 29 of the Revised Statutes of 1911 contains all the provisions of our law regulating the administration of the community property by the surviving husband or wife. Under an administration by virtue of this chapter the survivor has no control or power to dispose of the separate property of the deceased spouse. Under our law the community property is the primary fund for the payment of community debts, and we think that, where there exists sufficient community property to pay the community debts, no resort can be had to the separate property of the deceased husband for the purpose of paying such debts, though such property is, of course, liable if the community property should prove to be insufficient. We do not think it necessary to set out here the provisions of chapter 29 above referred to, but will say that said chapter recognizes the fact in various ways that the proceeding there provided for is an administration of the community estate for the purpose of paying community debts and the distribution of the remainder among the heirs entitled thereto. This chapter, among other things, provides that the community property, with certain exceptions, shall be liable for debts contracted during the marriage, and that in settlement of said community estate it shall be the duty of the survivor or administrator to keep a separate account of all community debts allowed or paid in the settlement of such estate; that where the husband or wife dies intestate, leaving no child or children or no separate property, the community property passes to the survivor charged with the debts of the community, and no administration shall be necessary. The method of procedure is fully set out in the chapter, and provision is made for filing a complete inventory and appraisal of the estate and for the execution of bond by the survivor. The chapter defines the powers, duties, and obligation of the administrator, and contains provisions for the protection of the rights of creditors.

Article 3612 provides that, "after the lapse of twelve months from the filing of the bond by the survivor, the persons entitled to the deceased's share of such community estate, or any portion thereof, shall be entitled to demand and have a partition and distribution thereof in the same manner as in other administrations," and it has been held that the county court may upon proper application make partition and distribution as authorized by said statute.

[3] We cannot escape the conclusion that this chapter provides for the administration of the community estate. Administration, in the sense used in the limitation statutes, means the management and disposal under legal authority of the estate of an intestate or testator. The provisions of chapter 29 clear-

ly bring the proceeding there provided for within this definition. The proceeding is constantly referred to in the statute as an administration. It is true that it may or may not be an administration on all the property of the deceased; but this law clearly provides for the administration of all community property except that portion thereof which may be exempt. It is evident, we think, that where the decedent owns no property, except community property, the appointment and qualification of the survivor would preclude any other administration.

[4] We do not think that, because the administration provided for does not authorize the administration on the separate property of the deceased spouse, it can therefore be said that it is not an administration on his estate, or in the language of article 5704, that an administrator has not "qualified upon such deceased person's estate." If there is no property except community, then the administration is for the whole estate, and comes literally within the language of the statute.

The words used in article 5704 should, we think, be construed to mean that when an administrator has qualified, who can be sued upon the claim asserted, and who has authority to apply the property of the decedent primarily liable for such claim to its payment, there is such an administration as sets the statute of limitation in motion.

[5] Article 5703 of the Revised Statutes provides that as to a cause of action in favor of a deceased person "the law of limitation shall cease to run against such cause of action until twelve months after such death, unless an administrator or executor shall have sooner qualified according to law upon such deceased person's estate; then, and in that case, the said law of limitation shall only cease to run until such qualification." We have no doubt that it would be a proper construction of this act to hold that as to a community debt limitation would be suspended only until such time as the survivor had qualified under the statute.

The construction we have given these statutes is that which it seems to us is in harmony with the meaning conveyed to the ordinary mind by the words used. The words "administration" and "administrator" are constantly used in the statutes and decisions in this state to describe that proceeding by which the survivor is authorized and empowered to manage and dispose of the community estate, and we think that in construing article 5704 the word "administrator," used as it is without qualification, should be construed to include every form of control over the estate of deceased persons authorized by law under which the property of the deceased may under authority of the court be applied to the payment of debts. We find nothing in the statute to limit the meaning to any particular class of administration.

It is true that there are statements in numerous decisions in this state to the effect that survivors who have qualified under the statute are trustees, and it is even said they are not administrators (*Huppman v. Schmidt*, 65 Tex. 585); but in an equal or greater number of cases they are referred to as administrators. With respect to their duties and obligations to the heirs and creditors they occupy the attitude of trustees. But in a very important sense every administrator and executor is a trustee, and they may very properly be described as such. We have found no decision which undertakes to define the word "administrator" as used in the limitation statute.

If the case of *Jones v. McRae*, 16 Tex. Civ. App. 308, 41 S. W. 403, was properly decided, upon which we express no opinion, it is not necessarily in conflict with our conclusion. In that case a question of venue was involved, and the court seems to rest the conclusion reached, in part at least, upon the provision of article 2227 of the Revised Statutes of 1807 (now article 3600, Revised Statutes 1911), which article provides that after qualification the survivor shall have the right of suing and being sued with regard to the community estate "in the same manner as during the lifetime of the deceased." The court seems to have held that this article controlled the venue of a suit against the survivor, and that the exception in the venue statute fixing the venue of suits against executors and administrators did not apply. Whether the case was properly decided or not, we do not think it should control in this case.

The case of *Mann v. Earnest*, 6 Tex. Civ. App. 606, 25 S. W. 1042, decided by the Court of Civil Appeals of the Second District, we think was properly decided, but do not think this decision is in conflict with the view we have expressed. Upon the whole case we have concluded that the honorable Court of Civil Appeals erred in reversing the judgment of the trial court. We therefore advise that the judgment of the Court of Civil Appeals be reversed, and that of the trial court affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

#### HEIMER v. YATES et al. (No. 39-2698.)

(Commission of Appeals of Texas, Section A.  
April 9, 1919.)

#### 1. JUDGMENT — 199(1) — NOTWITHSTANDING VERDICT—POWER OF COURT.

Having submitted the case to the jury on special issues, the court was without authority

to render judgment for defendant notwithstanding verdict for plaintiff; the limit of the court's power under such circumstances being to set aside the verdict and grant new trial in view of Rev. St. 1911, art. 1990.

#### 2. APPEAL AND ERROR — 1175(2)—ENTRY OF FINAL JUDGMENT.

The Court of Civil Appeals, upon reversing judgment of trial court rendered upon a verdict, may enter a final judgment, when it appears that one of the parties as a matter of law is entitled to such judgment.

#### 3. ESTOPPEL — 119—SILENCE—QUESTION FOR JURY.

That plaintiff remained silent at an interview had for the purpose of determining whether she had any objection to sale of land to a defendant held not as a matter of law to estop her as to such defendant who had knowledge of the coercive methods used by the other defendants in their dealings with plaintiff inducing her to part with title.

#### Error — Court of Civil Appeals of Second Supreme Judicial District.

Suit by Louisa C. Helmer against J. F. Yates and others. Judgment for plaintiff against all defendants was reversed by the Court of Civil Appeals on appeal by defendant named and judgment rendered in his favor (163 S. W. 140), and plaintiff brings error. Judgment of Court of Civil Appeals reversed, and cause remanded for new trial.

Lattimore, Bouldin & Lattimore, of Ft. Worth, for plaintiff in error.

J. C. Terrell and A. B. Curtis, both of Ft. Worth, for defendants in error.

SONFIELD, P. J. Plaintiff, Louisa C. Helmer, instituted this suit against Roy Neblett, O. D. Neff, Mrs. O. H. Marrett, and J. F. Yates to recover the title and possession of a tract of land in the city of Ft. Worth and to declare null and void deeds executed by plaintiff to C. D. Neff, by C. D. Neff to Mrs. C. H. Marrett, and by Mrs. Marrett to J. F. Yates, respectively, conveying the property. Plaintiff alleged a conspiracy on the part of the defendants to defraud her; that she was induced to part with her property by fraudulent representations, threats, and force made and used by defendants.

The case was submitted to the jury on special issues, and upon its findings judgment was rendered for the plaintiff against all of the defendants. Defendant Yates alone appealed. On appeal the Court of Civil Appeals reversed the judgment of the district court and rendered judgment in favor of defendant. Helmer v. Neff, 163 S. W. 140.

The jury in response to special issues found that defendants Neff, Neblett, and Mrs. Marrett, conspiring together, made fraudulent representations and used force and threats to induce plaintiff to part with title to her

property; and that the defendant Yates personally or through his agent, Webb Rose, at the time of the purchase of the property by Yates, knew of said fraudulent representations, and of the force and threats used upon the plaintiff.

The Court of Civil Appeals sustained defendant's assignment of error, to the effect that the court erred in refusing to render judgment for defendant upon his motion, notwithstanding the verdict, because, the undisputed evidence established, that before defendant purchased the property he made due inquiry of plaintiff as to all objections which she might have to his purchase of the property from Mrs. Marrett; that he refused to purchase same until plaintiff was satisfied; that plaintiff subsequently gave her consent, and upon such consent defendant purchased the property.

The court held that, defendant being chargeable with notice of some vice affecting Mrs. Marrett's title, the law imposed upon him the duty of making proper inquiry to ascertain the facts, and that he completely discharged this duty by having his agent and his attorney make inquiry of the plaintiff if his purchase of the property would be agreeable to her; that the law imposed upon the plaintiff the duty, upon such inquiry being made of her, to interpose then and there any valid objections she might have to the sale; that failing to point out her objections, if any, she could not afterwards be heard to complain if defendant, upon the faith of her silence, purchased the property, paying a valuable consideration therefor.

[1] It is definitely settled that the judgment of the trial court must be entered in conformity with the verdict, whether the verdict be correct or not; the court under the statute being without authority to enter judgment non obstante veredicto. *Houston & Texas Ry. Co. v. Strycharski*, 92 Tex. 1, 37 S. W. 415; *Henne & Meyer v. Moultrie*, 97 Tex. 216, 77 S. W. 607. This rule is applicable alike to general and special verdicts. The facts held by the court to create an estoppel were not found by the jury. The submission of the issue of estoppel was requested by defendant and refused. If it be conceded that under the facts the court should have peremptorily instructed the jury to find for defendant, this was not done. Having submitted the case to the jury, the court was without authority to render judgment for defendant, notwithstanding the verdict; the limit of the power of the court under such circumstances being to set aside the verdict and grant a new trial. *Article 1990, R. S. 1911*; *Fant v. Sullivan*, 152 S. W. 515.

[2] It is equally well established that the Court of Civil Appeals, upon reversing the judgment of the trial court, rendered upon a verdict, may enter a final judgment, when it appears from the evidence that one of the par-

ties, as a matter of law is entitled to such judgment. This is true only when the evidence is of such conclusive nature that the trial court, in the performance of its duty, should have directed a verdict for such party. *Henne & Meyer v. Moultrie*, supra.

Upon a careful consideration of the record, we are convinced that the Court of Civil Appeals erred in rendering judgment herein for defendant. In view of a remanding of the cause for a new trial, we shall refrain from setting out the evidence in detail and commenting thereon.

[3] The undisputed evidence establishes that defendant Yates, prior to the consummation of his purchase of the property, sent his agent, Rose, and his attorney to ascertain from plaintiff if she had signed a certain instrument exhibited to her, and if she was fully satisfied with the deal involving the sale of the property. The interview took place at the home of Mrs. Marrett, one of the defendants. In that interview, plaintiff was informed that defendant intended to purchase the property if she was fully satisfied. She referred her questioners to her son, who had returned home on a visit after the sale of the property by plaintiff to Neff. There is evidence, not undisputed however, that the son expressed himself as satisfied. Plaintiff, herself, expressed neither satisfaction nor dissatisfaction. There is evidence that, immediately after this interview, the son talked to defendant Yates over the telephone, advising him that plaintiff was not at all satisfied with the transaction and warning him against making the purchase.

Plaintiff is a widow, at the date of the trial 68 years of age, and in poor condition of health. With reference to the interview, she testified that when the agent and attorney of defendant entered the house she thought they had come to arrest her; she was very much frightened, and, after referring them to her son, sat at a distance from them weeping. Under the findings of the jury, force and threats had been used and false representations made to induce plaintiff to part with her property, and defendant Yates, personally or through his agent, had knowledge of the misrepresentations, force, and threats so made and used by the other defendants. The Court of Civil Appeals based its finding of an estoppel upon plaintiff's silence at this interview. We therefore leave out of consideration the alleged phone conversation between plaintiff's son and the defendant. Considering plaintiff's age, her belief that her arrest was intended, her condition during the interview, and having in view the character of the negotiations with reference to the sale of her property prior to the interview, it cannot be held, as a matter of law, that her silence estopped her as against defendant, who, under the findings of the jury, had knowledge

of the coercive methods adopted by the other defendants in their dealings with plaintiff.

We are of opinion that the evidence was not of such conclusive character as to authorize the trial court to peremptorily instruct the jury in favor of defendant, and consequently did not warrant the Court of Civil Appeals in rendering judgment for the defendant, and that the judgment of the Court of Civil Appeals should be reversed and the cause remanded for a new trial.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

### HARTFORD FIRE INS. CO. et al. v. WALKER. (No. 28-2566.)

(Commission of Appeals of Texas, Section B. April 2, 1919.)

#### 1. INSURANCE @—335(2)—FIRE INSURANCE—IRON-SAFE CLAUSE—INVENTORY—SUFFICIENCY.

An inventory stating neither the value nor the grade of the grain on hand, but giving only the quantity, held not a substantial compliance with the portion of the iron-safe clause requiring taking inventory, since by it the value of the stock insured could not be ascertained.

#### 2. INSURANCE @—335(2)—FIRE INSURANCE—IRON-SAFE CLAUSE—TAKING OF INVENTORY WITHIN TWELVE MONTHS—NEW BUSINESS.

The proposition that, where a new business is begun within twelve months from the date of the fire insurance policy with an entirely new stock, the original invoices preserved in such form as otherwise to comply with the iron-safe clause constitute a sufficient inventory, is without application, where the business is a continuation of an old business at a new place.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Suits by J. L. Walker against the Hartford Fire Insurance Company and against the Equitable Fire & Marine Insurance Company, respectively. From a judgment of the Court of Civil Appeals (153 S. W. 398), affirming a judgment of the trial court in favor of the plaintiff, the defendants bring error. Judgment of the Court of Civil Appeals reversed, and judgment rendered.

Wm. Thompson, of Dallas, and Jno. S. Patterson, of Austin, for plaintiffs in error. Capps, Cantey, Hanger & Short and D. B. Trammell, all of Ft. Worth, for defendant in error.

MCCLENDON, J. The plaintiff, J. L. Walker, instituted two suits in the district court of Tarrant county, one against the

Hartford Fire Insurance Company, and the other against the Equitable Fire & Marine Insurance Company, upon policies issued by said companies under dates of August 3 and August 5, 1908, respectively, insuring plaintiff against loss by fire to a stock of grain situated in plaintiff's warehouse in Ft. Worth. The fire occurred October 3, 1908. The Court of Civil Appeals, Sixth District, affirmed a judgment of the trial court in favor of plaintiff. 153 S. W. 398.

[1] In the view we take of the case, the controlling question is whether there has been a substantial compliance with that portion of the "iron-safe clause" in these policies regarding the taking of an inventory, reading as follows:

"The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy and is on hand at the date of this policy, one shall be taken complete in detail within thirty days after the date of this policy, or this entire policy shall be null and void from such date."

The only evidence of any inventory taken within 12 months prior to the date of these policies was what purported to be an inventory taken on May 18, 1908, found on the fly-leaf of one of plaintiff's ledgers, reading as follows:

On hand in warehouse May 18, 1908:

238 100# sax bran  
1445 160# sax W. oats  
194 160# sax R. oats  
2693 empty oat sax  
18681 empty corn sacks  
124# twine

No corn  
No wheat  
No chops

We have reached the conclusion that this inventory does not meet the substantial requirements of the policies. Neither the value nor the grade of the commodities is given. The evidence shows that plaintiff handled both red and white oats; that oats were sold in different grades as follows: No. 1, No. 2, No. 3, No. 4, no grade, and rejected grade; that the price of each grade differs. What constitutes a substantial compliance with the inventory clause of a fire insurance policy has been the subject of frequent adjudication, calling forth various definitions of "inventory." But we believe that whatever view may be taken of the question, and conceding that only a substantial compliance with the policy is required under our decisions, the inventory should present an itemized list of the commodities on hand at the time the inventory is taken, from which the value of the stock can reasonably be ascertained. It is no doubt true that as to a stock consisting of staple articles, such as oats, wheat, corn, and bran, the market value of which can be de-

terminated from day to day and which from day to day varies upon the market, the grade and quantity of these commodities would furnish all the data necessary to determine the value at a given date. However that may be, in the present instance there is nothing from which the grade can be determined. The quantity only is given. And in the absence of both value and grade, we believe there is not even a substantial compliance with the requirement as to inventory.

[2] It is contended, however, that there has been a substantial compliance in this regard, in that the plaintiff had been in business at the place covered by the policy less than 12 months and had preserved and presented to the insurance company after the fire all his inventories. There is support for the proposition that where a new business is begun within 12 months from the date of the policy, with an entirely new stock of goods, the original invoices covering the first goods placed in the business, and preserved in such form as otherwise to comply with the requirements of the iron-safe clause, would substantially meet the requirements of an inventory. The authorities upon this question are not uniform. The leading case upholding the doctrine appears to be *Ruffner Bros. v. Ins. Co.*, 59 W. Va. 432, 53 S. E. 943, 115 Am. St. Rep. 924, 8 Ann. Cas. 806. To the same effect are *Insurance Co. v. Forlines*, 94 Ark. 227, 126 S. W. 719, and *Insurance Co. v. Hardin* (Tex. Civ. App.) 151 S. W. 1152. Contra: *Insurance Co. v. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216; *Day v. Ins. Co.*, 177 Ala. 600, 50 So. 549, 40 L. R. A. (N. S.) 652. In this same connection, see *Joyce on Insurance* (2d. Ed.) vol. 3, § 2063, and *Ruling Case Law*, vol. 14, "Insurance," § 324.

After carefully examining the record, however, we have concluded that this question is not here involved, as the facts do not bring this case within the reasoning of the rule contended for. The evidence shows that the plaintiff began business in the warehouse in question about September 20, 1907; not, however, with an entirely new stock of goods covered by original invoices, but by moving into the building part of the stock from another business conducted by plaintiff. It appears that the plaintiff kept a set of books which purported to show all commodities coming into his warehouse with their grade, quantity, and price, all commodities purchased and sold direct from the cars, and all sales whether from the warehouse or otherwise. These books are not before us, but from the testimony we gather that they cover not only the period of plaintiff's occupancy of the warehouse mentioned in the policy, but some of the items date back several months prior to the time plaintiff began business in said warehouse. The invoices were not kept in such a way as to amount to a substantial

compliance with the policy, regarding the taking of an inventory, nor can we say that the data which an inventory would furnish is presented by the books. Had the plaintiff, upon moving to the warehouse in question, opened up a new set of books which showed all the commodities moved into the warehouse on the date he began business there, there would be much force in the contention that this would meet the substantial requirements of the policy. But where, as in this case, the books appear to be only a continuation of the old business at the new place, we believe there cannot be said to be even a substantial compliance with the policy.

We therefore conclude that the judgment of the Court of Civil Appeals should be reversed and judgment here rendered in favor of both the insurance companies upon the policies, and that Walker should recover \$49 against the Equitable Fire & Marine Insurance Company, and \$45 against the Hartford Fire Insurance Company, being the amounts of premiums upon the respective policies which were tendered to plaintiff in the pleadings in the trial court; all costs of all courts to be taxed against Walker.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

# WALKER v. NATIONAL UNION FIRE INS. CO. (No. 3-2547.)

(Commission of Appeals of Texas, Section B. April 2, 1919.)

## TENDER ~~←~~19(1)—ERROR—RIGHT TO MONEY TENDERED.

In an action upon a policy for loss, where judgment was rendered in favor of the insurer declaring the policy void for breach of an iron-safe clause, it was error not to render judgment for plaintiff for the amount of premium paid and tendered to plaintiff by insurer's answer.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by J. L. Walker against the National Union Fire Insurance Company. Judgment for plaintiff, and defendant brought error to the Court of Civil Appeals, which reversed the judgment of the district court and rendered judgment for defendant, and the plaintiff brings error. Judgment of the Court of Civil Appeals (158 S. W. 1095), in so far as plaintiff is denied recovery upon the policy of insurance, affirmed, and judgment rendered for plaintiff and against defendant for the amount of premium paid.

Cappa, Cantey, Hanger & Short and D. B. Trammell, all of Ft. Worth, for plaintiff in error.

Wm. Thompson, of Dallas, for defendant in error.

McLENDON, J. J. L. Walker, as plaintiff, brought this suit against the National Union Fire Insurance Company to recover upon a policy of fire insurance issued by defendant company on October 21, 1907. A judgment of the trial court in favor of plaintiff was reversed and rendered by the Court of Civil Appeals, Second District. 153 S. W. 1095.

The policy sued upon covered the same property and the damages claimed were occasioned by the same fire involved in the case of Hartford Fire Insurance Co. v. J. L. Walker, 210 S. W. 682, this day decided by this court, and the conclusions reached in that case are controlling in this case. In reversing the judgment of the trial court and rendering judgment for the insurance company, the Court of Civil Appeals declined to render judgment in favor of plaintiff for the amount plaintiff had paid as premium on the policy, which amount the defendant in its pleadings in the trial court tendered to the plaintiff. This action of the Court of Civil Appeals, we think, was error.

We therefore conclude that the judgment of the Court of Civil Appeals in so far as plaintiff is denied recovery upon the policy should be affirmed, and that judgment should be here rendered in favor of plaintiff Walker against the defendant insurance company for the sum of \$42, the amount of such premium; costs of the Supreme Court to be taxed against the insurance company, all other costs against Walker.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

CHICAGO, R. I. & G. RY. CO. v. SEARS.  
(No. 11-2576.)

(Commission of Appeals of Texas, Section A.  
April 2, 1919.)

**1. CARRIERS ⇐236(1) — DUTY TO RECEIVE MENTALLY INCOMPETENT PASSENGER.**

A carrier is not required to accept as a passenger one without an attendant who is mentally incapable of caring for himself.

**2. CARRIERS ⇐281 — MENTALLY INCOMPETENT PASSENGER—DUTY TOWARD.**

Where passenger without attendant is mentally incapable of taking care of himself, carrier with knowledge thereof is required to exercise such care in addition to that given the

ordinary passenger as may be reasonably necessary for his safety, considering the conduct and disposition of mind manifested by the passenger.

**3. CARRIERS ⇐281—MENTALLY INCOMPETENT PASSENGER—DUTY TOWARD.**

Where passenger's mental disability is not observable, and carrier has no knowledge thereof, no added duty of caring for such passenger is imposed upon carrier.

**4. CARRIERS ⇐281 — INCOMPETENT PASSENGER—NOTICE TO TRAINMEN.**

Where the only information possessed by trainmen of passenger's abnormal mental condition was that he was laboring under a delusion that some one wanted to kill or rob him, and passenger was otherwise apparently sane, there being nothing in his manner to indicate that he was dangerous to other passengers or that he was likely to injure himself, trainmen could not anticipate that he would leave train while it was in motion or that he would thereafter voluntarily injure himself.

**5. NEGLIGENCE ⇐59—"ACTIONABLE NEGLIGENCE."**

To constitute "actionable negligence," the injury must be a natural and probable consequence of the negligence complained of, and must be such that it should have been foreseen in the light of attending circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actionable Negligence.]

**6. CARRIERS ⇐247(1) — PASSENGER OR TRESPASSER.**

Where passenger jumped off train during afternoon of one day and was killed by train during following day while on track, he was not a passenger at the time of his injury, but merely a trespasser.

**7. CARRIERS ⇐283(2)—INCOMPETENT PASSENGER—DUTY OF EMPLOYEES—SCOPE OF EMPLOYMENT.**

Negligence of railroad for failure to care for mentally incompetent passenger could not be predicated upon failure of station agent, telegraph operator, and section hands, who had knowledge of such condition, to protect passenger from injury or report his condition to the company, the knowledge of such employees not being imputable to company, inasmuch as it was not their duty to make such report to the company.

**8. PRINCIPAL AND AGENT ⇐178(1)—IMPUTED KNOWLEDGE—SCOPE OF AUTHORITY.**

The knowledge of an agent, to be imputed to principal, must affect some matter within the scope of the agent's authority.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by William Sears, by next friend, against the Chicago, Rock Island & Gulf Railway Company. Judgment for plaintiff affirmed by Court of Civil Appeals (155 S. W. 1008), and defendant brings error. Re-

versed, and judgment rendered for defendant.

Lassiter, Harrison & Rowland, of Ft. Worth, and Bennett Hill and Dabney & Townsend, all of Dallas, for plaintiff in error.

H. W. Summers and Leake & Henry, all of Dallas, for defendant in error.

**STRONG, J.** This is an action by William Sears, by next friend, against the Chicago, Rock Island & Gulf Railway Company to recover damages for personal injuries alleged to have been received through the negligence of defendant company. The case has been twice tried. The first trial resulted in a judgment in favor of plaintiff, which was reversed by the Court of Civil Appeals. 130 S. W. 1019. Upon the second trial plaintiff again recovered judgment, which was affirmed. 155 S. W. 1003.

The facts upon which the recovery is based are thus stated by the Court of Civil Appeals in their findings:

"Wm. Sears, then 42 years of age, apparently sound mentally, left his home in Dallas to make a visit of a few days in Lawton, Okl. While there he showed signs of mental unsoundness, and it became clear to the gentleman whom he was visiting that his mind was unbalanced. Two days after the first appearance of this mental unsoundness, he bade his host farewell and went to the depot to take passage for Dallas, and after buying his ticket became possessed of the hallucination that some of the people on the platform wanted to rob him, and he determined to remain over until the following morning. At the time he left for Dallas, he appeared to be rational, and his conversation with his host and the members of the family was intelligent. He left the train at Chickasha, and went to the postmaster, telling him that he had come for protection, that he was afraid of being attacked and robbed, and tried to hire the postmaster to accompany him home for protection. The postmaster turned him over to the chief of police, L. D. Hopkins, who took care of him for about three hours until train time, at which time he took him to the depot and put him on the train. Hopkins testified that when he put him on the train he told the porter or brakeman to take care of him, and that the porter or brakeman said he would, and that after the train had started, and by the time it had run perhaps the length of the platform, he jumped off the train. Another train was due in a few minutes, so they waited until that train came in and Hopkins put him on this second train and says he told the porter to take care of him. At Ringgold he jumped off the train about 100 yards south of the depot about 4 o'clock in the afternoon. There is no evidence that any agent of the defendant knew that Sears got off the train at Ringgold, or that any agent at Ringgold knew that he was, or had been, a passenger on defendant's train; but a section man saw Sears jump off the train at Ringgold, and afterwards saw him acting strangely. He spent the night at Ringgold, being a part of the time in the depot, and indicated to observers that he was

mentally unbalanced during this time. The next morning he went about 2 miles north of Ringgold to where the section gang was at work, and talked to them for a while, and while near them a passenger train approached, which struck him, breaking his leg and inflicting a wound on his head. Sears is now permanently and hopelessly insane, and the testimony is conflicting as to whether or not there was any hope for an improvement in his mental condition prior to the accident. The defendant's testimony was to the effect that no charge was given to any trainman with reference to the plaintiff's condition, and that none of the trainmen knew anything about his being mentally unbalanced. Sears was in a badly insane condition during the time he was at Chickasha, and this fact was noticeable to any one observing him. The representatives of the railway company, at Ringgold, including the station agent, telegraph operator, and three section foremen, knew that Sears was insane and unable to take care of himself. The helpless condition of Sears was observed by all persons with whom he came in contact. On the train between Chickasha and Ringgold, and while Sears was at Ringgold, wandering about the railroad tracks, up to the time he was hurt, nothing was done in any way to protect him from injury, although trains were constantly passing and repassing on the line of defendant through the Ringgold station."

In addition to the foregoing facts, we think it conclusively appears from the record that plaintiff voluntarily placed himself on the track in front of the moving train for the purpose of permitting it to strike him.

The plaintiff in his petition alleged the facts substantially in accordance with the foregoing findings of the Court of Civil Appeals. The grounds of negligence relied upon were: First, that the servants in charge of the train, although being informed of plaintiff's mental condition at the time he was accepted as a passenger, negligently permitted him to leave the train before reaching his destination; and, second, that while at Ringgold plaintiff's mental condition was apparent to the representatives and agents of defendant at that place, and they negligently failed to protect him from injury.

[1-3] The principal questions presented by the record are whether, under the evidence, defendant company was guilty of negligence in failing to prevent plaintiff from leaving the train before he reached his destination, and, if so, was such negligence the proximate cause of his injuries. The answers to these questions depend upon the character of the plaintiff's mental derangement and the knowledge thereof possessed by defendant's servants in charge of the train. A carrier is not required to accept as a passenger one without an attendant who is mentally incapable of caring for himself, but, if such person be accepted as a passenger with knowledge of his condition, or if such knowledge be acquired after he becomes a passenger, the carrier owes him a duty to

exercise such care as may be reasonably necessary for his safety. The carrier must bestow upon a passenger in such condition any special care and attention in addition to that given the ordinary passenger which reasonable prudence and foresight demand for his safety, considering the conduct and disposition of mind manifested by the passenger or any conduct or disposition which might be reasonably anticipated from one in his mental condition. The additional care in such case, however, is measured by the knowledge which the carrier has, or should obtain by observation, of the passenger's incapacitated condition. If the carrier has no notice of such condition, and it is not observable, no added duty is imposed.

[4] Viewing the testimony in the most favorable light for plaintiff, the only information to servants in charge of the train had as to Sears' mental condition was that he was laboring under the delusion that some one wanted to kill or rob him. Otherwise he was apparently sane. There was nothing in his manner to indicate that he was dangerous to other passengers or that he was likely to injure himself. He seemed to be rational and conscious of the nature of his acts and of what was taking place. He knew where he lived and expressed a keen desire to be carried home. There is evidence that the porter knew that he left the train the previous day, before reaching his destination, but it is not shown that he evidenced any desire on that occasion to leave the train while in motion. Prior to the time of his injury he had given no indication of a desire to voluntarily injure himself; on the other hand, his mental attitude was that of a person seeking to avoid injury. Under such circumstances, in our opinion, the servants in charge of the train could not anticipate either that Sears would leave the train while it was in motion or that he would thereafter voluntarily injure himself.

[5] To constitute actionable negligence, the injury must be a natural and probable consequence of the negligence complained of, and must be such that it should have been foreseen in the light of the attending circumstances. *Railway v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Scheffer v. Railway*, 105 U. S. 249, 26 L. Ed. 1070; *Railway v. Bigham*, 90 Tex. 223, 38 S. W. 162; *Seale v. Railway*, 65 Tex. 274, 57 Am. Rep. 602; *Railway v. Adams* (Civ. App.) 163 S. W. 1029.

In the *Adams Case*, supra, in which a writ of error was denied by the Supreme Court, a passenger, while suffering from the delusion that there were robbers on the train, jumped from the train while in motion and was injured. The Court of Civil Appeals for the Fifth District held the carrier not

liable for failure to restrain or guard the passenger, saying:

"We think it may be safely said that, although a passenger may be suffering with the delusion, as was appellee, that there were robbers on the train, yet, if there is nothing in her actions to indicate that she is dangerous or obnoxious to other passengers, or liable to do violence to herself, a carrier cannot be held liable for failure to restrain or guard such passenger."

The only conclusion to be drawn from the evidence is that Sears voluntarily placed himself in front of the moving train. There is no evidence tending to show that he was injured by reason of being permitted to leave the train at a dangerous place or under dangerous conditions. The only danger to which he was subjected was the danger of voluntarily injuring himself. He probably would have been subjected to this danger if he had been carried to his destination, or if he had never taken passage on the train. His own voluntary act, which could not have been foreseen "in the light of the attending circumstances," was the proximate cause of his injury.

[6-8] The remaining ground of negligence relied upon to sustain the judgment is that the employees of defendant at Ringgold, knowing plaintiff's mental condition, failed to protect him from injury. Having left the train voluntarily, under the circumstances shown by the evidence, plaintiff was not a passenger at the time of his injury. He was a mere trespasser. It is not contended that the employees operating the train that injured plaintiff knew his mental condition. The station agent, telegraph operator, and section hands at Ringgold knew his condition, but it was not in the line of their duty to either protect plaintiff from injury or to report his condition to the company. Negligence on the part of defendant could not therefore be predicated upon their failure to do so. It is well established that the knowledge of an agent, to be imputed to the company, must affect some matter within the scope of the agent's authority. It must be a part of the agent's duty either to act upon the information himself, or to report it to others for action. *Korn v. Railway Co.*, 125 Fed. 897, 62 C. C. A. 417, 63 L. R. A. 872.

We are of opinion that the evidence fails to show actionable negligence. As the case seems to have been fully developed upon the trial, we recommend that the judgment of the Court of Civil Appeals and that of the trial court be reversed, and judgment rendered for plaintiff in error.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.



**LE BLANC et al. v. JACKSON et al.**  
(No. 42-2698.)

(Commission of Appeals of Texas, Section B.  
April 2, 1919.)

**1. DEEDS — 207—EVIDENCE—EXECUTION.**

In a suit between heirs involving title to lands, evidence held insufficient to show that a conveyance was made by either of two of deceased's sons to a third son.

**2. TENANCY IN COMMON — 15(1)—ADVERSE POSSESSION BY COTENANT.**

The existence of the relationship of tenants in common robs the possession and use of the property by one of them of all probative force as against others, and, the possession being lawful, no inference of adverse claim arises therefrom.

**3. TENANCY IN COMMON — 15(10)—ADVERSE POSSESSION—NOTICE TO OTHER JOINT OWNERS—EVIDENCE.**

In an action involving the title to land, evidence held insufficient to show that the possession of any part of the land by an heir and tenant in common was ever adverse to his brothers, also tenants in common.

**4. TENANCY IN COMMON — 15(10)—ADVERSE POSSESSION—NOTICE—PRESUMPTION.**

Neither general reputation nor rumor have any weight in establishing a deed from certain tenants in common to another, unless of such general notoriety as to raise a presumption that the parties sought to be affected knew thereof; and, where such parties were in comfortable circumstances and the supposed grantee was poor, his possession must be attributed to indulgence rather than presumption of the deed.

**5. DEEDS — 81—DEEDS SIGNED BY DECEASED GRANTOR'S HEIRS.**

Where a deed executed and delivered after death of the person named in the granting clause as one of the grantors was signed and acknowledged by persons shown by extrinsic evidence to be heirs, but the deed did not identify the parties as such, it did not pass the interest of such heirs.

**6. GUARDIAN AND WARD — 111—DEED—EXECUTION BY CURATOR—VALIDITY.**

A deed signed by grantor, per another as curator, reciting that grantor by said curator appeared before the notary and acknowledged its execution, was executed by her curator, and in the absence of evidence of his authority no title passed.

**7. TRESPASS — TRY TITLE — 41(2)—EVIDENCE—DEEDS—COMMON SOURCE OF TITLE.**

Rev. St. 1911, art. 7749, provides that in trespass to try title plaintiff may offer in evidence deeds for purpose of showing common source of title only, and that such deeds shall not be evidence of title in defendant unless offered by him, so that plaintiffs, having shown an undivided interest in the land, however small, were entitled to recover all of the land as against the defendant relying on evidence of deeds merely showing common source.

**8. HUSBAND AND WIFE — 274(4)—COMMUNITY PROPERTY—INTEREST OF HEIRS OF WIFE—PRESUMPTION.**

Where plaintiffs sought an interest in land as community property of their mother and stepfather, the burden is upon them to show the community interest and its extent, where being acquired by deed after the death of the wife, it was presumptively the separate property of the husband, and plaintiffs asserting an equitable title were bound to show that purchaser had prior notice of their equity; mere knowledge of the stepfather's marriage to plaintiffs' mother being insufficient.

Error to Court of Civil Appeals of First Supreme Judicial District.

Suit by Ellen Craigen and others against R. S. Jackson for the recovery of land alleged to be community property of plaintiffs' mother and stepfather. Later the heirs of Azema Broussard, deceased, of Emile Broussard, deceased, and of Theophile Broussard, deceased, respectively, intervened, claiming title to respective portions of said land inherited by the several ancestors from P. O. Broussard and interveners were made defendants by plaintiffs' amended petition. Judgment was rendered in favor of the plaintiffs Ellen Craigen and Odella Carouthers against all the other parties to the suit for one-eighth part of the two-eighths' interest of said land inherited by Theophile Broussard and Emile Broussard and for a small interest of a portion of the land inherited by Victorie B. Hebert, and that the intervenor Alodie Broussard Le Blanc take nothing, that the heirs of Azema Broussard recover one third of one-eighth interest in said land, and that the heirs at law of Emile Broussard and Theophile Broussard take nothing, and that the heirs at law of Emerente Broussard recover in an undivided one-eighth interest in the land and in favor of the defendant R. S. Jackson for the remainder of said land, which judgment was affirmed by the Court of Civil Appeals (161 S. W. 60), except as to the judgment against the heirs of Azema Broussard, which was reversed and judgment rendered in their favor, and the plaintiffs and the defendants R. S. Jackson, the heirs of Emile and of Theophile Broussard, bring error. Affirmed in part, reversed in part, and remanded.

Blain & Howth, of Beaumont, for plaintiffs in error Ellen Craigen and others.

Thos. J. Baten and E. E. Easterling, both of Beaumont, for other plaintiffs in error.

Lipscomb & Lipscomb, of Beaumont, for defendants in error.

**MONTGOMERY, P. J.** This suit involves the title to 666 acres of land, a part of the W. H. Smith league in Jefferson county. All parties to this suit claim through P. O. Broussard as a common source of title. P.

O. Broussard owned the land at the time of his death. He died about the year 1876, leaving surviving him three sons, Emile Broussard, Theophile Broussard, and Derneville Broussard, and four daughters, Delzende Broussard, Ezilda Broussard, Victorie Broussard, and Emerente Broussard. He also left surviving him four grandchildren, the offspring of his deceased daughter, Azema Broussard.

P. O. Broussard died intestate, and his lands passed according to law of descent in Texas. It appears that Derneville Broussard, in addition to the one-eighth inherited by him, acquired by deed from his sister, Delzende Broussard her one-eighth, and from his sister Ezilda Broussard her one-eighth, and also acquired by deed one thirty-second undivided interest from one of the four heirs of his deceased sister, Azema Broussard.

Derneville Broussard prior to his death joined by all of his children sold all of their interest in the land in controversy to R. S. Jackson.

Derneville Broussard married a widow having two children by a former husband. These children are Ellen Craigen and Odella Carouthers, whose husband is Edgar Carouthers. These stepchildren did not join in the conveyance to Jackson.

This suit was originally brought by Ellen Craigen and Odella Carouthers, joined by her husband, against R. S. Jackson, to recover the land in controversy, they claiming that the land was community property of their mother and Derneville Broussard, and that they were entitled to their proportionate part of their mother's community interest. The petition, however, does not disclose what interest they claim, the suit being for the entire tract.

Afterwards the heirs of Azema Broussard, deceased, the heirs of Emile Broussard, deceased, and the heirs of Theophile Broussard, deceased, intervened, claiming title to the respective portions of said land inherited by their several ancestors from P. O. Broussard.

Ellen Craigen and Odella Carouthers, joined by her husband, Edgar Carouthers, amended their petition, and made all of the interveners parties defendant, and the several interveners by amendment sought a judgment against the plaintiffs and the defendant Jackson for the title and possession of the land.

The foregoing is sufficient as to the general nature of the suit. The case was tried by the court, a jury being waived, and the court rendered judgment in favor of the plaintiffs Ellen Craigen and Odella Carouthers against all the other parties to the suit for one-eighth part of the two-eighths interest in said land inherited by Theophile Broussard and Emile Broussard, and for a small interest in that portion of said land inherited by

Victorie B. Hebert. (As to this interest of Victorie Hebert there is no complaint that the judgment was improper.) The court further rendered judgment that the intervener Alodie Broussard Le Blanc take nothing; that the heirs of Azema Broussard recover one-third of one-eighth interest in said land; that the heirs at law of Emile Broussard and Theophile Broussard take nothing, and that the heirs at law of Emerente Broussard recover an undivided one-eighth interest in the land, and as to the remainder of said land judgment was rendered in favor of the defendant Jackson.

Jackson attempted to appeal from the judgment of the trial court, but his appeal was dismissed, and no complaint is made of this action of the Court of Civil Appeals.

The Court of Civil Appeals (161 S. W. 60) affirmed the judgment of the trial court except as to the judgment rendered against the heirs of Azema Broussard, the court holding that the interest of Celema Broussard, one of said heirs, did not pass by a certain deed under which it was claimed her interest was conveyed, and that the heirs of Azema Broussard were entitled to recover her interest; the said Celema Broussard being dead.

The court granted the application of R. S. Jackson, of Ellen Craigen, and Odella Carouthers and of the heirs of Emile Broussard and Theophile Broussard for a writ of error, and the whole case is now before this court. All other necessary facts will be stated in the opinion.

### Opinion.

The facts in this case are very complicated, but the questions involved are:

First. Is the evidence sufficient to authorize the finding by the trial court that Emile Broussard and Theophile Broussard conveyed their interest in the land to Derneville Broussard?

Second. Did the deed signed by the heirs of Emerente Broussard, but in which their names did not appear as grantors, pass their interest in the land?

Third. Did the purported deed of Celema Broussard pass her interest in the land?

Fourth. Was the land purchased by Derneville Broussard from his sisters Delzende Broussard and Ezilda Broussard and from the heirs of his sister Azema the community property of Derneville Broussard and his wife, or was it his separate property?

[1] There was no conveyance produced on the trial from either Emile Broussard or Theophile Broussard to Derneville Broussard or to any other person, but certain evidence was offered which the court found sufficient to authorize the presumption that such deeds had in fact been executed. The sufficiency of this evidence is the first, and perhaps the most important, question in the case.

We have carefully considered the entire record, and from the findings of fact made by the trial court and the Court of Civil Appeals, and from an independent examination of the statement of facts we will undertake to state the facts which we think can be properly considered in determining this question.

P. O. Broussard died about the year 1877 in the state of Louisiana, where he then resided. He owned at the time of his death a considerable estate in land and cattle and other property in that state situated in or about Johnson's bayou in the southwest corner of that state. He died intestate. He left surviving him seven children whose names we have already stated and the descendants of a daughter, as heretofore stated. At the time of his death he owned two tracts of land, a part of the Smith League in Jefferson county containing approximately 1,000 acres. One of these tracts is the land in controversy.

Theophile Broussard died in December, 1881, leaving as heirs some of the interveners in this case, and Emile Broussard died in 1904, leaving heirs who are also interveners.

At the time of P. O. Broussard's death he was the owner of some cattle running on the range in Jefferson county, Tex. Derneville Broussard at the time of his father's death lived in Texas, and resided on the 666-acre tract of land in controversy, and had resided on said land for several years previous to his father's death. He continued to reside on the land until the year 1907, and had on the land a small house and about 20 acres fenced and under cultivation. The remainder of the land was open prairie and was not inclosed. After the death of P. O. Broussard his son, Emile Broussard, principally looked after the business of the estate in Jefferson county, Tex. Under his direction J. Burrell, an old citizen of the county, for several years after the death of P. O. Broussard and up to the year 1881, rendered the land for taxation in the name of P. O. Broussard, and paid the taxes on the land out of the sale of stock belonging to the estate of P. O. Broussard, rendering an account of the balance of said sales to Emile Broussard. About the year 1891 Emile Broussard and Theophile Broussard were together in Jefferson county, Tex., and in what is known as the Hamshire settlement, where Derneville Broussard, J. Burrell, and L. Hamshire lived. Some time about this period Theophile Broussard tried to sell his interest in his father's estate in Jefferson county to L. Hamshire, who refused to buy. Some time about the year 1881 there was some kind of adjustment or settlement between the brothers Theophile Broussard, Emile Broussard, and Derneville Broussard as to some part of the estate of their father in Texas. The evidence leaves it in doubt as to exactly what matters were settled, but is sufficient to show that at that

time some disposition or division was made of the stock and personal property. There is no evidence that any division was made of the land, or that any settlement was made with reference to the land. The evidence does show that the estate of P. O. Broussard in Louisiana was administered on, and that it was settled and divided among the heirs, and that Derneville Broussard got his portion of his father's estate in Louisiana. The administration in Louisiana seems, so far as the evidence shows, to have taken no notice of the property situated in Texas.

That after about 1881 Emile Broussard ceased to look after the estate in Texas, and that about the year 1883 Derneville Broussard instructed J. Burrell to render the land for taxes in his name, and that the land was so rendered for taxes in his name and the taxes paid by him, so far as they were paid at all, from the year 1883 to the year 1907; after the lands were rendered in the name of Derneville Broussard, J. Burrell, under the instruction of Derneville Broussard, continued to pay taxes on the lands out of the proceeds from the sale of the cattle on the range, which cattle were then claimed by D. Broussard, and that he accounted to D. Broussard for the balance of the proceeds of such cattle, and this course of dealing continued for many years. There was evidence that some time about the year 1881 there was a rumor in the neighborhood that Derneville Broussard had brought the interest of Theophile Broussard, and that he had also in some manner acquired the interest of Emile Broussard. The evidence shows that from about the year 1881 Emile Broussard did no act showing a claim of title or ownership to the land in Texas prior to his death, which occurred in the year 1903, and that his heirs had made no such claim until this suit was filed. Theophile Broussard died December 15, 1881, and the evidence fails to show that he had asserted title to the land at any time, except by offering to sell his interest, as above stated, and that his heirs after his death took no steps with reference to this land, nor made any active claim thereto until this suit was filed.

Derneville Broussard resided on the land in controversy with his wife until about the year 1893, his wife dying in that year. After her death he undertook to qualify as survivor in community of the estate of himself and his deceased wife, and caused to be prepared and signed an inventory, purporting to show the community property of himself and wife. This inventory, so far as material, was as follows:

"Inventory and appraisement of property, real and personal, belonging to D. Broussard and his deceased wife, Mary Broussard. Real estate, 125 acres of the W. H. Smith league valued at \$125.00."

This inventory was never approved or filed, but was found among the papers in the probate court, and was shown to have been signed by D. Broussard.

The evidence showed that Derneville Broussard was married some time prior to 1880, the exact date not shown. About the year 1893 or 1894, and evidently after the death of his wife, Derneville Broussard employed an attorney to make a search of the records of the county to ascertain if he could find of record any instrument from any of his brothers and sisters conveying a transfer of their shares in his father's estate to him. He stated that he had purchased some such interest. The search was made, and no such instruments were found registered in the county. The lower court finds that it was a part of the family history that Derneville Broussard had acquired some of the interest of his brothers or sisters in the early 80's but we find no satisfactory evidence of such fact in the record, there being nothing more than testimony that there were rumors to that effect. No statement by Emile Broussard or Theophile Broussard or any person claiming under them to that effect was shown to have been made, and there was no evidence that they or their heirs ever heard of any such history. On the contrary, some of the interveners testified that no such sale had occurred so far as they ever heard or knew.

The Court of Civil Appeals found that after the death of Theophile Broussard in 1881 and of Emile Broussard in 1903 none of their heirs ever asserted any claim or disputed the claim set up by Derneville Broussard. This is true with the qualification that there was no evidence that either Theophile Broussard or Emile Broussard or their heirs ever heard or knew that any such claim had been set up. One of the daughters of Derneville Broussard testified that her father had bought the interest of some of his brothers and sisters prior to her mother's death, but there was no testimony that he had bought the interest of either Emile or Theophile Broussard.

The evidence we think tends to show that the Broussard family in Louisiana were at least in reasonably good circumstances, and shows that the land in controversy in the year 1881 was worth only about 50 cents an acre. It further shows that Derneville Broussard had little or no property prior to his marriage, and that his wife had a few cattle, and that he during his father's lifetime had resided with his family upon the land in controversy, and that after his father's death he continued to reside thereon. No question arose as to the ownership of this land until after the death of Derneville Broussard and his two brothers, Emile and Theophile.

The evidence further shows that in the year 1894 Derneville Broussard went to one Russell, an attorney at Beaumont, and stated that the land (referring to the land in controversy) belonged to some of his kindred, but that he had seen the parties in Louisiana and had paid them for their interest. He then mentioned the parties whose interest he had acquired. He further stated that he had bought them out and paid them before that, and that he wanted to take a deed to Louisiana and get them to sign and acknowledge it. He gave the attorney the names of the parties to put in the deed, and stated that he had purchased the interest of the parties named by him. He directed the attorney to recite in the deed the consideration as \$50 paid to each of the grantors severally. This deed, which was obtained and appears in the record, was signed by his sisters Ezilda and Delzende Broussard and by various heirs of his deceased sisters, but the deed as prepared from the names furnished by him did not include either his brother Emile, he being then living, nor did it include the names of any of the heirs of his brother Theophile Broussard. Derneville Broussard at the time said deed was prepared, although he then knew that there was no deed of record from his brothers, did not claim to the attorney that he had acquired the interest of his brothers, nor did he at that time undertake to obtain a deed from his brother Emile and the heirs of Theophile, although he knew that no such conveyance was of record.

The evidence further shows that one of the sisters of Derneville Broussard about the year 1900 sold her interest in the land to one Gallier, and that he took possession of about 125 acres of the land and fenced it, and that his right to the land was recognized by Derneville Broussard. In the year 1907 Derneville Broussard, joined by all of his children, made a conveyance to the defendant R. S. Jackson of their interest in the land. This deed recited a consideration of \$1,332 cash, and in the granting clause purported to convey "all the interest of the grantors in these certain lands situated in Jefferson county, Texas, described in a deed from Ezilda Broussard and others to said Derneville Broussard recorded in vol. 11, page 510, of the deed records of Jefferson county, Texas, being part of the league of land granted to William H. Smith, and being 666 acres, more or less." The evidence tends to show that at the time of this sale the land was worth much more than the amount paid. The defendant R. S. Jackson, who purchased the land from Derneville Broussard, taking the deed above referred to in the year 1907, did not testify in person on the trial. It appears that his ex parte depositions had been taken and a portion of these depositions were introduced by the plaintiff. In that portion

of his ex parte deposition introduced he stated that "he had required no affidavits of heirship at the time of the purchase and that Derneville Broussard informed him that he had lived on the tract for several years." No explanation is furnished by the record as to why the defendant Jackson did not testify on the trial. He certainly knew whether or not Derneville Broussard when he executed the deed to him claimed to be the owner of the entire tract of land, or, if not, what interest he at that time claimed to own. We think this important in view of the fact that the price paid was inadequate if Derneville Broussard intended to convey to Jackson and Jackson intended to buy the entire tract of 666 acres.

From the facts above recited the trial court and the Court of Civil Appeals found that Emile and Theophile Broussard had about the year 1881 conveyed their interest in the land to Derneville.

[2] We have found no case in this state where the presumption of the execution of a deed from one tenant in common to another has been indulged. Doubtless a case might occur in which such presumption would be authorized. The existence of the relationship of tenants in common robs the possession and use of the property by one of them of all probative force as against the other joint owners. The possession is lawful, and from it alone no inference of adverse claim arises, and therefore no inference of title as against the other joint owners.

These principles have been announced in numerous cases in Texas where title was asserted by limitation by one tenant in common as against the other tenants in common, and it is equally applicable where the presumption of a deed is sought to be proved by such possession and use. The Supreme Court of West Virginia, in a case involving this question, said:

"There can be no adverse claim or title, unless there is actual ouster and notice or knowledge of hostile claim brought home to the other party. Mere silent possession by one, no matter how long continued, does not destroy the right of another, unless there be ouster, or adverse claim with notice to the other of adverse claim. *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102; *Cochran v. Cochran*, 55 W. Va. 178, 46 S. E. 924; *Cooley v. Porter*, 22 W. Va. 121; *Bogges v. Meredith*, 18 W. Va. 1.

"Where the possession of one is entirely consistent with title in another it cannot give rise to a presumption of a conveyance from the latter." 22 Am. & Eng. Encyc. of Law (2d Ed.) 1290.

"*Ricard v. Williams*, 7 Wheat. 59, 5 L. Ed. 598, says that this presumption can never arise 'where all the circumstances are perfectly consistent with the nonexistence of a grant.' As the possession of one joint tenant is consistent with that of another—is in fact his possession—the law raises no presumption that the other has conveyed his title to the one in possession."

*Logan v. Ward*, 58 W. Va. 575, 52 S. E. 401 (5 L. R. A. [N. S.] 156).

[3] Under this and other authorities which might be cited the evidence fails to show that Derneville Broussard's possession of any part of the land was ever adverse to his brothers who owned the land with him as tenants in common. He owned an interest in it, had occupied it prior to his father's death, and afterwards continued to occupy it. There is in the record no proof that his brothers or their heirs ever had any knowledge or notice of an adverse claim by him. His possession as one of the tenants in common and the payment of taxes did not make his claim adverse, in the absence of knowledge or notice to the other joint owners. The mere fact that he was in possession as owner and may have claimed the land would not of itself be sufficient to show that he was claiming adversely to others who as tenants in common were also owners of the land. The evidence fails to show that he ever made an unequivocal statement to the effect that he had purchased his brothers' interest, although there were occasions where, if such purchase had occurred, he would naturally have stated that he had acquired such interest. The fact that he had the title investigated in 1894, and was informed that no conveyances appeared of record from any of his brothers or sisters, and that he then claimed to have purchased the interest inherited by some of his sisters, and then had a deed prepared to be signed by them, but made no claim to the interest of his brothers, is a strong circumstance tending to negative any such claim by him. When he discovered the condition of the record, if in fact he had purchased his brothers' interest, we think that he would, when attempting to clear up his title, have then made some effort to obtain from his brother Emile, who was then living, and from the heirs of his brother Theophile, some kind of conveyance or acknowledgment of his title.

When Derneville Broussard and his children sold to Jackson and made a deed conveying their interest in the land they did not, so far as the record shows, assert title or purport to convey the entire tract or any specific interest therein, but only their interest in it, whatever that interest might be. The evidence tends to show that this land was then worth about \$5 per acre, and Jackson only paid \$1,332. The price paid tends to show that Jackson did not purchase, and that Derneville Broussard and his children did not intend to convey, the entire tract of land, but an interest in same much less than the whole.

The fact that Jackson did not testify as to the transaction by which he acquired the land and the negotiations preceding the purchase and as to what interest was intend-

ed to be conveyed, coupled with the meager statement from his ex parte deposition that Derneville Broussard told him that he had lived on the land for a number of years, leads almost irresistibly to the conclusion that Derneville Broussard did not sell or intend to convey the entire tract, but only such interest as appeared from the record to be owned by him.

As the execution of a deed or deeds is sought to be established by circumstantial evidence, all the circumstances must be considered, and they must at least render it probable that such deeds were executed.

If any such deeds were executed or if Derneville Broussard had in any manner acquired the title of his brothers, he knew it, and we would naturally expect that when he discovered that he had no record title and undertook to cure the defects that he would have procured, or attempted to procure, from his brother Emile Broussard, who was living, a confirmation deed, and also some evidence of title from the heirs of his brother Theophile.

Again, we think that when the land was purchased by Jackson that the question of title and the extent of Derneville Broussard's ownership would naturally arise, and we would reasonably expect that at that time, if in fact conveyances had been made, some effort would be made to cure the defect in title apparent of record by procuring conveyances from the heirs of Emile and Theophile Broussard.

The inventory made by Derneville Broussard after the death of his wife amounted to a statement by him that the community estate owned 125 acres in the Smith league. We are unable to see how it can be construed as the assertion that the community owned 250 acres, but, if so construed, it is clearly accounted for by reason of the fact testified to by various witnesses that he claimed to have acquired the interest inherited by some of his sisters. We can see no reason why this inventory should be explained on the theory that he had acquired the interest of his brothers which he never claimed to have done, rather than upon the theory that he had acquired the interest of some of his sisters which he had claimed to have done.

[4] The rumors referred to in the findings of fact, in our opinion, are entitled to no weight. Neither general reputation nor rumor could be given any weight, unless the matter was of such general notoriety as to raise a presumption that the parties sought to be affected by them knew of such rumor or reputation.

We think that, considering the small value of the land and the pecuniary condition of Derneville Broussard, as disclosed by the record, and the apparent comfortable circumstances of his relatives, that his possession

and limited use of the land can more reasonably be attributed to the indulgence of his kindred than to the presumption of a deed.

There is not, we believe, one single circumstance disclosed by the record that cannot be reasonably explained otherwise than by the presumption of a deed, while many circumstances appear to be entirely inconsistent with the theory that Emile and Theophile Broussard had conveyed their interest in this land to Derneville Broussard.

We therefore are constrained to conclude that there is no evidence in this record authorizing a finding that Derneville Broussard ever acquired the interest of his brothers Emile and Theophile Broussard.

[5] The second question is, we think, settled by the decisions of the Supreme Court of this state. The deed under which it is claimed the title of the heirs of Emerente Broussard passed in the granting clause showed Emerente Broussard as one of the grantors. She at that time was dead, and the deed was signed and acknowledged by various persons shown by the evidence to be her heirs. The Court of Civil Appeals held that this deed did not pass the title of the heirs. We think this conclusion correct. There was nothing in the deed itself to identify the parties who signed as grantors, or to identify them as the heirs of Emerente Broussard, whose name appears in the granting clause. This relationship, and the intention to convey as heirs, did not appear from the instrument, but, if at all, from parol evidence. Under the decisions of this state we think the deed did not pass the interest inherited by the heirs. *Stone v. Sledge*, 87 Tex. 52, 26 S. W. 1068, 47 Am. St. Rep. 65; *Agricultural Bank v. Rice*, 4 How. 225, 11 L. Ed. 949.

[6] The Court of Civil Appeals we think properly held that the deed, signed "Celema Broussard, per Sevenne Le Blanc, Curator," did not pass the title of Celema Broussard. In addition to the facts stated by the Court of Civil Appeals we call attention to the fact that the acknowledgment recites that "Celema Broussard, by Sevenne Le Blanc, Curator," appeared before the notary and acknowledged the execution of the deed. We think that from the whole instrument it appears that same was executed, not by Celema Broussard, but for her by her curator, and in the absence of evidence showing the authority of the curator no title passed.

[7] The only other question involves a controversy between the plaintiffs Ellen Craigen and Odella Carouthers and the defendant R. S. Jackson. We are confronted with this situation: There was proof that P. O. Broussard was the common source, and that Derneville Broussard inherited one-eighth of the land, and had acquired certain interest from his sisters and their descendants. The plaintiffs after making this proof offered in evidence the deed from Derneville Broussard

sard and his children to R. S. Jackson for the purpose of showing common source, and for no other purpose. This deed, so far as the record shows, was not introduced by Jackson for the purpose of showing title.

Article 7749 of the Revised Statutes provides that the plaintiff may offer in evidence deeds for the purpose of showing common source only, and that such deeds shall not be evidence of title in the defendant unless offered in evidence by him. So in this case the defendant is without any evidence of title whatever. This is a statutory rule, and we think founded on good reason. We do not feel authorized to disregard it. The plaintiffs having shown that they have an undivided interest in the land, however small, in the state of this record were entitled to recover as against the defendant Jackson all of the land.

This condition of the record requires a reversal of the judgment as between the plaintiff and the defendant Jackson. But for the fact that this situation is perhaps the result of an oversight either in the introduction of the evidence or preparation of the record, we would be disposed to here render judgment for the plaintiff, but as it appears from the entire record that Jackson owns an interest in the land, we think that in the interest of justice the cause should be remanded for a new trial as between the plaintiffs and the defendant Jackson.

[8] In view of another trial between the plaintiffs and the defendant, we will say that the evidence tends strongly to show that the interest acquired by Derneville Broussard under the deed from Delzende Broussard and others, executed after the death of Derneville Broussard's wife, was in fact contracted for before the death of the wife, and probably paid for in whole or in part from community funds. If it should be so determined, then the land so contracted and paid for prior to the death of Mrs. Broussard would in equity be community property to the extent that community funds were used in its purchase. The burden of proof to show the community interest and its extent is upon the plaintiffs, as presumptively having been acquired by deed after the death of the wife, it was the separate property of the husband. *Johnson v. Newman*, 43 Tex. 640. We think it also incumbent on the plaintiffs, who assert an equitable title, to show that Jackson had notice of the equity of the plaintiffs at or prior to the time of its purchase.

We do not think that knowledge on the part of Jackson that Derneville Broussard

had been married, and that plaintiffs were children of his wife, would be sufficient, but that in some way notice must be brought home to Jackson that the lands were purchased and paid for either in whole or in part with community funds. *Pouncey v. May*, 76 Tex. 565.

We recommend that the judgment of the Court of Civil Appeals awarding Alodie Broussard Le Blanc a judgment against the plaintiffs and against the defendants and all other parties to the suit for an undivided one forty-eighth interest in the land be affirmed; that the judgment of the Court of Civil Appeals awarding Adam Thibedeaux and Aurelia Thibedeaux a judgment against the plaintiffs and the defendants and all the other parties to the suit for one forty-eighth undivided interest in the land in controversy be affirmed; that the judgment of the trial court and the Court of Civil Appeals denying the heirs of Emile and Theophile Broussard any recovery be reversed; and judgment here rendered in favor of said heirs and against all the other parties to the suit for an undivided one-fourth interest in the land in controversy; that the judgment of the trial court in favor of the heirs of Emerente Broussard be affirmed; that the judgment rendered by the trial court and by the Court of Civil Appeals in favor of the plaintiffs be reversed; and that the case be remanded for a new trial between the plaintiffs Ellen Craigen and Odella Carouthers, joined by her husband, and the defendant Jackson; that all the interveners for whom judgment is hereinbefore rendered recover against the plaintiffs and the defendant Jackson all cost, and that as between the plaintiffs and the defendant Jackson the plaintiffs recover all costs of the Court of Civil Appeals and the Supreme Court.

PHILLIPS, C. J. The judgment recommended by the Commission is adopted and will be entered as the judgment of the Supreme Court except in so far as it recommends that judgment be here rendered in favor of the heirs of Emile and Theophile Broussard against all parties to the suit for an undivided one-fourth interest in the land. The judgment of the trial court and of the Court of Civil Appeals denying these heirs recovery for their interest will be reversed, but instead of judgment being rendered in their favor for such interest, the cause, as to their right of recovery, will be remanded to the District Court. We approve the holding of the Commission on the questions discussed.

(85 Tex. Cr. R. 103)

**GARDNER v. STATE.** (No. 5306.)

(Court of Criminal Appeals of Texas. March 26, 1919.)

**1. CRIMINAL LAW** ¶570(1)—**INSANITY—EVIDENCE.**

Evidence of accused's insanity held to require reversal of conviction of assault with intent to rape a female under 15 years of age.

**2. CRIMINAL LAW** ¶1159(5)—**SANITY—VERDICT—REVIEW.**

Where the testimony of many witnesses that defendant is insane is not controverted, a conviction cannot stand.

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Ed Gardner was convicted of assault with intent to rape a female under 15, and he appeals. Reversed and remanded.

Oscar H. Calvert and La Fayette Fitzhugh, both of Dallas, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

**LATTIMORE, J.** This is the second appeal in this case. See *Gardner v. State*, 198 S. W. 312, L. R. A. 1918B, 1144.

Appellant was convicted of assault with intent to rape a female under the age of 15 years, and his punishment fixed at two years' confinement in the penitentiary.

Complaint is made of the insufficiency of the indictment; it being claimed by appellant that such indictment combined in one count the two offenses of assault with intent to rape and an attempted rape. Indictments almost identical in form have been before this court and held good. *Taylor v. State*, 44 Tex. Cr. R. 153, 69 S. W. 149.

[1, 2] We have examined this record carefully, in view of the admission in the brief of the state, filed by the able Assistant Attorney General, that there is reversible error in that a large number of witnesses testified to the insanity of the appellant, and that no witnesses were placed upon the stand by the state to controvert this issue. This admission is made on the authority of the *Kiernan Case*, 208 S. W. 518, recently decided. It appears from the evidence that the appellant was a man 72 years of age, and he is shown by all of the witnesses to have been a man of the highest standing and character all of his life until a few years prior to the filing of this case, when failing health and advancing age caused his mental decay to such an extent as to induce numerous witnesses to testify that they believed him insane.

The alleged assaulted party is a girl only 7 years of age, and the facts testified to by the eyewitnesses show that the assault occurred in the blazing noon, on the third step from the bottom of an open stairway on the out-

side of a brick hotel, having a vacant lot next it; that this was in full view of street cars, jitneys, passers-by, and the persons in nearby buildings; that men were at work at the foot of said stairs, and a man at work just behind the stairs; and that the two eyewitnesses who located themselves just across the alley and in plain view watched the appellant with the child upon his lap for a length of time extending over 10 to 20 minutes, and made no outcry or movement to interfere or attempt to restrain what was being done. The entire testimony appears so unreasonable and the testimony of these eyewitnesses as outlined above tend so strongly to corroborate the testimony as to appellant's insanity that the court is inclined to agree with the Assistant Attorney General.

The judgment of the lower court is reversed, and the cause remanded.

(85 Tex. Cr. R. 109)

**LANDERS v. STATE.** (No. 5254.)

(Court of Criminal Appeals of Texas. March 26, 1919.)

**1. INTOXICATING LIQUORS** ¶236(11)—**PROSECUTION FOR ILLEGAL SALE—EVIDENCE—SUFFICIENCY.**

In a prosecution for violating the local option law by selling whisky, evidence held sufficient to justify a finding of a sale.

**2. INTOXICATING LIQUORS** ¶134—**INTOXICATING QUALITY—WHISKY.**

Whisky is per se an intoxicating liquor.

**3. CRIMINAL LAW** ¶681—**VIOLATION OF LOCAL OPTION LAW—WAIVER OF PROOF—CRIMINATIVE FACTS.**

In a prosecution for violating the local option law, it was competent for defendant's attorney to waive proof of records showing that the local option law was in effect; such fact not being a criminative fact.

Appeal from Madison County Court; T. J. Ford, Judge.

J. R. Landers was convicted of violating the local option prohibition law, and he appeals. Affirmed.

E. A. Berry, Asst. Atty. Gen., for the State.

**MORROW, J.** The appellant appeals from a judgment assessing a fine of \$25 and a jail penalty of 20 days in jail for violating the local option prohibition law.

In his motion for a new trial he complains that the evidence is insufficient. His contention is that it was not proved that the liquor was intoxicating, and there was no legal proof that prohibition was in effect, and that a sale was not established.



[1, 2] The prosecuting witness owed appellant \$1, and went to his place of business and paid him 75 cents, and asked if he had any whisky. Appellant replied, "Yes, I have some stuff." The witness asked the price of a quart, and appellant stated, "\$3-50." Witness said that he would take some, but had no money. The accused said, "If you want it, take it; I can't drink the stuff," and asked how much he wanted. Witness said, "A quart," and the accused delivered him two pint bottles. The witness was accosted by an officer when he had possession of the liquor, and it was taken to the county attorney. Witness dropped a bottle on the floor, and the county attorney stuck a match to it and tried to burn it, but it would not burn. The officer was asked if he got any whisky off of witness, and replied, "Yes," that he got two pint bottles; that he had kept one of them and put it in the safe of one Norwood, but, on showing that Norwood had access to the safe, the court sustained objection to the introduction of the bottle and its contents. This evidence, while not as specific as it might be, detailed sufficient circumstances, we think, to justify the conclusion, reached by the jury, that there was a sale of whisky by appellant. Whisky is, per se, an intoxicating liquor.

Touching the proof that prohibition was in effect, the record shows that after the trial begun the county attorney asked the defendant's attorney if he would waive proving the records, and, receiving an affirmative reply, the county attorney asked if he would admit that prohibition was in effect in Madison county, to which the attorney replied, "Yes." This conversation took place in the presence of the jury. The case of *Starnes v. State*, 52 Tex. Cr. R. 408, 107 S. W. 551, is one presenting a similar question. The defendant's attorney was there asked if he would agree that prohibition was in effect, which he declined to do, but stated he would waive reading the records and regard them as read, reserving an exception, however, to that part of one of the records which would recite the order of the county judge designating the newspaper in which the result was published. No evidence was introduced, further than this agreement showing that prohibition was in force. The court refused to instruct the jury that it was not proved, and this ruling of the court was sustained on appeal.

[3] We observe no substantial distinction between the facts on this issue in the case reported and the instant case, and we have been referred to no authority calling in question the correctness of the ruling made. It is not uncommon that counsel for one accused of crime may, by failing to object to oral testimony to the contents of a written instrument at the time of its admission in evidence, waive the proof by the best evi-

dence. *Morton v. State*, 37 Tex. Cr. R. 133, 38 S. W. 1019, where the result of a local option election was proved without objection by verbal testimony, furnishes an example of this practice. This court, in *Eoff v. State*, 75 Tex. Cr. R. 244, 170 S. W. 707, held that an agreement made by the attorney for the appellant, to the effect that the sale of intoxicating liquors was prohibited under the local option law, was binding upon the accused; he being present at the time and making no objection, though not specifically consulted. A similar ruling with reference to an agreement touching another matter was made in *Sutton v. State*, 76 Tex. Cr. R. 70, 172 S. W. 791, and in *Sullivan v. State*, 204 S. W. 1170, the matter again arose, and Presiding Judge Davidson expressed the views of the court in the following language:

"There is an agreement set out in quotations in the record to the effect that the felony local option law was in force in Grayson county, and had been since 1910, up to the present time. There was no objection urged to this testimony at the time it was offered. Had an objection been made, the court would have sustained it. We are of opinion, under the authorities, as the matter is presented, it does not constitute reversible error. While counsel cannot agree to waive the introduction of criminative facts, the defendant may, if the waiver is warranted by law; but the fact that local option was in effect would not be considered as a criminative fact, and in the absence of objection we are of opinion this was not error."

We think this is a correct disposition of the point adverse to appellant's contention.

Finding no errors in the record, the judgment is affirmed.

(85 Tex. Cr. R. 121)

FREAD v. STATE. (No. 5122.)

(Court of Criminal Appeals of Texas. March 28, 1919.)

#### 1. HOMICIDE $\Leftrightarrow$ 124—DEFENSE OF PROPERTY.

Where evidence tended to show a homicide, justified under Pen. Code 1911, art. 1105, as committed on a person taking the slayer's property at night while at place of taking, the qualification of an instruction thereon by stating that, if defendant killed deceased in pursuance of a previously formed design, and not to prevent theft of his corn, the killing would not be justified, was erroneous.

#### 2. HOMICIDE $\Leftrightarrow$ 308—DEFENSE OF PROPERTY—INSTRUCTION—FORMER ACTS OF DECEASED.

Where facts tended to show a killing, justified under Pen. Code 1911, art. 1105, as committed upon deceased while he was taking defendant's property at night while at place of taking, an instruction that former thefts by deceased would not justify the homicide was erroneous, where there was no contention that defendant's arrest and shooting of deceased was for past thefts, as his act would be attributed to the

theft at time of the killing rather than to former thefts.

**3. HOMICIDE ⇐298—INSTRUCTION—ARREST—AUTHORITY.**

Where defendant, as authorized by Code Cr. Proc. 1911, arts. 259-263, arrested deceased while committing a felony or breach of the peace, such as theft in defendant's presence, and attempted to hold him until he could bring officers, and where deceased had his wife bring a gun, the court should have charged as to defendant's authority to make the arrest under the facts.

**4. HOMICIDE ⇐111, 800(1)—SELF-DEFENSE—INSTRUCTION.**

Defendant, who discovered deceased in his corner crib stealing corn, and who attempted to arrest him, as authorized by Code Cr. Proc. 1911, arts. 259-263, when deceased's wife, at his request, came with a shotgun, had right to prevent deceased from securing it and using it, and court should have so charged.

**5. HOMICIDE ⇐145, 286(1)—INTENT TO KILL—PRESUMPTION.**

Where defendant had discovered deceased in his corner crib at night, and had undertaken to arrest and hold him for the officers, the court should have charged that, if deceased was about to secure a gun from his wife, the presumption would be that he intended to kill defendant or to inflict serious bodily injury.

**6. HOMICIDE ⇐198—DEFENSE OF PROPERTY—EVIDENCE.**

In prosecution for murder growing out of defendant's discovery of deceased in his corner crib at night, defendant might show that deceased did not have sufficient corn to have fed his stock for the time shown, and keep it in condition shown, and have remaining the amount shown, as it would tend to show that deceased was stealing defendant's corn, when caught by defendant.

**7. WITNESSES ⇐407—IMPEACHMENT—REITERATION BY IMPEACHED WITNESS.**

In a trial for murder, where during testimony of widow of deceased several predicates were laid for her impeachment, and she was impeached thereon, it was error to permit her to be again placed upon the stand by the state, and to allow her to then reiterate her former testimony, as after impeachment on proper predicate the matter should rest.

Appeal from District Court, Navarro County; H. B. Daviss, Judge.

Jesse Fread was convicted of murder, and he appeals. Reversed and remanded.

See, also, 204 S. W. 113.

Hawkins Scarborough and Richard Mays, both of Corsicana, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder; his punishment being assessed at five years in the penitentiary.

He shot and killed Hal Phillips. Deceased married the widow of appellant's deceased brother about three months after his death, and had been married four or five months at the time of the homicide. Trouble arose between deceased and appellant. On one occasion a personal difficulty ensued. This resulted in the discomfiture of appellant in the fight. These troubles grew mainly out of the fact that deceased was appropriating the corn belonging to appellant. Appellant complained to the officers, who advised him to watch his corner crib, and take some one with him. In accordance with these directions, he, on the night of the homicide, took his brother and went to the crib. They secreted themselves in appellant's part of the crib; the house being divided by a partition wall separating appellant's part of the structure from that used by deceased. These rooms were used for storing corn. Late at night and towards the early morning the deceased came from his house, about 100 yards away, entered his portion of the crib, and thence over the partition wall into the end of the crib where appellant's corn was stored. While deceased was securing appellant's corn, he challenged and held deceased in custody, sending his brother to phone the officers to come. Immediately after his departure deceased undertook to leave the crib. As he was getting out of the house, or just on the outside, he was shot by appellant. At the time deceased was arrested by appellant and before emerging from the crib he called to his wife to bring his gun. She brought it. It was a double-barrel shotgun; both barrels being loaded. Appellant was undertaking to hold the deceased under arrest, and both, it seems, got outside of the house. When the wife reached her husband with the gun, or within a few feet of him, over protest she kept approaching, whereupon appellant shot. In a struggle between deceased's wife and appellant, he succeeded in getting the gun. There is evidence that deceased had been taking and using defendant's corn for some time, feeding his hogs and mules. There seems to be no particular issue as to the fact that deceased was using appellant's corn, which was discoverable from the fact that deceased's corn was white, whereas appellant's was what they called "strawberry color." Corn of the kind that appellant raised was found in the trough out at the place where deceased fed his stock. The deceased's crop amounted to about 35 bushels, and he had been feeding his stock for some months. His corn had not diminished in proportion to the amount of corn he is supposed to have used. Without further detailing the facts, this is a sufficient statement to bring in review some of the questions presented for revision.

[1] Homicide, under article 1105, Pen. Code, is justified where it is committed upon the person who takes the property of the slayer at night while at the place of the taking, or within gunshot range of said place. This is made justifiable homicide upon the theory of self-defense, and is statutory. Where the facts bring it within the purview of this statute, the slayer is not criminally liable. See Branch's Ann. Pen. Code, art. 1105, and authorities cited under this statute.

Exceptions to the charge were timely urged, and requested instructions asked, but refused, covering some of the phases of the case. The court in a general way charged the statute, but he qualified it by instructing the jury that, if defendant killed deceased in pursuance of and in execution of a previously formed design to kill, and not to prevent the theft of the corn then being committed, such killing would not be justified, though done in the nighttime and while deceased was stealing defendant's corn. This charge should not have been given. If deceased was stealing the corn, or attempting to do so, appellant was justified in the killing. The law under such circumstances justifies the homicide, and it is not a question of previous ill will, but one of legal right or justification. The law of self-defense is not to be abridged by such ill will, where deceased places himself outside the law and becomes the wrongdoer. Malice may exist in the mind of the slayer, but it does not debar him the right of self-defense, if the causes exist which bring him within the terms of the law of self-defense. He may desire to slay, but if the deceased attacks wrongfully, and so as to bring about the act of defendant in self-defense, he is entitled to legal protection for the homicide; and this is true, generally speaking, whether it is done under this or any statute with reference to self-defense which justifies or exonerates from criminality. This underlying proposition pervades all of our laws and jurisprudence with reference to self-defense. The statute relieves the slayer of criminal responsibility when he slays him who at night steals his property, and is at the place of the theft, or within gunshot range of it. It does not require that he be free of ill will in order to justify such act under the statute. In such event the deceased places himself outside the law as much as if he was making an unlawful attack threatening the life of the slayer. The slayer under such circumstances is within the law, and protected by it.

[2] In this connection the court also charged that former thefts by deceased would not justify the homicide. This rather emphasizes the error in the charge already mentioned. It had the effect, or could legally impress the jury with the idea that the

killing may have occurred because deceased had been stealing appellant's corn prior to the time of the homicide, and not on the occasion of the killing, and for this reason he fired the fatal shot. If deceased was not taking, or attempting to take, appellant's property at the time of the killing, appellant was not justified, and could not avail himself of self-defense. If he was within the terms of the statute, it would not matter as to the condition of his mind or purpose from the former thefts. His right to act would be based upon circumstances upon which he did act. The idea underlies the court's charge that previous malice would defeat self-defense, though he shot deceased in self-defense. Deceased was under arrest, and was seeking to relieve himself by calling for his gun. There was no contention that the arrest was for past thefts. It was for the present theft. It is well settled that, as between prior causes and that occurring at the time of the difficulty, the latter will be looked to rather than the former. Former thefts, it is true, became a part of the case, as shown by appellant's complaint to the officers and his presence in the corncrib at the time of the trouble. It was the inducing cause for his presence in his crib. The former thefts, however, would not deprive him of acting as he did at the time he did act in regard to the then occurring theft. His act would be attributed to the theft at the time of the killing, rather than to former thefts. The court should not have charged the jury with reference to former thefts as a basis for motive or malice. It was a charge, also, on the weight of the evidence. If a charge was thought necessary to be given in this connection, the jury should have been charged that they should look to the present cause, and not those which had previously occurred.

[3] Exception was reserved to the charge because of its failure to instruct the jury with reference to appellant's right to arrest deceased under the circumstances mentioned. The court did not so charge. Appellant requested a special instruction to this effect, but it was refused. Appellant contends that this error is magnified by reason of the fact that the state contended in argument before the jury that appellant was the wrongdoer in having deceased illegally under arrest; that he had no legal authority to arrest him. Appellant had the right to make the arrest. This is authorized by statute. See articles 259-263, Code Cr. Proc. Under the terms of those statutes a citizen may arrest where there is a felony or breach of the peace being committed in his presence. To this end he is clothed with the same authority as is an officer to make such arrest. *Alford v. State*, 8 Tex. App. 545. We are of opinion that the court should have given

the charge with reference to the authority of appellant to make the arrest under the facts. If appellant had no authority to make the arrest, the arrest was illegal, and the deceased was restrained of his liberty in violation of law. If he had the right to arrest, the deceased was legally held. Appellant was trying to hold him until he could bring the officers, and had sent his brother for the purpose of securing their presence. The deceased called for his shotgun. His wife had brought it, and was within a few feet of him. This would further place deceased in the wrong.

[4, 5] Another question is suggested from the standpoint of self-defense. Appellant had the right, when the wife came with the shotgun, to prevent the deceased from securing and using it. He had had a previous difficulty with deceased, in which he had been beaten by deceased with brass knucks. His wife was within a few feet of him with the shotgun, brought by his command, with the evident purpose of using it. The court charged in a general way with reference to the law of self-defense as to this phase of the case, as he did on threats. The issue of threats was raised by the testimony. Upon another trial the court should be more specific with reference to the charge on self-defense from this viewpoint. The court should also charge, as contended by appellant, that, if deceased was about to secure the gun, the presumption would be that he intended to kill or inflict upon appellant serious bodily injury. These matters are treated in a general way, without specifically discussing each question suggested for revision by the exceptions to the charge and special requested instructions refused. The court will understand upon what theory this case should be tried upon these issues.

[6] A bill of exceptions was reserved to the refusal of the court to permit defendant to prove:

"That the deceased had two hogs and a pair of mules, and that they were fat and in good condition at and for some time prior to the killing. That after deceased married the widow of his [appellant's] deceased brother, they gathered and housed from Mrs. Fread's crop, during the year 1915, not exceeding 35 bushels. That during the fall of 1915, and after said corn had matured, the deceased fed out of said corn said hogs and mules, and at the time of the killing had on hand as much as 10 bushels."

The court qualifies this by stating that a perusal of appellant's testimony discloses that he testified to the number of hogs and number of mules owned by deceased, Phillips, and his wife. Upon another trial, if the testimony is offered, the defendant should be permitted to show these conditions, and that deceased did not have a sufficient amount of corn to have fed his stock

for the length of time that he did, and keep them in the condition they were, and have still remaining the number of bushels mentioned. This would tend to show that deceased was stealing the corn of appellant. This whole case revolved around the fact that deceased was stealing appellant's corn, and led to his being caught in the act the night of the tragedy.

[7] Another bill of exceptions recites the fact that, while the widow of deceased, Phillips, was testifying, several predicates were laid for her impeachment, and that she was impeached in accordance with those predicates. After the witnesses had so testified, she was again placed upon the stand by the state, and permitted, over objection, to reiterate her former testimony. It was but a reiteration of what she had previously testified. Upon another trial this should not occur. A witness may be cross-examined, and impeached, upon proper predicate. The matter should rest at that point. The impeached witness should not be again permitted to reiterate her former testimony. If the state could have the witness reiterate her testimony, the defendant would have the right to recall his witnesses, and have them reiterate their impeaching evidence. The law does not justify this character of proceeding. The assertion of the facts upon one side, and a denial upon the other, leaves the testimony before the jury for their decision as to the weight to be given it.

The judgment is reversed, and the cause remanded.

(85 Tex. Cr. R. 111)

WEAVER v. STATE. (No. 5118.)

(Court of Criminal Appeals of Texas. March 28, 1919.)

1. CRIMINAL LAW  $\S$  925½(8)—NEW TRIAL—MISCONDUCT OF JUROR.

Under Code Cr. Proc. 1911, art. 837, the action of jurors, after retirement in a trial for murder and after a disagreement as to character of punishment, in stating instances in which the Governor had used pardoning power to shorten terms to penitentiary in urging the death penalty, is ground for a new trial.

2. CRIMINAL LAW  $\S$  862(1)—CONFRONTATION OF WITNESS—STATEMENT OF MATERIAL FACT BY JUROR.

Evidence coming to the jury otherwise than that introduced under supervision of presiding judge, as by the statement of a juror after a retirement, violates the constitutional provision declaring that one accused of crime shall be confronted with the evidence against him, as such conduct denies cross-examination.

Appeal from Criminal District Court, Travis County; James R. Hamilton, Judge.

P. C. Weaver was convicted of murder, and he appeals. Reversed and remanded.

Dickens & Dickens, of Austin, for appellant.

E. B. Hendricks, Asst. Atty. Gen., for the State.

MORROW, J. This appeal is from a conviction for murder with the death penalty assessed.

The tragedy took place near one of the public schools at which appellant was working as janitor. He shot and killed the deceased. According to the state's theory, the homicide was on malice engendered by the efforts of deceased to collect an account from the appellant. It was appellant's theory that he had been informed by his wife that the deceased had insulted and assaulted her, and that, when appellant on first meeting charged the deceased with this conduct, it was not denied, but the deceased used threatening words and gestures, which produced in appellant's mind a fear of losing his life. The wife of appellant testified to the criminal assault by the deceased and her communication of the fact to the appellant.

The issues of manslaughter and self-defense were raised by the evidence, and submitted by the court. Bills of exception were reserved to matters of procedure upon the trial; but, after careful examination of them, we are of opinion that they disclose no reversible error.

[1] The jury retired to consider their verdict about noon on the 13th day of the month, and returned their verdict about 9 o'clock on the following morning. It appeared on hearing of the motion for a new trial that, after the jury had taken several ballots, they agreed that appellant was guilty of murder, but disagreed on the character of punishment. Appellant contends that, when this difference of opinion developed, the members of the jury were guilty of misconduct which vitiated the verdict, in that they received in their retirement evidence not developed upon the trial, and that these new facts were used against the appellant, and were instrumental in bringing about the decision of the jury in favor of the extreme penalty. It appears that the foreman and other members of the jury made statements in the presence of the jury bringing to their attention several instances occurring in Travis county in which, after conviction of persons accused of crime and sentenced to the penitentiary, as claimed by the jurors, the Governor had wrongfully interfered and used the pardoning power to shorten the terms of service of those condemned. In this discussion the murder of a Mr. Hornsby by Mexicans was disclosed; also, the murder of Eugene Smith, and a homicide committed by one Miller. These homicides were not known to

some of the members of the jury, and they were in ignorance of the subsequent history of the trials of those charged with them. These were repeatedly referred to by the foreman and other members of the jury, and the jurors told that, if they failed to assess the death penalty against the appellant, the Governor would be guilty of misconduct like that in the cases mentioned and release him from the penitentiary, and that for that reason the death penalty should be assessed. Some of the jurors were Germans and possessed an imperfect knowledge of the English language. Other members of the jury did not understand the German language, and one of the German members of the jury, who was quite reluctant to consent to the death penalty, and the last to concur in it, was urged by one of his fellows using the German language to consent to the death penalty upon the ground mentioned. The jurors on their cross-examination declared that they were not influenced by these new facts, though some of them stated that they were considered by them.

Our statute provides that, "where the jury, after having retired to deliberate upon a case, have received other testimony," or where on account of "the misconduct of the jury the court is of the opinion that the defendant has not received a fair and impartial trial," a new trial shall be granted. Article 887, C. C. P. It has often been held that a statement of facts within the personal knowledge of one of the jurors, and which has not been developed upon the trial, is misconduct, and where the facts thus disclosed are material the law presumes that they injured the accused, and a new trial will be ordered unless the presumption of injury is rebutted by the evidence introduced on the motion for a new trial. 12 Cyc. 727; *McDougal v. State*, 194 S. W. 946, L. R. A. 1917E, 990, and cases therein cited. And the mere conclusion of the juror that he is not influenced is not sufficient rebuttal. In *Lankster v. State*, 48 Tex. Cr. R. 296, 65 S. W. 373, it is said:

"The affidavits of jurors who are guilty of misconduct to the effect that they were not prejudiced by what they did is of little weight. \* \* \* Such an affidavit is to be expected from jurors seeking to justify themselves for their own misconduct."

On the subject, Presiding Judge Hurt, in a leading case, said:

"It would appear from this [statute] that, if the jury received other testimony after having retired to deliberate upon the case, a new trial is mandatory. Certainly it would be so where the testimony is of a material character, and it makes no difference whether the jury received the testimony from one of their number, or from others." *Mitchell v. State*, 36 Tex. Cr. R. 278, 36 S. W. 456.

Touching the materiality of the new facts adduced, and the alleged misconduct of the jury relating thereto, we are referred to *Kannmacher v. State*, 51 Tex. Cr. R. 123, 101 S. W. 238, wherein it is held that proof that one of the jurors was not originally in favor of the death penalty, but consented to it because the jurors thought that wholesale killings in the county should be stopped, and that the death penalty should be inflicted to effect that purpose, was of such material character as to require a reversal. In *Crow's Case*, 47 Tex. Cr. R. 226, 82 S. W. 1033, a statement by one of the jurors that he knew the accused and did not like his morals, in connection with a discussion by the jury of evidence not introduced on the trial to the effect that there was a gang of criminals in the community and that a purse had been made up to further their prosecution, was held so prejudicial as to require a reversal. In *Hopkins' Case*, 68 S. W. 986, the death penalty on plea of guilty of rape was reversed because of the reference by one of the jurors while in retirement that the accused had been previously tried for a similar offense and where the jury discussed without evidence the probability of consent. In the early case of *Anschlicks v. State*, 6 Tex. App. 537, a reversal of a conviction for rape was ordered because one of the jurors in retirement stated, in the presence of his fellows, that he knew one of the witnesses for the accused and that she was unworthy of credit. And the same holding was made in *McKissick v. State*, 26 Tex. App. 673, 9 S. W. 269, and in *Lucas v. State*, 27 Tex. App. 324, 11 S. W. 443; and in *Mason's Case*, 16 S. W. 766, a conviction of arson was reversed because of a discussion by the jury in their retirement of the burning in the same community of other buildings by unknown parties. In a recent case, *Walker v. State*, 206 S. W. 96, the remarks of the district attorney in his argument in which he instanced a case which he had prosecuted on facts similar to those in the case on trial, in which the death penalty had been assessed, were held reversible on the ground that it was stating to the jury a fact not admissible in evidence and not testified to under oath, which was prejudicial to the accused on trial.

[2] It is contemplated by the statute that the evidence upon which a jury is authorized to render a verdict against one accused of crime is to be that alone which was introduced under the supervision of the presiding judge. Evidence coming to the jury otherwise is not only a transgression of the statutory law, but violative of the constitutional provision which declares that one accused of crime shall be confronted with the evidence against him. New evidence given in the jury room comes under circumstances denying the accused the opportunity to test

its truth by cross-examination, or to controvert its accuracy by other testimony. In the instant case, if upon the trial an offer had been made to prove that the incidents mentioned took place, the judge would doubtless have refused to admit it. Without his sanction, however, such evidence was given the jurors and used against appellant upon the vital question of life or death, and after its receipt, and upon its consideration, the jurors who had previously refused to consent to the death penalty concurred in its infliction. The facts developed upon the motion for a new trial indicate that the verdict assessing the death penalty does not reflect the deliberate judgment of the members of the jury upon the evidence against appellant legally before them, but that some of them were induced to agree to it because a similar punishment had not been inflicted in other cases of which they knew nothing, except such things as were told them during their retirement, and because in such cases the Governor had, in the opinion of the jurors relating the extraneous facts, been overlenient in the exercise of the pardoning power.

The facts adduced on the hearing of the motion confirm rather than repel the presumption of prejudice which the law indulges when it is shown that new and material facts have entered into the verdict, and we think there was error in refusing to grant a new trial, to correct which we deem it our duty to order a reversal of the judgment.

The judgment is reversed, and the cause remanded.

(35 Tex. Cr. R. 106)  
**McKINNEY v. STATE.** (No. 4983.)

(Court of Criminal Appeals of Texas. March 26, 1919.)

**1. CRIMINAL LAW §597(1)—MOTION FOR CONTINUANCE.**

Where an affidavit for continuance for the absence of two witnesses set out their proposed testimony as identical, and one of them became a witness for the state and told a different story from that set out in the application, the court below was justified in concluding that the absent witness, if present, would testify the same as the witness who had testified.

**2. CRIMINAL LAW §1092(6), 1099(5)—APPEAL—BILL OF EXCEPTIONS—STATEMENT OF FACTS—TIME OF FILING.**

Where the term of the trial court adjourned on December 15, 1917, a bill of exception containing a statement of the evidence heard in support of a motion for a new trial not filed until February 21, 1918, could not be considered, as the statement of such facts and the bill taken thereto must be filed during term time.

**3. CRIMINAL LAW §1144(18)—APPEAL—PRESUMPTION OF CORRECTNESS—NEW TRIAL.**

Where Court of Criminal Appeals is not permitted to consider the evidence offered in sup-

port of a motion for a new trial, it would conclude that trial court was justified in overruling it; the presumption in such case being in favor of correctness and regularity of trial court's action.

Appeal from District Court, Marion County; J. A. Ward, Judge.

Funny McKinney was convicted of manslaughter, and he appeals. Affirmed.

W. L. Grogan, of Shreveport, La., and T. D. Rowell, of Jefferson, for appellant.

E. B. Hendricks, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was indicted for the murder of Monroe Paire in the district court of Marion county, and on trial was convicted of manslaughter, and his punishment fixed at two years' confinement in the penitentiary.

The difficulty occurred at a negro baseball game, and both appellant and deceased belonged to the same baseball team. Deceased was evidently drunk, and was cursing and abusing everybody on the grounds, women as well as men, and was asked by a number of people to desist and to behave himself, but their importunities did not seem to have any effect upon him. It appears that several passages had taken place between deceased and appellant prior to the fatal difficulty, in all of which it may be admitted that deceased was ugly and abusive. At a certain stage of the game, while deceased was playing the right field, the captain of his team, one Newt Fisher, decided to take him out and substitute another player, and so notified deceased. As deceased came in toward the place where the players were standing, he had to pass by the first base, where the appellant was, and before reaching that point it also appears that deceased met Fisher and had a wordy altercation with him. Fisher seems to have tried to get from appellant the baseball bat with which the killing was done, but without success. Beginning at about this stage, there seems confusion in the testimony as to what was done by the parties prior to the blow that was struck by appellant with the bat, which killed deceased.

Billy Chisholm says that deceased was talking to Newt Fisher and that his hand was hanging down by his side when appellant struck him with the bat. Duke Bolton says deceased was not making any effort to strike appellant, but was talking to Fisher, when appellant struck him on the head, producing his death. Robert Skinner says deceased and appellant were talking; that deceased had his knife in his right hand, which was down in front of him, and that he was not trying to cut appellant; that appellant struck him on the head with the bat; that just before appellant struck with the bat deceased cursed him. Wes Skinner said: "Monroe

Paire was talking to Funny McKinney at the time Funny hit him; he made no attempt to cut him at all; he was just cussing him." Two witnesses named Paire, brothers of the deceased, said that deceased had his knife in his hand down by his side when appellant struck him with the bat, and that deceased had made no effort to cut nor made any demonstration against appellant. Dave Holloman says that the right hand of the deceased was down by his side with the knife in it; that deceased said to appellant, "You G—d—s—b—, if you want anything, you can get it," and the lick of appellant was right then. He was about 12 feet from the parties. Roy Bauekham, one of the witnesses for whom the appellant made an application for a continuance, testified as a witness for the state, and said: "I did not see Monroe make any effort to cut Funny; he had his knife in his hand down in that position, by his side;" deceased had used some rough language to appellant, and appellant asked him why he did not go and behave himself; "then Funny hit him with the bat." This witness was umpire in the game, and says he had heard deceased and others cursing that day, and that it was a common thing.

In behalf of appellant Ned Calvin said deceased advanced on appellant "cussing and parading," and that he had an open knife in his hand; that when he got close to appellant he raised his hand, but witness could not say he raised it to cut; that appellant then "tapped" deceased on the head with the bat and knocked him down; that just before appellant struck, deceased called him a G—d—s—b—.

Tinsey Morrow said that deceased was cursing, and that there were a lot of women there, and that appellant tried to get him to quit cursing, but when asked not to curse he then cursed the women, too. Later deceased came up where appellant was at first base and cursed him and called him a vile name. "When Monroe said that, he was in about hand reach of Funny, as well as I could say. The knife was in his hand. I seen Monroe start to raise his hand, the one he had the knife in. He was then right in hand reach of him. That is when the defendant hit him. The defendant had not done anything at all that I know of to Monroe up to that time."

Jack Spearman said that deceased was cursing everybody and using vile language toward everybody; that when he went to go by where appellant was he called him a black s—b—, and that appellant was standing there with the bat in his hand, deceased having a knife open in his hand down by his side, and that the lick was then struck, but that he did not see it. Vollie Nash said deceased and appellant had some words, and appellant had picked up a rock, and that he, the witness, told him not to have any trouble,

and that later deceased had a tangle with Newt Fisher, captain of the team; that later, when taken off the field by the captain, deceased walked toward appellant with his knife in his hand, drunk and cursing, and that when he got close to appellant he "kinder" threw his left shoulder toward appellant and threw his knife "this way," and appellant made his lick "this way." This witness said he was about 40 feet away at that time, and did not hear what was said between the parties. He carried appellant to town and made his bond and was on his bond at the time of the trial. Appellant testified to language a little more vigorous than any of the others, and said that deceased was advancing on him with an open knife in his hand, and that he brought the bat up and knocked him over; that he expected if he had not deceased would have killed him.

[1, 2] We have given this much of the evidence because of the fact that appellant's main contention is that the trial court erred in overruling his application for a continuance based on the absence of the witnesses Roy Bauckham and Dave Washington. It will be observed that the testimony expected from said witnesses, as set out in said application, appears to be the same, to wit:

"That at the time he struck Monroe Paire, deceased, that the said Monroe Paire had an open knife in his hand and was flourishing it and making hostile threats and demonstrations toward defendant, and that the said Monroe Paire was in close proximity to defendant and was in such position to carry said threats into execution."

The record further shows that the absent witness Bauckham was brought into court, or came, some time during the trial, and was placed on the stand as a witness in behalf of the state, and told quite a different story from that set out in said application. His testimony was to the effect that the deceased was cursing everybody, and that, when the captain told him to come in off the right field where he was playing, he came by first base, where appellant was; that when he came near appellant, who had a bat in his hand, deceased asked him, with an oath, how he expected to play first base with a bat in his hand; that as he came nearer he repeated this statement, and that appellant told him to behave himself and then hit him with the bat; that at that time deceased had his knife in his hand down in "that position" by his side and made no effort to cut appellant. Bauckham by thus becoming a witness was eliminated from the list of absentees and left only the witness Washington. In this position of the record, we think the court below amply justified in concluding that the absent witness Washington would probably testify, if present, as did the witness Bauckham; the affidavit for a continuance having

set out their proposed testimony as identical. Nor can our view be changed by the fact that in making his motion for a new trial appellant asked and was granted the privilege of supporting said motion by the testimony of witnesses, among others being the said absent witness Washington, for the reason that, when we come to consider such testimony heard by the court in support of said motion, we are confronted by the objection made thereto by our Assistant Attorney General to the effect that the bill of exceptions containing the statement of the evidence which was heard by the court thereon was filed too late, and therefore cannot be considered by us. The term of the trial court seems to have adjourned on December 15, 1917, and this bill of exception containing this statement of facts was not filed until February 21, 1918. It is well settled by the decisions of this court that the statement of such facts, and the bill taken thereto, must be filed during term time. *Miles v. State*, 200 S. W. 158; *Lopez v. State*, 208 S. W. 167; *Dodson v. State*, 76 Tex. Cr. R. 439, 174 S. W. 1048; *Kinney v. State*, 67 Tex. Cr. R. 175, 148 S. W. 783; *Bailey v. State*, 65 Tex. Cr. R. 1, 144 S. W. 996; *Treadway v. State*, 65 Tex. Cr. R. 208, 144 S. W. 655; *Black v. State*, 41 Tex. Cr. R. 185, 53 S. W. 116.

[3] Not being permitted to consider the evidence thus offered in support of said motion, we conclude that the trial court was justified in overruling same; the presumption in such case being in favor of the correctness and regularity of the action of the court below in the absence of a showing to the contrary.

There were no exceptions to the charge of the court on the trial, and no bills of exception complaining of any ruling upon the reception or exclusion of evidence.

What we have said disposes of the only objections presented to this court, and, no reversible errors appearing, the judgment of the lower court will be affirmed.

BEAUMONT COTTON OIL MILL CO. et al.  
v. HESTER. (No. 8932).\*

(Court of Civil Appeals of Texas. Ft. Worth.  
Nov. 30, 1918. On Rehearing,  
Jan. 18, 1919.)

1. CORPORATIONS ⇐503(2)—ACTION AGAINST  
VENUE—PLACE OF ACCRUAL OF RIGHT.

Petition held not to state primarily a suit for rescission of contract whereby defendant corporations were to deliver to plaintiff peanut hulls, weights and grades "guaranteed" at destination, but a cause of action sounding in damages arising out of breach of alleged contract occurring in county of destination, so that cause of action arose there, within Vernon's *Sayles' Ann. Civ. St.* 1914, art. 1830, § 24, as to suits against private corporations being com-

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Writ of error refused March 19, 1919.



menced in any county where cause of action, or any part thereof, arose.

**2. CORPORATIONS §=503(1)—ACTION AGAINST—VENUE—ENTIRE CAUSE.**

If the courts of J. county had venue and jurisdiction to try cause against corporation arising by reason of alleged breach of guaranty as to quality or grade of peanut hulls shipped, the venue for the entire cause of action, with its several items of damages, was in said county.

**3. ACTION §=1 — NATURE AND ELEMENTS—"CAUSE OF ACTION."**

A "cause of action" cannot exist without the concurrence of a right, a duty, and a default; or, stated differently, an obligation must exist upon one party in favor of the other, the performance of which is refused (citing Words and Phrases, Second Series, Cause of Action).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cause of Action.]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Suit by S. T. Hester against the Beaumont Cotton Oil Mill Company and another. From judgment overruling plea of privilege, defendants appeal. Affirmed.

S. C. Padelford, of Cleburne, and A. E. Hampton, of De Leon, for appellants.

Walker & Baker, of Cleburne, for appellee.

**BUOK, J.** The disposition of this appeal turns on the question of whether or not the trial court correctly overruled defendants' pleas of privilege to be sued in the counties of their respective residence. It was alleged in plaintiff's petition that the defendant the Beaumont Cotton Oil Mill Company resided in Jefferson county, and the De Leon Peanut Company resided in Comanche county, while the plaintiff resided in Johnson county, in which county the suit was brought. The defendants are corporations. Plaintiff alleged that defendants employed a brokerage company to sell peanut hulls from the factory of the De Leon Peanut Company, and that the defendants through said brokerage company contracted to sell to plaintiff 150 tons of "factory run" hulls at the price of \$10.25 per ton f. o. b. De Leon, Tex., on the following terms: Sight draft, bill of lading attached, free of exchange, and shipment to be made during May, allowing the seller privilege of finishing contract first half of June, if necessary, and the weights and grades guaranteed at destination. The memorandum of the contract prepared by the broker was made in triplicate, and defendants indorsed on one of the copies sent them the following:

"Accepted, 5-10-17. Beaumont Cotton Oil Mill Co., by De Leon Peanut Co., by W. P. Luse."

Plaintiff indorsed an acceptance on the copy sent him and delivered it to the defendants. The petition alleged that W. P. Luse was the duly authorized agent of both defendants to act for them in the capacity stated. The petition further alleged that, by virtue of the written contract aforesaid the defendants bound themselves to sell to plaintiff 150 tons of factory run hulls at the price stated, f. o. b. at the place stated, and to attach sight drafts to bills of lading, free of exchange on the plaintiff at Cleburne, Johnson county, Tex., and further guaranteed at destination, which was Cleburne, the weights and grades of said hulls.

It was further alleged that the defendants shipped 18 car loads of commodity, purporting to be peanut hulls, and shipped said 18 cars to their own order, and attached the bills of lading to drafts on the plaintiff at Cleburne, Tex.; that eight of said drafts, aggregating \$973.55, were paid by plaintiff, and in addition \$237.60 freight on said hulls, and also demurrage charges, caused, as alleged by plaintiff, by the defendants' failing to send bills of lading and drafts promptly with shipment. It was further alleged: That when plaintiff opened the cars he found the commodity not to be factory run hulls, such as defendants had contracted to sell him, but a mixture of peanut hulls, dirt, and trash. Plaintiff was engaged in the manufacture of feedstuffs and expected to use the peanut hulls bought for such purpose. That the mixture actually shipped plaintiff could not be used for said purpose and was useless and worthless to him. That plaintiff when he discovered the condition and character of the commodity snipped promptly advised the defendants and asked them to take possession of the cars and their contents and refund to him the amount paid therefor, but said defendants refused to do so and plaintiff, not having any place in which he could unload or store said commodity, was compelled to leave same on the cars, and that further demurrage charges had accrued, for which he sought recovery.

Plaintiff further alleged that factory run hulls, such as defendants contracted to sell him for \$10.25 per ton, were worth at the time of the suit \$15.25 per ton, and that plaintiff had sustained damages in the sum of \$750 by reason of the failure on the part of defendants to deliver the kind and character of hulls sold plaintiff. Plaintiff further alleged: That the defendants had shipped to him, at Cleburne, five additional cars, containing a mixture of peanut hulls, dirt, and trash, and that upon his refusal to accept said cars, as in part compliance with the contract of the defendants, said defendants notified him that they expected to sell the contents of the five cars and hold him responsible for any loss, between the contract

price and the price which they might be able to realize therefor. That such claim on the part of defendants was not valid or legal, and hence plaintiff prayed that on hearing he have judgment for his damages, consisting of the amount paid on the eight drafts aforesaid, the demurrage charges, the loss by reason of the increased market price of factory run peanut hulls, and that the purported claim of the defendants on the five cars be canceled.

[1] Appellants urge that this is a suit for a rescission of the contract alleged to have been made between the plaintiff and defendants, and that as to such a suit it cannot be reasonably claimed that any part of the cause of action arose in Johnson county, and that the pleas of privilege of the defendants to be sued in the counties of their residence should be sustained. We do not so construe the cause of action pleaded. We think the allegations of the plaintiff's petition allege a cause of action sounding in damages arising out of a breach of contract alleged. Said contract contained, as shown by the statement of facts, substantially, the elements pleaded in plaintiff's petition, and, among other terms it required that weights and grades be guaranteed at destination by defendants. Article 1830, § 24, vol. 2, Vernon's Sayles' Tex. Civ. Stats., provides that—

"Suits against any private corporation, association or joint-stock company may be commenced in any county in which the cause of action, or a part thereof, arose."

[3] We think that, under the contract pleaded, defendants guaranteed at Cleburne the weights and grades of the peanut hulls, and that a failure of said hulls on their arrival at Cleburne to measure up to the grade of the commodity contracted to be sold constituted a breach of the contract on the part of the defendants, and that said breach occurred in Johnson county. It is said that a "cause of action" cannot exist without the concurrence of a right, a duty, and a default; or, stated differently, an obligation must exist upon one party in favor of the other the performance of which is refused. *W. & P.* vol. 1, p. 599; *Bruner v. Martin*, 76 Kan. 862, 93 Pac. 165, 14 L. R. A. (N. S.) 775, 123 Am. St. Rep. 172, 14 Ann. Cas. 39. Plaintiff had the right under the contract to demand that defendants should ship to him factory run peanut hulls; it was the duty of defendants to ship said kind of hulls, in which duty defendants were alleged to have defaulted. Defendants' guaranty or duty in this respect was to be fulfilled or performed at Cleburne. If they failed to fulfill their contract in this respect, we think the breach occurred at Cleburne; hence, we hold that a part of the cause of action arose in Johnson county. See *Rhyme Milling Co. v. Cunningham*, 171 S. W. 1081; *Kell Milling Co. v. Bank of Miami*, 155 S. W. 325; *Hous-*

*ton Rice Milling Co. v. Wilcox*, 45 Tex. Civ. App. 308, 100 S. W. 204; *Cuero Cotton O. & M. Co. v. Feeders' Supply Co.*, 208 S. W. 79; *Silo Co. v. Alley*, 191 S. W. 774. In *Doughty v. Funk*, 15 Okl. 643, 84 Pac. 484, 4 L. R. A. (N. S.) 1029, it is said:

"We cannot, therefore, in determining the meaning of the phrase under consideration, hold that a cause of action has arisen only when the remedy and the right occur at the same time. But we do hold that a cause of action arises when the obligation was created which gave rise to a right of action as soon as such right accrued thereon."

In the instant case we think the cause of action, if any, arose when defendants breached their contract, expressed in the term "guaranteed," that the commodity should conform upon its arrival at Cleburne to the quality stated in the contract.

[2] We need not determine whether the accrual of the demurrage charges at Cleburne, due to the alleged failure of defendants to promptly forward the bills of lading with drafts attached constituted a cause of action arising in Johnson county; for if the courts of Johnson county had venue and jurisdiction to try the cause of action arising by reason of the alleged breach of guaranty as to the quality or grade of the peanut hulls shipped, the venue of the entire cause of action arising, with its several items of damages, was in Johnson county. See *Keller Co. v. Mangum*, 161 S. W. 19; *Middlebrook et al. v. Bradley Mfg. Co.*, 86 Tex. 706, 26 S. W. 935.

As to whether the defendants, or either of them, executed the contract, for the breach of which suit was brought, is a question which we are not in this appeal required to determine. The appeal is merely from the judgment overruling the plea of privilege. Plaintiff alleged that the contract was executed by W. P. Luse, who was authorized to act for and bind both defendants. As to whether such allegation was supported by the facts is an issue to be determined upon the trial of the case on its merits. Hence we overrule those assignments in appellant's brief in which it is urged that, because the defendant the Beaumont Cotton Oil Mill Company is not mentioned in the contract as the seller, said company is not bound, as shown by the acceptance set out hereinabove. The Beaumont Cotton Oil Mill Company signed the contract "by the De Leon Peanut Company, by W. P. Luse." It was alleged in the petition that the peanut company was a subsidiary of the Beaumont Cotton Oil Mill Company, and the latter owned the stock or controlling part of the stock of the peanut company, and that the contract was made for the joint use and benefit of both parties, and that W. P. Luse had authority to represent and bind both parties.

All assignments are overruled, and the judgment is affirmed.

## On Rehearing.

Appellants have filed a lengthy motion for rehearing, supplemented by an equally lengthy written argument, and we have carefully read them and given due consideration thereto; and while we recognize the evident ability and industry of counsel, disclosed in these two documents and the unmistakable good faith and earnestness with which the insistence of error is made, yet we still adhere to the conclusions reached on original hearing. We have again read with care plaintiff's petition and find no allegations which would justify the conclusion that the suit is primarily one for a rescission of the original contract. In this respect the petition differs from that shown in *Hunt County Oil Co. v. Scott*, 28 Tex. Civ. App. 218, 67 S. W. 451, cited by appellant. Plaintiff is standing on the contract alleged, and, averring a breach on defendant's part, seeks to recover his damages by reason of said breach. It is true he asks for cancellation of the alleged claim of defendants' for the five cars of the commodity refused by plaintiff because the hulls ordered were not of the quality provided in the contract. He also asks recovery of the amounts paid out, including freight charges and demurrage, on the eight cars delivered and received; but such rights and claims are but incidental to and spring from the contract which he asserts was made by defendants to deliver peanut hulls of a designated quality.

If no delivery had been made and the plaintiff was suing merely for his damages by reason of the failure of defendants to deliver the hulls at the place, within the time, or the quality specified in the contract, it could not be seriously claimed, we think, that the action was not on the contract. The fact that plaintiff had been caused to expend sums of money in his effort to comply with his part of the contract, and that such outlays were caused by defendants' alleged breach, does not change the character of the suit, but merely enlarges the damages he is entitled to recover. If A. agrees to sell and ship to B. a horse, and A. sends a cow instead and B. has no opportunity to discover the substitution until he had paid the draft attached to the bill of lading, B. would have a cause of action on the contract, not only for damages sustained by the failure to ship the horse, but also for the amount paid for the cow. Of course, he would have to tender back the cow before he could recover the amount paid for her, if shown to be of any value; but this the plaintiff in the instant case alleged he did, and that defendants refused the tender. In line with the statement, where a lessee sued the lessor for an eviction from the leased premises, he was held to be entitled to recover, in addition to his other damages, the value of his labor in clearing

the land so that he could use it. *Carter v. Lacy*, 3 Ind. App. 54, 29 N. E. 168. A petition, which shows the making of the contract between plaintiff and defendant, its violation by the defendant, and the damages sustained by plaintiff from the breach, contains the essential elements of a good cause of action *ex contractu*. 9 Cyc. p. 711 (G); *Ry. Co. v. Ross*, 62 Tex. 447; *Construction Co. v. Eugene*, 20 Tex. Civ. App. 601, 50 S. W. 736; *Beville v. Rush*, 25 S. W. 1022.

The motion for rehearing is overruled.

**RUSSELL et al. v. OLD RIVER CO. et al.**  
(No. 435.)

(Court of Civil Appeals of Texas. Beaumont.  
March 10, 1919.)

**1. APPEAL AND ERROR ⇨759—BRIEFS—CONSECUTIVE NUMBERING OF ASSIGNMENTS—RULE OF COURT.**

Under Rules for the Courts of Civil Appeals, No. 29 (142 S. W. xii), a brief wherein the assignments were numbered from 1 to 10, consecutively, omitting 4 and 5, was improper as not numbering all the assignments consecutively.

**2. APPEAL AND ERROR ⇨742(2) — ASSIGNMENT OF ERROR—MULTIFARIOUS CHARACTER—PROPOSITIONS NOT GERMANE — LACK OF SUPPORT BY ADEQUATE STATEMENT.**

Assignment of error, divided into six separate paragraphs, each separately numbered, except the first, and each paragraph within itself being a separate assignment, which is followed by no statement whatever, except "See testimony V., S. F. 3 et seq., testimony R., S. F. 50 et seq., testimony H., S. F. 80 et seq.," is improper as multifarious, having propositions under each paragraph not germane to the assignment, and as not supported by adequate statements, and should not be considered, in view of the Rules for the Courts of Civil Appeals, Nos. 25, 26, and 30 (142 S. W. xii, xiii).

**3. APPEAL AND ERROR ⇨766 — IMPROPER BRIEFING—CONSIDERATION OF BRIEF.**

Where appellee is deprived of no valuable right by omission of appellant in briefing, the Court of Civil Appeals would not be disposed to disregard his brief, but under its rules on appeal appellant has the laboring oar, and it is the duty of his counsel on his professional honor to state all the facts in the record supporting his assignments, and when he fails he deprives appellee of a valuable right, and the brief will not be considered.

**4. APPEAL AND ERROR ⇨757(1)—ABSENCE OF STATEMENT AND SUPPLEMENTAL BRIEF—ACCEPTANCE OF STATEMENTS IN ADVERSE PARTY'S BRIEF.**

Where appellants make no statement, and do not file a supplemental brief contesting the statements made by appellees, the Court of Civil Appeals will take such statements as correctly reflecting the facts of the record.

**5. LANDLORD AND TENANT §79(2)—SUBLEASE AS ASSIGNMENT—RESPONSIBILITY OF SUBLESSORS.**

Where a lessee in turn leased the premises for the same length of time, there was an assignment of his lease, and the sublessees became responsible to the lessor to the same extent as if the contract of lease had been made directly to them.

**6. LANDLORD AND TENANT §248(4)—LANDLORD'S LIEN—CATTLE OF SUBLESSEES—STATUTE.**

Under Rev. St. 1911, art. 5864, the lessor of pasture lands held a lien on the cattle of sublessees of such lands for the rent due from the lessee.

**7. LANDLORD AND TENANT §75(8) — SUBLEASE—BINDING FORCE ON LESSOR.**

Where it was understood between the lessor and lessee of pasture lands that the lessee was to sublet or assign to other parties, the lessor, though not having the particular sublessees in mind, is bound by the lessee's assignment or sublease; the relation of landlord and tenant existing between him and the sublessees.

**8. EVIDENCE §441(4) — PAROL EVIDENCE—SUBLEASE OR ASSIGNMENT.**

In suit by lessor and lessee against sublessees, the latter cannot defend on the ground of a parol statement made before the sublease or assignment was executed.

**9. EVIDENCE §441(4) — PAROL EVIDENCE—SUBLEASE.**

In suit by the lessor and the sublessor of pasture lands, proof that the sublessor falsely represented to his lessees that he owned 20,000 acres of land over which their cattle could graze, thereby inducing the sublessees to lease, would have been inadmissible as varying the terms of the writing by a parol contemporaneous agreement to furnish lands not specified.

**10. APPEAL AND ERROR §719(6) — FUNDAMENTAL ERROR — MISREPRESENTATIONS AS DEFENSE—DIRECTION OF VERDICT.**

In suit by lessor and sublessor of pasture lands, direction of verdict for plaintiffs held not erroneous in so far as concerned the allegation of defendants that the sublessor took them around the leased premises, and pointed out certain lands as being included, which in fact were not included, where such lands are not described or their value stated; allegation not being sufficiently specific for Court of Civil Appeals to determine under a proposition of fundamental error whether or not the court had erred in so directing verdict.

**11. APPEAL AND ERROR §719(6) — FUNDAMENTAL ERROR—BREACH AS DEFENSE—DIRECTION OF VERDICT.**

In suit by lessor and sublessor of pasture lands, direction of verdict for plaintiffs, in view of testimony of a defendant, held not patently erroneous on an assignment of fundamental error in relation to the sublessees' plea that their cattle did not do well on the lands described in the sublease, and that the sublessor refused to furnish other lands as he had agreed to do.

Appeal from District Court, Liberty County; J. Llewellyn, Judge.

Suit by the Old River Company against T. C. Dunn, Jr., R. R. Russell, and others, wherein T. C. Dunn, Jr., by his answer made W. E. Vasbinder a party. From the judgment, R. R. Russell, W. E. Vasbinder, and the other defendants, except T. C. Dunn, Jr., appeal. Affirmed.

Horace E. Wilson, of San Antonio, for appellants.

Oswald S. Parker, of Beaumont, Andrews, Streetman, Logue & Mobley, of Houston, and E. B. Pickett, Jr., of Liberty, for appellees.

**WALKER, J.** In September, 1917, Old River Company made a verbal contract with T. C. Dunn, Jr., whereby the said Dunn was to have permission to pasture about 2,500 head of cattle on 7,000 or 8,000 acres of its lands in Chambers and Liberty counties for an agreed consideration of \$3,500; pasture rights to extend until April 1, 1918. Afterwards, Dunn made a contract with W. E. Vasbinder to pasture for him 2,500 head of cattle for the same length of time, and on the same lands, this contract being in writing, and is as follows:

"Houston, Texas, Sept. 12, 1917.

"This agreement entered into this day by and between T. C. Dunn, Jr., of Houston, Harris county, Texas, and W. E. Vasbinder of Center Point, Kerr county, witnesseth:

"That the said Dunn for and in consideration of three dollars and fifty cents (\$3.50) per head agrees to pasture, beginning September 15, 1917, twenty-five hundred (2,500) head of cattle for said Vasbinder, in part of the rice fields and pastures belonging to the Old River Rice & Irrigation Company in Chambers county, Texas. Said Dunn agrees to receive said cattle at the unloading pens at Walley, Chambers county, Texas, and deliver the said cattle back to and onto the train at Walley, Chambers county, Texas, or other point to be agreed upon later, free of extra cost to said Vasbinder on or about April 20, 1918. If said Vasbinder desires to ship out said cattle on or before April 1, 1918, then said Dunn is to deduct fifty (50¢) cents per head from said cattle, and the amount to be paid said Dunn by said Vasbinder will be three (\$3.00) dollars per head instead of three dollars and fifty cents (\$3.50) per head. The said amount to be paid said Dunn when cattle are delivered back to said Vasbinder on the train at Walley, Texas, or point to be decided on. In the event said cattle fail to do well in the rice farms and pastures in which they are to be located, on account of lack of feed in the way of sufficient grasses, tame or otherwise, then the said Dunn hereby agrees to give the said cattle more room in said rice farms and pastures.

"It is hereby understood by and between said Dunn and said Vasbinder that they are to hire a man to stay with the said cattle, to look after

and care for them, and the said Dunn and said Vasbinder are to pay one-half each of the expense of this man. It is hereby acknowledged by the said Dunn that said Vasbinder has paid to said Dunn five hundred (\$500.00) dollars in cash to show his good faith in the premises.

"T. C. Dunn, Jr.

"W. E. Vasbinder.

"Witness: John J. Boyle."

Vasbinder then arranged with R. R. Russell, R. H. Martin, and T. P. Russell for them to pasture their cattle with his on the property described above; they to pay Vasbinder \$4 per head. Some time about the last of November or the first of December, Old River Company notified Vasbinder and his associates that Dunn had not paid the \$3,500 due by him, and that the company was going to look to them for this pay, and advised them not to pay their rent to Dunn until Old River Company was paid. Part of the cattle of appellants remained on the land of Old River Company after the expiration of their contract with Dunn, under a special contract between them and Old River Company. Dunn never paid Old River Company, nor did the appellants herein pay Dunn or the Old River Company.

This suit was brought by Old River Company against R. R. Russell, R. H. Martin, T. P. Russell, and T. C. Dunn, Jr., to recover \$3,500 rental, which Dunn had agreed to pay, less a small credit entered by agreement, and to foreclose the lien claimed by Old River Company against the cattle; it pleading the contract substantially as set out above.

T. C. Dunn, Jr., answered, making Vasbinder a party to the suit, and alleging that Russell, Martin, Russell, and Vasbinder, the appellants here, were partners, pleading the contract between him and Vasbinder, and asking for judgment against them as partners for the amount due under the contract, this amount being in the sum of \$5,970.67, the appellants having paid about \$1,900 on this contract before the suit was filed.

The appellants answered the plaintiff's petition and this affirmative action of Dunn against them, by pleading the contract as above set out, and further that, at the time of the execution of said contract, Dunn pointed out to appellants certain lands as being the lands on which appellants were to pasture their cattle, and that Dunn falsely represented to appellants that he had 20,000 acres of land on said premises, 5,000 of which was pasture land and 15,000 of which was rice land, and that appellants could have the use of all of this land for their cattle, if necessary; that he further represented that the stacks of rice straw on the premises were for the use and benefit of appellants' cattle; and that the premises were well watered by wells and running bayous, and that Dunn took them on the lands and pointed out to them certain land as being a part of the

leased premises, which in fact was not. He further alleged that all of said representations were falsely and fraudulently made by Dunn for the purpose of inducing appellants to pasture their cattle with him and enter into the above agreement; that Dunn further agreed that if the cattle failed to do well on the rice farms, to give the cattle more room, and this representation was falsely and fraudulently made by the said Dunn; that the said Dunn failed and refused to carry out all the representations made by him before the contract was signed; and that appellants suffered damages thereby in the sum of about \$29,000. They did not deny under oath the partnership as pleaded by Dunn.

On the trial of the case before a jury, on the conclusion of the testimony, the trial court instructed the jury to return a verdict for Old River Company against Dunn and R. R. Russell, R. H. Martin, and T. P. Russell, for the amount claimed by it, with a foreclosure of lien against the cattle owned by appellants; and also instructed a verdict for Dunn against all of the appellants for the amount claimed by him against them in the sum of \$5,970.67, with a foreclosure of lien against the cattle; the judgment further providing that appellants, when they paid the Old River Company judgment, should have a credit for the same against the judgment held by Dunn. To this action of the court, appellants excepted, and this case is now before us on appeal. All parties have filed briefs.

Appellees object to our considering appellants' brief, asserting that the same is not prepared according to the rules for briefing. These objections are well taken.

[1] Appellees' first objection is that the assignments are not consecutively numbered, as required by said rules. Appellants' assignments are numbered 1, 2, 3, 6, 7, 8, 9, 10, 11, and 12; it thus appearing that the fourth and fifth assignments are omitted. Appellants' brief is subject to this criticism. Rule 29 for the Courts of Civil Appeals (142 S. W. xii); *Barron v. White*, 155 S. W. 590; *Grisham v. Connell Lbr. Co.*, 164 S. W. 1107; *Taylor v. Butler*, 168 S. W. 1004; *Petty v. City of San Antonio*, 181 S. W. 224; *Western Union Telegraph Co. v. Golden*, 201 S. W. 1080.

[2] The following additional objections are made against appellants' tenth assignment of error:

(a) Said assignment is multifarious.

(b) The propositions under said assignments are not germane to the assignment itself.

(c) Neither the assignment nor the propositions thereunder are supported by statements adequate to advise the court concerning the issues sought to be presented or to

enable the court to form any judgment concerning such issues.

This assignment is divided into six separate paragraphs, each separately numbered, except the first, and each paragraph within itself being a separate assignment. It is followed by no statement whatever, except:

"See testimony Vashinder, S. F. 3 et seq., testimony T. P. Russell, S. F. 50 et seq., testimony Hedgard, S. F. 30 et seq.," etc.

This assignment is subject to this criticism, and under the following authorities it should not be considered:

To the effect that an assignment which is multifarious will not be considered, see Rules 25, 26, and 30 for Courts of Civil Appeals (142 S. W. xii, xiii); Davidson v. Jones, Sullivan & Jones, 196 S. W. 571; Holton v. G., H. & S. A. Ry. Co., 31 Tex. Civ. App. 128, 71 S. W. 408.

To the effect that, where the propositions are not germane to the assignment and the assignment itself is not a proposition, the court will refuse consideration, see Rule 30 for Courts of Civil Appeals; Ward v. Odem, 153 S. W. 634; Duren v. Bottoms, 60 Tex. Civ. App. 355, 129 S. W. 376.

To the effect that, where neither the assignment nor the propositions thereunder are supported by adequate statements from the record, the court will refuse consideration, see Rule 31 for Courts of Civil Appeals (142 S. W. xiii); McKenzie v. Beason, 140 S. W. 246; First National Bank of Crockett v. Hardtt, 204 S. W. 712; Ins. Co. v. Ellison, 160 S. W. 1141; Ludtke v. Murray, 199 S. W. 321; Hooks et al. v. Pate, 197 S. W. 613; Davidson v. Jones, Sullivan & Jones, 196 S. W. 571; Louisiana & Texas Lbr. Co. v. Kennedy, 119 S. W. 888; Edwards v. Smith, 137 S. W. 1164; Childress v. Robinson, 161 S. W. 78.

Appellees also object to a consideration of assignments 1, 2, 3, 6, 7, 8, and 9, for the same reasons assigned by Dunn against the tenth assignment. All of these assignments are subject to this criticism. Some of them are multifarious; none of them are followed by a sufficient statement to enable us to review them.

[3] Because of all of these omissions on the part of appellants in briefing this case, we are precluded from considering their brief. Where appellee is deprived of no valuable right by an omission on the part of appellant in briefing, we would not be disposed to disregard his brief; but, under our rules, on appeal the appellant has "the laboring oar." It is the duty of his counsel, on his professional honor, to state all the facts in the record supporting his assignments. When this is not done, either the appellee must make this statement, or the court is forced to go to the record and search for the facts relied on by appellant to sus-

tain his assignments. The rules are designed to relieve the appellate courts of this burden. Also, when the appellant fails to do this, he is depriving the appellee of a substantial and valuable right granted him by law.

However, appellants insist that they are entitled to a reversal of this case on fundamental error apparent of record. In discussing this assignment before us on submission, appellants advance the following propositions under fundamental error:

(1) Under the pleadings of Old River Company, it was not entitled to a foreclosure of a statutory lien, or any other lien against the cattle.

(2) On the answer of appellants, if the record supported the issues made, the court erred in instructing a verdict against them in favor of T. O. Dunn.

(3) That the Old River Company was entitled to no judgment against any of these appellants.

[4] On these assignments of fundamental error, we have examined the pleadings of all the parties, the judgment of the court, and, as appellees have briefs in the case, we have also examined the statements of the testimony made in their briefs. As appellants made no statement, and have not filed a supplemental brief contesting the statements made by appellees, we will take the statements made by them as correctly reflecting the facts of the record.

[5] In leasing to Vashinder and others, Dunn conveyed to them the same premises leased by him from Old River Company, and for the same length of time. This constituted an assignment of the lease held by Dunn and made appellants responsible to Old River Company to the same extent as if the contract of lease had been made directly with them and the Old River Company.

The following rule is announced in 24 Cyc. 979:

"The assignment of a lease creates the relation of landlord and tenant between the assignee and lessor, and the rights and liabilities of those parties are such as are incident to that relation."

In *Forrest v. Durnell*, 86 Tex. 649, 26 S. W. 482, Chief Justice Stayton said:

"The relation of landlord and tenant strictly does not exist, unless there be a reversionary interest in the former; and out of this arises the distinction between assignments and underleases. If a lessee parts with his whole term in all the rented premises, no reversionary interest remains in him, and a person taking through him is an assignee, liable to payment to the landlord as the original lessee contracted to pay. If he rents parts of it to different persons for the entire term, then such persons, to the extent of their several holdings, are also assignees, and in so far liable to the lessor just as was the original lessee. *Railway v. Sette-*

gast, 79 Tex. 262 [15 S. W. 228]; *Taylor on Landl. and Ten.* 443.

"A subtenant is one who leases all or a part of rented premises from the original lessee for a term less than that held by the latter, and in that case the lessee retains a reversionary interest. In such cases at common law a subtenant's property was subject to distress, while he was not liable on the contract between lessor and lessee."

In *Menger v. Ward*, 28 S. W. 824, it was said:

"An assignment of a lease would be nothing but a subletting for the whole term."

In *Campbell v. Cates*, 51 S. W. 269:

"In addition, the lease from Campbell to Worsham \* \* \* conveyed Campbell's entire interest in the pasture as acquired by him from Cates and wife. This operated as an assignment of said lease."

In *Railway Co. v. Settegast*, 79 Tex. 262, 15 S. W. 229, the Supreme Court said:

"When the lessee conveys his entire term in the whole or a part of the demised premises, it is an assignment of the lease; but, when he lets the premises for a less time than the period of his unexpired term, it is an underlease."

See, also, *Wildy Lodge No. 21, I. O. O. F., v. City of Paris*, 31 Tex. Civ. App. 632, 73 S. W. 69; *Edwards v. Anderson*, 82 S. W. 659; *Wooldridge v. Railway Co.*, 38 Tex. Civ. App. 551, 86 S. W. 943; *Giddings v. Felker*, 70 Tex. 176, 7 S. W. 694; *M., K. & T. v. Keahy*, 37 Tex. Civ. App. 330, 83 S. W. 1103; *Land v. Roby*, 56 Tex. Civ. App. 333, 120 S. W. 1058; *Doyle v. Scott*, 134 S. W. 828.

[5] But even as subtenants under Dunn, the Old River Company held a lien on the cattle of appellants for the rent due by Dunn, under article 5664, R. S. 1911.

In *Forrest v. Durnell*, supra, the Supreme Court said:

"The land and the crops to be grown cannot be freed from the conditions imposed by law, nor can the lessor's rights be abridged by any subordinate contract of the lessee. He can pass no better estate nor confer any superior right to the use of the land than he possessed himself. If it were otherwise, the subletting in parts might defeat the security given under the statute and render it inoperative."

In *Maverick v. Skinner*, 50 S. W. 640, the court said:

"The landlord's lien for the rent existed on the goods in the hands of the trustee and assignee precisely as if the tenant had held them. *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481. It was not necessary for plaintiff to resort to a distress proceeding; his right to the lien could be as effectually enforced by a suit for foreclosure."

In *Edwards v. Anderson*, supra, the court said:

"Unless he had waived it, the appellee had a landlord's lien, created by statute, on all the products grown upon his farm, whether raised by Foesselman or Edwards, and whether Edwards was a subtenant or assignee under Foesselman, and whether appellee did or did not consent for Foesselman to sublet to appellant."

See, also, *Wooldridge & Sons v. Railway Co.*, 38 Tex. Civ. App. 551, 86 S. W. 943; *Land v. Roby*, 56 Tex. Civ. App. 333, 120 S. W. 1058; *Ft. Worth Fair Ass'n v. Ft. Worth Driving Corporation*, 56 Tex. Civ. App. 167, 121 S. W. 213.

[7] We further find that, when Dunn leased the premises from the Old River Company, it was understood between them that Dunn was to sublet or assign this lease to other parties, and while the Old River Company, at such time, may not have had the appellants in mind as being the persons to whom Dunn would sublease or assign, yet Dunn had such right, and the Old River Company is bound by such assignment or sublease, and under the rule announced in *Forrest v. Durnell*, supra:

"If the landlord consents expressly or impliedly to the occupation of his land by an assignee or undertenant, the relation of landlord and tenant necessarily exists between him and such persons."

This rule is again announced in *Strong v. State*, 70 Tex. Cr. App. 89, 156 S. W. 659, and *Horton v. Lee*, 180 S. W. 1170.

Under appellants' assignment of fundamental error, we hold that the Old River Company has pleaded facts entitling it to a statutory lien against appellants' cattle for the full amount of the lease contract between it and Dunn, and also, as appellants hold as assignees under Dunn, that they are personally liable for the full amount of said contract; and, if we should be in error in holding them liable as assignees, then, as they held the premises with the knowledge and consent of the Old River Company, the relation of landlord and tenant existed between them and Old River Company, and they are liable for the amount of the rent, and Old River Company is entitled to a foreclosure of its lien on said cattle.

Unless appellants were entitled to defeat Dunn's claim against them by reason of the facts pleaded by them, under the contract copied above, Dunn was entitled to recover the full amount asked by him, with a foreclosure of the lien provided in article 5664, which he duly pleaded.

[8] Appellants insist, under an assignment of fundamental error, that we should review the action of the court in peremptorily instructing a verdict against them on the facts set up in their answer. Now, going to their answer, we find that appellants pleaded that Dunn falsely represented to them that their cattle were to get the benefit of the rice straw on the leased premises.

There is nothing in the contract to that effect. There is no plea against Dunn that he despoiled the leased premises of the rice straw or that he permitted others to do so. Appellants ask for relief solely and only on the ground of a parol statement made before the contract was executed. As to this ground of recovery, the court properly charged the jury to return a verdict against appellants.

To the same effect is appellants' plea as to water and the running bayous. There is nothing in the contract binding Dunn to furnish any water, so the court did not err as to this element of damage.

[9] Appellants pleaded also that Dunn represented to them that he owned 20,000 acres of land, over which the cattle could graze, and that this representation was false. There is no allegation in the pleading that this 20,000 acres was a part of the leased premises, but only that Dunn falsely represented that he owned this land, and that appellants' cattle could graze on it, thereby inducing appellants to lease the land described in the contract. This would clearly vary the terms of the written contract by a parol contemporaneous agreement to furnish lands not set out therein.

[10] Appellants further allege that Dunn took them around the leased premises and pointed out certain lands as being included therein, which, in fact, were not included therein. This allegation is not sufficiently specific for us to determine, under a proposition of fundamental error, whether or not the court erred in relation thereto. The lands so pointed out, and which appellants claim were not included in the contract, are not described; nor is their value as pasture lands set out; nor are any facts stated as a specific basis for damage regarding these lands. The court did not err in his instruction, so far as this allegation is concerned.

[11] It is provided specifically in the contract:

"In the event said cattle fail to do well in the rice farms and pastures in which they are to be located, on account of lack of feed in the way of sufficient grasses, tame or otherwise, then the said Dunn hereby agrees to give the said cattle more room in said rice farms and pastures."

Appellants pleaded that the cattle did not do well on the lands described in the contract, and that Dunn refused to furnish other lands.

Looking to appellees' brief, we find this statement, from the testimony of T. P. Russell, one of the appellants:

"I believe I got a letter from Mr. Dunn something to the effect that if I thought the cattle were not doing well enough that he could furnish me from 2,000 to 3,000 acres right away. With reference to whether I went to see him

after that, I didn't want to see him because I did not have a contract with him. I had a contract with Mr. Vasbinder."

It is our conclusion that on an assignment of fundamental error, the judgment of the lower court cannot be disturbed.

We would add further that, though not required to do so under the rules for briefing, or under the decisions of our courts, we have examined all of the different assignments made by appellant, and if we were passing on them serially, as presented, together with the propositions thereunder, we would be forced to overrule all of them.

Finding no errors in this record, this case is in all things affirmed.

#### MORRISS v. HESSE (No. 6181.)

(Court of Civil Appeals of Texas. San Antonio. March 12, 1919. Rehearing Denied April 9, 1919.)

#### 1. EVIDENCE $\S$ 419(4) — PAROL EVIDENCE — COVENANT AGAINST INCUMBRANCES.

In action for damages for breach of covenant against incumbrances, consisting of retention of possession of the granted premises by a tenant of the vendor for several months after the conveyance, parol evidence is inadmissible to show that the plaintiff grantee assumed the burden imposed by the tenant's occupancy, and took the land subject to the tenant's right of possession.

#### 2. COVENANTS $\S$ 96(3) — AGAINST INCUMBRANCES—UNEXPIRED LEASE.

An unexpired lease constitutes an incumbrance, in that it entitles the tenant to a right or interest, to the diminution of the value of the land conveyed.

#### 3. COVENANTS $\S$ 97—QUIET ENJOYMENT.

An unexpired lease is a breach of the covenant for quiet enjoyment.

#### 4. COVENANTS $\S$ 127(6). — INCUMBRANCES — SET-OFF.

A grantee, receiving from tenant in possession of the granted premises lease money or part of the crops in lieu of lease money, is chargeable with what he so receives as an offset to his claim, under covenants in his deed, for the value of the use of the land during the time he is deprived thereof by reason of the tenant's possession.

#### 5. COVENANTS $\S$ 131—INTEREST.

In an action for damages for breach of covenant against incumbrances consisting of an outstanding lease of the granted property, interest was properly allowed on the amount found by the jury as the amount by which the value of the use and enjoyment of the land by the grantee was diminished by occupation of the premises by the lessee.

Appeal from District Court, Bexar County; R. B. Minor, Judge.



Suit by Charles W. Green against Nellie Hesse and another, in which by plea A. G. Morriss was made a party. From judgment for Nellie Hesse against said Morriss, the latter appeals. Affirmed.

Will A. Morriss and W. H. Lipscomb, both of San Antonio, for appellant.

Don A. Bliss, of San Antonio, for appellee.

**MOURSUND, J.** Charles W. Green sued William and Nellie Hesse, upon a certain vendor's lien note, executed by A. G. Morriss to Will A. Morriss, and assumed by said William and Nellie Hesse upon the purchase by them of certain tracts of land situated in Kerr county. William Hesse died pending the suit. Nellie Hesse and the children of William Hesse filed a plea, making A. G. Morriss a party, and sought to recover damages from him on account of the fact that at the time he conveyed said tracts of land to said Nellie Hesse, to wit, on July 12, 1909, they were in the possession of a tenant, who continued in possession thereof until the latter part of November, 1909. For the purposes of this appeal, the cause of action thus asserted may be said to have been one based upon the covenant against incumbrances in the deed from said A. G. Morriss to Nellie Hesse, implied from the use of the words "grant and convey" therein and a general warranty of title, which covenant was alleged to have been breached by such failure to deliver possession. Said Morriss' answer contained the following allegations:

" \* \* \* This defendant says that it is not true that he represented to or agreed with said defendant Hesse, nor her husband, William Hesse, that she or they should have immediate possession of the property conveyed by this defendant to said Hesse, upon the execution and delivery of said deed to her, but, on the contrary, avers that at the time of his agreement to convey said property to said Hesse, and at the time of the execution and delivery of his said deed, and as a part of the consideration therefor and at all times thereafter, it was understood and agreed between the parties that one Burks was then a tenant on the property so conveyed to said Hesse, and that the husband of defendant Hesse, to wit, William Hesse, under instructions and agreements with this defendant, saw and interviewed said tenant with regard to the time when said tenant could give possession of said lands and premises to said Hesse, and said Hesse took said property with the agreement and understanding that he should not have possession of same until such time in the fall or winter of 1909, when said tenant should surrender the possession of said premises, or when the tenancy of said tenant for the year 1909 should expire, and that said Hesse should have the lease or use of the premises in San Antonio, so traded by them to this defendant for said property, until such time as they could get possession from said tenant Burks, said William Hesse having prior thereto seen and interviewed said tenant with regard to the

time when he, said tenant, should surrender said premises, and fully understanding and agreeing to the continued occupancy of said lands by said tenant until such later period in said year when said tenant could and would remove therefrom."

The cause of action asserted by Green having been severed from that of Nellie Hesse and the heirs of William Hesse against Morriss, the court, as to the cause of action against said Morriss, submitted to the jury only the question:

"By what amount, if any, was the value of the use and enjoyment of the land by an owner of the fee simple title diminished by Burks' occupation or use of the same, or such part of the same as you may believe from the evidence that he occupied or used, and during such time as you may believe from the evidence that he occupied or used the same after the delivery of the deed for the land by A. G. Morriss to Mrs. Hesse?" The jury answered: \$250.00."

Thereupon judgment was rendered in favor of Nellie Hesse against said Morriss for said sum, with interest thereon from January 1, 1913, at the rate of 6 per cent. per annum, and against the heirs of William Hesse, who also had sought a recovery against said Morriss.

Upon the trial appellant, Morriss, offered to prove by Will A. Morriss:

"That he, the said Morriss, acted, throughout the negotiations with William Hesse, for A. G. Morriss in making the deed for plaintiff, Hesse, and that all of his dealings were with William Hesse, the husband of the plaintiff, Nellie Hesse; that when said William Hesse and the said witness were first discussing said deal, the said witness, Will A. Morriss, told the said William Hesse that a man by the name of Burks was on the property subsequently deeded to said Nellie Hesse, living in the house; that he had some sort of crops in the fields, and that as he, the said Hesse, was going up there with Mr. Hixon, the agent who brought said Hesse to the witness, to look at the place and see whether he wanted it, the said witness wanted him to see the occupant, Mr. Burks, and find out from, and agree with, Burks as to when said Burks could get off, as said witness knew that Burks had some crops on there, and it might take him some little time to get off the property, and that said witness would not make the deal with him, except for him to let Burks stay on and get his crops off, or for him, the said Hesse, to deal with Burks as he saw fit; that after Hesse went up there and saw the property he came back, and in the course of a discussion between said witness and said Hesse he, the said Hesse, discussed it with Burks, and that Burks did not have any crops over much of the fields, and that he, the said Burks, said that he could get off what crops he had there—principally cotton—as soon as the cotton was ready to pick, and that this would be satisfactory to him, provided the witness would let the said Hesse and his family occupy the place he was to trade A. G. Morriss on Matamoros street, until such time as he could get possession up there, and he said that would be

satisfactory, as it would take him some time to get possession any way, and the witness told him that he would not let him have the property for the price he was paying therefor, except on his making his own arrangements and assuming any kind of occupancy under Burks; that this was agreed to and understood between said William Hesse and said witness, and that witness agreed that he should keep the place on Matamoras street until such time as he could go up there and get possession from Burks; that such agreement was the understanding, and a part of the consideration at the time of the delivery of deeds, that he should assume the matter of getting Burks off or waiting to take possession until Burks should get off."

[1-3] This testimony was objected to on the ground that it was inadmissible, "in that it tended to alter, vary, change, contradict, and modify the written agreement between the said A. G. Morriss and said Nellie Hesse, as evidenced by the warranty deed executed by said Morriss to Nellie Hesse." This objection was sustained, and by the first assignment of error complaint is made of such ruling. The proposition relied on is that parol evidence was admissible to show that the grantee in the deed had assumed the burden imposed by the tenant's occupancy and took the land subject thereto. The case of Johnson v. Elmen, 94 Tex. 168, 59 S. W. 253, 52 L. R. A. 162, 86 Am. St. Rep. 845, is the only one cited by appellant, and that case is the first one cited by appellees in support of their counter proposition. In that case it was held that in a suit on the covenant against incumbrances it could be shown by parol that the grantee assumed and agreed to pay off a certain debt secured by lien against the land. The holding is in line with many cases decided by courts of other states, some of which are collated in the note on page 229 of L. R. A. 1916E. It will be seen, by reading the editor's note beginning on page 221, that there are many cases holding the contrary. In the case of Johnson v. Elmen the court recognizes the rule that parol evidence cannot be admitted to show merely that the parties orally agreed that a certain incumbrance should be excepted from the operation of a deed, but at the same time held that the effect of a verbal promise to assume and pay off the incumbrance was not to except the vendor's lien notes from the covenant, but to show that as between the parties to the contract the incumbrance had been discharged. It was deemed that the equitable principle should apply that "that is considered as done which ought to be done, and that as between the parties the lien should be held to be discharged." Appellants, in order to bring this case within the rule applied in the case of Johnson v. Elmen, desire to have the possession of the tenant treated as a burden assumed as part of the consideration for the deed. It seems to us, however, that

instead of the parol agreement being considered as one involving the assumption of an incumbrance by the grantee, it should be treated as one to the effect that a certain incumbrance is to be excepted from the operation of the covenants therein made. The agreement does not restrict the covenant by adding to the consideration expressed in the deed an obligation on the part of the grantee to pay off a certain debt against the land, which necessitates the construction that the covenant is restricted to the extent that it must be consistent with the consideration, but directly restricts the covenant by adding to the deed, not something agreed to be paid or performed by the grantee, but simply an agreement that the incumbrance created by the possession of the tenant is to be excepted from the general covenant against incumbrances. If this effort to differentiate the agreements in this case from the one in the case of Johnson v. Elmen is without merit, then it occurs to us that it can plausibly be urged that every parol agreement may be shown, regardless of its effect on the covenants of the deed. That a parol agreement to the effect that the grantee bought only a certain estate in the land, or bought subject to certain defects of title, cannot be shown in defense of a suit on the covenants of a general warranty deed is sustained by our decisions. Wells v. Groesbeck, 22 Tex. 429; Bigham v. Bigham, 57 Tex. 238; Warren v. Clark, 24 S. W. 1105; Ord v. Waller, 107 S. W. 1166; Johnson v. Johnson, 147 S. W. 1167. The same rule should, we believe, apply when it is sought to show by parol that the grantee bought subject to the right of possession of a tenant of the grantor. An unexpired lease not only constitutes an incumbrance, in that it entitles the tenant to a right or interest to the diminution of the value of the land conveyed, but in addition it prevents the grantee from obtaining the possession to which he is entitled under the terms of his deed, and therefore it seems, in view of the general warranty, that there is also a breach of the covenant for quiet enjoyment. Williams v. Turner, 50 Tex. 137; Jones v. Paul, 59 Tex. 41.

The case of Burroughs v. Pate, 166 Ala. 223, 51 South. 978, is very similar in its facts to this case. The Supreme Court of Alabama held that if the parol testimony reduces the estate conveyed, or limits or restricts the unqualified use and enjoyment of the land conveyed, it is inadmissible. See, also, O'Connor v. Enos, 56 Wash. 448, 105 Pac. 1039; Simons v. Diamond Match Co., 159 Mich. 241, 123 N. W. 1182; Anthony v. Rockefeller, 102 Mo. App. 326, 76 S. W. 491.

Had it been alleged and proven that the Hesses actually received benefits under the parol agreement, an element of estoppel would have been introduced into the case, which would probably be sufficient to prevent

a suit on the covenant, but it is only alleged and was only sought to prove that appellant agreed that the Hesses might occupy certain premises in San Antonio, which they conveyed as part of the consideration for their conveyance. It was not alleged nor sought to be proven that the Hesses actually occupied the premises on Matamoras street after the deal was closed. The testimony excluded related wholly to negotiations preceding the execution of the deed. Had the testimony been to the effect that an agreement was made subsequent to the delivery of the deed by which, in consideration of the agreement permitting the Hesses to occupy and use the Matamoras street property until they could obtain possession of the premises conveyed them, it was agreed by them that the incumbrance existing by virtue of the unexpired lease should not be relied on as a breach of the covenants in the deed, a different case would have been presented, one in which a claim existing because of breach of a covenant was canceled for a valuable consideration. There are cases in which a written assignment of the lease has been made, and of course, such assignment and the deed being construed together for the purpose of ascertaining the terms of the written contract, it was held in such cases that the grantee bought subject to the lease, and could not sue for breach of covenant.

[4] In some cases premises are purchased because of the existence of a good lease thereon. In such cases there is a breach of the covenant, but it may not occasion damages, for what the grantee receives from the tenant may be the full rental value. If the grantee collects lease money from the tenant or receives part of the crops in lieu of lease money, it is obvious that what he receives is chargeable against him in offset to his claim for the value of the use of the land during the time he is deprived thereof. It appears to us that in some instances the courts have confused the issue of whether any actual damages were suffered with the issue whether the covenant was breached.

We conclude that the court did not err in excluding the testimony.

[5] Appellant also complains because the court allowed interest on the amount found by the jury in answer to the question submitted. No authority is cited by appellants, and we believe none can be found to support their contention. We have had occasion to read many cases in passing on the first question, and in all, in which the issue arose as to the measure of damages, interest was allowed. In this case, the court allowed no interest up to the time of the death of Wm. Hesse in 1912, evidently on the theory that it was community property, but did allow Mrs. Hesse interest from that time on.

The judgment is affirmed.

# SIMMONS et al. v. WESTERN INDEMNITY CO. (No. 8996.)

(Court of Civil Appeals of Texas. Ft. Worth. Feb. 15, 1919.)

## 1. INSURANCE — 679 — ASSUMPTION OF LIABILITIES BY ANOTHER COMPANY.

A contract of one company assuming the liabilities of another company does not constitute an issuance of a new policy upon the life of one dead at the date of such contract, nor an extension of the period of limitation which had begun to run.

## 2. INSURANCE — 177 — PREMIUMS — DEFAULT AFTER INJURY.

A beneficiary can recover upon an accident policy for injury occurring during the period for which a premium was paid, though death from the injury took place after such period.

## 3. LIMITATION OF ACTIONS — 24(1) — INSURANCE — 558(4), 623(1) — PROOF OF CLAIM — FAILURE TO FURNISH BLANKS — WAIVER — STATUTE OF LIMITATIONS.

Where the beneficiary in an accident policy wrote to the insurer within 90 days after death of insured, as provided by the policy, to furnish blanks required for proof, but insurer failed to furnish same, such failure constitutes a waiver of insurer's right to such proof, and of the contractual period of limitation stated in the policy in pursuance of Vernon's Sayles' Ann. Civ. St. 1914, art. 4742, and hence the statutory period of four years applied.

## 4. LIMITATION OF ACTIONS — 190(1) — INSURANCE POLICY — "REASONABLE TIME."

Unless the facts are clear, the question as to what is a "reasonable time" after refusal of insurer to furnish blanks for proof of loss under an accident policy, during which time limitations would not run against action by insured, is a mixed question of law and fact to be submitted to the jury under proper instructions; "reasonable time" being such promptitude as the situation of the parties and the circumstances allow (citing Words and Phrases, vol. 4, p. 186).

## 5. INSURANCE — 668(14) — QUESTION FOR JURY — NOTICE AND PROOF.

Whether the beneficiary in an accident policy notified the insurer of the death of insured and requested blanks required by the policy for proof of claim, and received no reply and no blanks were sent, held a question of fact for the jury.

## 6. INSURANCE — 146(3), 623(1) — ACTION ON POLICY — LIMITATION PROVISIONS — CONSTRUCTION.

The provision in an insurance policy for shortening the period of limitation, being one for the benefit of the insurer, may be waived, and will be construed strictly against the insurer and liberally in favor of the beneficiary.

Appeal from Cooke County Court; H. S. Holman, Judge.

Action by Georgia Simmons and others against the Western Indemnity Company. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

E. A. Blanton, of Gainesville, and Thos. C. Tripp, of Nocona, for appellants.

C. R. Pearman and Davis & Davis, all of Gainesville, for appellee.

BUCK, J. [1] This is an appeal from a judgment for defendant under an instructed verdict. We are not advised as to whether the ground upon which the peremptory instruction was given was that, in the opinion of the court, the uncontroverted evidence sustained one or more of the defendant's pleas of limitation, or that the court concluded that the facts showed that the policy was not in force at the time of the insured's death. In this connection, it may be well to state that in our opinion the fact that the Western Indemnity Company on October 16, 1913, in writing, assumed all the liabilities of the Western Casualty & Guaranty Insurance Company, which company issued the policy declared upon, would not extend or in any way affect the question of limitation. The contract of assumption of liability by the appellant company, while for the benefit of the policy holders in the Western Casualty & Guaranty Company as their rights existed at the time of such assumption, could not reasonably be held as the issuance of a new policy upon the life of one who was dead at the date of the contract between the two companies, or as prolonging any period of limitation which had begun to run.

It is agreed in the statement of facts that on October 16, 1913, the Western Indemnity Company "assumed, in writing, all liabilities" of the Western Casualty & Guaranty Insurance Company. If the insured in any policy issued by the Western Casualty & Guaranty Insurance Company had died prior to the assumption of liability by the Western Indemnity Company, such right of action against the company issuing the policy, as the beneficiary named might have had, was fixed at the time of the reinsurance, and her right of recovery would be determined according to the terms of the policy as originally issued. As to policies matured by death, the beneficiary's rights would not be enlarged because of such assumption by the reinsuring company.

Taking the view of the evidence most strongly in favor of the plaintiff below, it may be said that the record discloses the following state of facts, to wit: On May 10, 1912, the insured, Abe Belton, took out a policy in the Western Casualty & Guaranty Insurance Company, hereinafter called the "guaranty company." This policy provided for sick benefits and monthly accident indemnities in the sum of \$30, and was in the principal sum of \$300. The premium for May

and June, 1912, was paid by the insured prior to his injury, which occurred during the first week in June while he was engaged as a laborer for a paving company in Houston, Tex. The insured was treated by a physician in Houston, and was confined to his bed until July 15th, when he returned to his home in Gainesville, where he was likewise confined to his bed and under medical treatment until August 7th, following, when he died. Within 90 days the widow and beneficiary, appellee here, caused letters to be written to the guaranty company at Houston and Dallas, in both of which cities the company had offices. In these letters, there being some five or six of them, the company was informed of the accident to the insured and his subsequent death therefrom, and was requested to send blanks for proof. No answer was received. The widow was an illiterate negro, unable to read or write, and made no further effort to collect on the policy until the latter part of 1915, when she turned the policy over to her attorney for collection. The attorney immediately set about to locate the guaranty company, and learned that it had left the state of Texas and returned to the state of Oklahoma, and that it had reinsured its risks in the Western Indemnity Company, hereinafter called the "indemnity company," and that the indemnity company had assumed the rights and all liabilities of the old company. He then wrote to the indemnity company at Dallas, giving it the date of Belton's death and all particulars with reference thereto, and asked the company to send him blanks to make proof of death. The manager of the claim department replied: That he had examined the books carefully and had failed to find any claim made under the Belton policy. That the company had never received any letters from Belton's widow giving information of the insured's death and requesting blanks for proof of death. That, if any claim against the company had ever existed by reason of Belton's alleged injury and death, at the time the company was informed thereof the claim was barred by limitation. That while the company did not ordinarily take advantage of the statute of limitation, yet, in this instance, the accident had happened so long ago that it would be impossible for the company to obtain trustworthy evidence of the man's injury or the cause of insured's death. Hence the company refused to recognize the claim. The correspondence between the indemnity company and appellee's attorney seems to have occurred during March and April of 1916. Suit was filed March 15, 1916, or three years, seven months, and eight days after the insured's death.

Plaintiff sought to recover the sum of \$830, together with interest and attorney's fees, the \$30 being claimed for total disability of

insured "for the second month that said Abe Belton was confined to his room and unable to work."

Part XI, under the head of "Indemnity Payments," of the policy, provides that claims of disability of less than one month's duration shall be payable after the termination of the disability only, while another clause provides that in consideration of the extra premium paid the indemnity mentioned extended to cover the first week of any illness for which the insured would be entitled to benefit according to the terms and conditions of the policy. Just why the claim was made for indemnity covering the second month's illness, and not the first, is not disclosed either in the record or in the briefs.

[2] There is no claim made by plaintiff that the premium for either July or August, 1912, was paid. The policy provides that—

"The payment of any past-due premium shall not continue this insurance in force beyond the first day of the succeeding month."

But it has been held that recovery may be had upon a policy for injury, resulting in loss of time or death, occurring during the period for which premium has been paid, though death of the insured took place after such period. *Burkheiser v. Mut. Acc. Association*, 61 Fed. 816, 10 C. C. A. 94, 26 L. R. A. 112; 14 R. C. L. § 148, p. 976. If this holding be sound, and we are of the opinion that it is, then, if limitation does not bar a recovery, it would seem that the peremptory instruction should not have been given.

The policy contains the following clause:

"No proceedings at law or in equity shall be brought against the company for recovery under this policy until ninety days from the date of filing proof, nor shall the same be brought at all unless commenced within two years and ninety days from the date when the final proofs of claim are filed with the company."

[3] Conceding that the evidence tends to establish that within 90 days the beneficiary wrote to the guaranty company, both at Houston and at Dallas, in which last-named city its general office was maintained, and that no reply was received, and that no proof of death was made because of said failure on the part of the company to furnish such blanks, and that such failure constituted a waiver on the part of the company of the provision in the policy requiring proofs on forms furnished by the company, then was the beneficiary relieved from the bar of limitation, when she delayed suit until March 15, 1916, three years, seven months and eight days from the insured's death? The policy provides that such must be furnished within 90 days after the happening of the event upon which claim of liability is based. Limitation begins to run when a cause of action accrues, and not before, and this does not exist unless facts exist which

authorize the person asserting the claim to get relief from some court of justice against the person who ought to make reparation. *Stanley v. Schwalby*, 85 Tex. 348, 19 S. W. 264. Article 4742, V. S. Revised Civil Statutes, provides that no provision in an insurance policy shortening the limitation period to less than two years shall be valid. The contract of insurance here under consideration provides for a period of limitation of 2 years and 90 days after final proofs of claim are filed with the company. The appellee would have had a reasonable time after her husband's death to attempt to secure the blanks from the company upon which she could make proof of claim. If, after a reasonable time, the company failed to furnish such blanks, such failure, in the absence of reasonable explanation, would be held to constitute a waiver on the company's part of the right to such proof, and the claimant would have the right to prosecute her action in the absence of proofs made. *Metropolitan Life Ins. Co. v. Gibbs*, 34 Tex. Civ. App. 131, 78 S. W. 398; *Williams v. Bowie County*, 58 Tex. Civ. App. 116, 123 S. W. 190; *Smith v. Wise County*, 187 S. W. 705, writ denied. We think it cannot be reasonably held that the failure on the company's part to furnish blanks would stay indefinitely the running of limitation. 17 R. C. L. § 121, p. 755. Only a reasonable time after such failure would be allowed before the operation of the statute would begin. The policy provides, in the case at bar, that proof must be furnished within 90 days after loss of life or the determination of disability. During this period, if proof of loss was not filed before, limitation would not run. Further, perhaps, the beneficiary would have a reasonable time after the failure of the company to furnish blanks before limitation would begin.

[4] "'Reasonable time' is such promptitude as the situation of the parties and the circumstances of the case will allow. It never means an indulgence in unnecessary delay or in a delay occasioned by a fruitless effort to do the act required." *W. & P. vol. 4, p. 186*, and cases there cited. Ordinarily, what is a "reasonable time" constitutes a mixed question of law and fact and should be submitted to the jury under proper instructions of the court. *Ibid.* What is a reasonable time where the facts are clear is held in *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 1 Sup. Ct. 178, 27 L. Ed. 819, and in *Paine v. Cent. Vermont R. R. Co.*, 118 U. S. 152, 6 Sup. Ct. 1019, 30 L. Ed. 198, to be a question of law for the court. Giving full credit to plaintiff's testimony, she waited some 3 years after the 90 days allowed for filing proof before she even advised with her lawyer. If the limitation provided in the contract be given effect, this was some 9 months beyond the period of limitation provided.

[5, 6] But we have concluded that in view of plaintiff's testimony that she had letters written, addressed, and mailed to the company, notifying it of the death of the insured and asking for blanks on which to make proof of claim, and that no reply was received from the company, and no blanks sent, and in view of the provision in the policy that proof of claim was required to be made in accordance with the said blank forms furnished by the company, it became a question of fact for the jury as to whether the beneficiary did give the notice and request the furnishing of the necessary blanks by the company. If the company received such notice and within a reasonable time failed to furnish the said blanks, such failure would constitute a waiver of proof, and also a waiver of the contractual period of limitation of 2 years and 90 days after the filing of proofs. "If the limitation applies under certain conditions, such conditions must exist or it will not bar an action." 4 Cooley, Briefs on Insurance, 3971. If the event which was to set the contractual limitation in motion did not occur because of the fault of the insurance company, i. e., the failure to furnish blanks, the provision in the policy shortening the period of limitation would have no effect, and the statutory period of four years would apply. See *Dechter v. K. & L. of Security*, 130 Minn. 329, 153 N. W. 742, Ann. Cas. 1917C, 142. In this case, it is said:

"Nor can we see that the denial of liability in the answer in the former action started the contract limitation in motion. The reason is simply that this was not the event that the contract stipulated should start the contract limitation in motion. The occurrence of the event provided in the contract having failed as a result of wrongful conduct of defendant, the provision of the contract has no application, and the statutory limitation applies. This is in accordance with the rule generally followed in fire insurance cases."

The provision in the policy requiring suit to be brought within 2 years and 90 days after the filing of proofs was one for the benefit of the company and might be waived. See *Bates v. Acc. Co.*, 87 Vt. 129, 88 Atl. 532, Ann. Cas. 1916C, 447. See, also, 5 Elliott on Contracts, § 428, p. 430; 13 C. J. § 801, p. 700; *Landis v. Ins. Co.*, 56 Mo. 591; *Williams v. Ins. Co.*, 29 Me. 465; *Bartlett v. Ins. Co.*, 46 Me. 500. The stipulation for shortening the period of limitation in an insurance policy being undoubtedly for the benefit of the insurer, the provision should be construed strictly against the insurance company and liberally in favor of the beneficiary.

We have concluded that the trial court erred in giving a peremptory instruction for the defendant, and the judgment is hereby reversed, and the cause remanded for further proceedings not in conflict with this opinion.

CHANDLER et ux. v. RILEY et al.  
(No. 8092.)

(Court of Civil Appeals of Texas, Dallas.  
March 22, 1919.)

1. JUDGMENTS ⇐271 — ENTRY — CONSTRUCTION OF STATUTE.

Vernon's Sayles' Ann. Civ. St. 1914, art. 1694, providing that district clerk shall enter all judgments under the direction of the judge, has reference to the amplified decree which goes upon the minutes, and not to the judge's docket entry.

2. EVIDENCE ⇐83(6) — PRESUMPTIONS — OFFICIAL PROCEEDINGS.

Where judge's name does not appear in the blank constituting part of the form required by district court's rule 48 (142 S. W. xxi) following the judgment copied in the transcript, it will be presumed, for the purpose of giving court on appeal jurisdiction of the appeal, in the absence of such attack on the verity of the record as is permitted by law, that the clerk performed his duty in making out and certifying transcript as required by Vernon's Sayles' Ann. Civ. St. 1914, arts. 2108, 2114, and that judgment was entered under direction of judge under article 1694, since such direction may be oral.

3. APPEAL AND ERROR ⇐608(1)—JURISDICTION OF COURT—AFFIDAVIT IN LIEU OF APPEAL BOND—DATE OF FILING.

Where clerk, in preparing transcript, indicated time of filing instruments by date at end of each pleading, court on appeal will take jurisdiction, where there is no file mark following affidavit in lieu of appeal bond, and where judgment immediately following such affidavit is followed by file mark; it being obvious that file mark following judgment was intended for affidavit, since judgment is not required to be filed.

4. TRUSTS ⇐95 — CONSTRUCTIVE TRUST — FRAUD.

Generally, where legal title to property has been obtained through actual fraud, misrepresentations, concealments, taking advantage of one's necessities, or under circumstances rendering it unconscionable for holder of legal title to retain beneficial interest, equity impresses a constructive trust.

5. TRUSTS ⇐96 — CONSTRUCTIVE TRUST — FRAUD.

Where a person acquires legal title to land by means of an intentionally false and fraudulent verbal promise to hold same for a certain specified purpose, or to reconvey, and thereafter retains, uses, and claims property as his own, so that the transaction is in fact a scheme of actual deceit, a constructive trust results.

6. TRUSTS ⇐100 — CONSTRUCTIVE TRUST — PROMISE TO RECONVEY—EXECUTION SALE BY PURCHASER—FRAUD.

Where land is purchased at execution sale under prior fraudulent verbal promise to hold property for benefit of owner and reconvey upon payment of the amount advanced for the purchase price, and purchaser, having obtained

property for much less than actual value, refuses to abide by verbal promise and retains the land as his own, a constructive trust results in favor of former owner.

**7. TRUSTS §99 — TRUSTS EX MALEFICIO — PROMISE TO CONVEY.**

A mere verbal promise to purchase and convey land does not create an ex maleficio trust; positive fraud accompanying the promise, and by means of which the acquisition of the legal title was obtained, being necessary.

**8. MORTGAGES §512 — FORECLOSURE SALE — RIGHTS OF OWNER — "EXECUTION."**

In mortgage foreclosure sale, owners may divide land and have it sold in lots, under Vernon's Sayles' Ann. Civ. St. 1914, art. 3754, providing that lands not in towns and cities taken "in execution" may be so sold upon owner's compliance with certain formalities; process issued upon judgments decreeing foreclosure of mortgage lien being "execution," within such statutes, in view of articles 2000 and 3729, subd. 3.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Execution.]

**9. PLEADING §228 — INDEFINITENESS — GENERAL DEMURRER — SPECIAL EXCEPTIONS.**

Pleading of right to have land, on mortgage foreclosure sale, sold in small lots under Vernon's Sayles' Ann. Civ. St. 1914, art. 3754, without alleging that the plat and field notes were certified to by the county surveyor as required by such statutes, was sufficient on general demurrer, since such omission could only be reached by a special exception.

**10. PLEADING §228 — DEFECTIVE FORM — SPECIAL EXCEPTIONS.**

Defect in the form or manner of stating a fact should be pointed out by special exception, since a good cause of action, defectively stated, or the omission of a formal, but necessary, averment, is good against a general demurrer.

**11. MORTGAGES §618 — ACTION TO SET ASIDE SHERIFF'S DEED — JURY QUESTION — TIME OF ESSENCE OF CONTRACT.**

In action to cancel sheriff's deed upon ground that purchaser verbally promised plaintiffs to reconvey on payment by plaintiffs of purchase price, the question of whether time was of the essence of such contract was one of fact for the jury under appropriate charge.

**12. CONTRACTS §50 — CONSIDERATION.**

A benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made, is a sufficient consideration.

**13. CONTRACTS §56 — CONSIDERATION — MUTUAL PROMISE.**

A mutual promise is a sufficient consideration, if concurrent in point of time.

**14. MORTGAGES §591(3) — CONSIDERATION — PROMISE TO RECONVEY — MORTGAGE FORECLOSURE SALE.**

Promise by purchaser at mortgage foreclosure sale to reconvey land to owner upon owner's payment of purchase price, where as a result of such promise owner refrained from having land sold in parcels, by means of which several hun-

dred acres would have been saved from sale, was based upon a good consideration.

**15. TRIAL §130(1) — REASONABLE TIME — JURY QUESTION.**

What is a reasonable or unreasonable time is generally for the jury.

**16. MORTGAGES §605 — ACTION TO SET ASIDE SHERIFF'S DEED — TENDER.**

In action to cancel sheriff's deed on ground that purchaser promised owner to reconvey on owner's payment of price paid for land by purchaser, it was not necessary for owner to actually tender the money admitted to be due and owing to purchaser into court; an offer to do equity and to perform such decree as the court may enter being sufficient.

Appeal from District Court, Freestone County; A. M. Blackmon, Judge.

Action by R. F. Chandler and wife against John Riley and others. Judgment of dismissal, and plaintiffs appeal. Reversed and remanded, with directions.

R. L. Willford, of Fairfield, and Adams & Stennis, of Dallas, for appellants.

A. B. Geppert, of Teague, and T. W. Young, of Crockett, for appellees.

**RASBURY, J.** The appellants, R. F. Chandler and his wife, Mary, sued appellee John Riley, to cancel sheriff's deed to certain lands in Freestone county, claimed thereunder by appellee, and to invest them with title thereto and possession thereof. Tenants in possession were made parties to the suit for purposes unimportant to detail. The facts narrated in the petition, and upon which the prayer for the relief sought was predicated, are in substance these:

March 26, 1915, in cause No. 6262 in the district court of McLennan county, Mary Young obtained judgment against appellants upon their promissory notes for \$7,730 with foreclosure of lien upon 1,431 acres of land in Freestone county, given as security for payment of said notes, with award of statutory order of sale, etc. July 1, 1915, in cause No. 5381 in the district court of Freestone county, John Riley, appellee, secured judgment against appellant R. F. Chandler upon debt, also secured by lien upon said 1,431 acres of land above recited, subject to lien in favor of Mary Young, and in addition upon 216 acres of land, and was awarded statutory order of sale, with stay until September 1, 1915. Subsequently orders of sale were issued from both judgments, and the lands described were levied upon and posted for sale according to the respective decrees on December 7, 1915. In order that the lands ordered sold might sell to the greatest advantage, appellants, prior to the sale, caused said lands to be surveyed into 23 tracts of not less than 50 acres each by the county surveyor of Free-

stone county, who also prepared a plat thereof, together with field notes of each tract, and prior to said sale placed the same in the hands of the sheriff, with the request that the lands be sold in tracts according to said plat one at a time and in the order designated by appellants. A few minutes before the sale, and when appellant R. F. Chandler, appellee John Riley, Young, and others had gathered in attendance upon the sale, appellee Riley proposed that appellant Chandler withdraw his request for a sale of the lands in tracts of 50 acres each, and permit Riley to bid in all the lands without competition, on condition that appellee Riley would reconvey said lands to appellant upon payment within 30 days of the amount due under said judgments.

Appellant accepted the offer, and withdrew his request and plat from the sheriff, and the 1,481 acres of land were sold in bulk by the sheriff to appellee Riley for \$8,200, the total amount due under the Young judgment, whereas, it was worth \$30,000, while 216 acres were sold to appellee Riley for \$400 whereas it was worth \$4,000 there being, as result of said agreement, no competition at said sale, and but for which a sufficient amount of money to pay off said debts would have been realized by the sale of 1,000 acres of said land. After the sale, upon the representation of appellee Riley that it was necessary that he have possession of the lands before the expiration of the 30 days agreed upon, appellants consented for him to take possession thereof. Before the 30 days expired it was further agreed between the parties that appellee Riley should possess, use, and rent the lands for the year 1916, and appropriate the use and rentals for that year in lieu of the interest on Riley's debt for said year 1917, on condition that appellants would repay the full amount of Riley's debt on or before March 6, 1916. On March 6, 1916, appellee Riley further extended the time in which his debt should be paid to March 20, 1916, in order to cure some slight defect in the title at the request of one who had promised a loan to appellants sufficient to liquidate all debts. On March 15, 1916, one day before the expiration of the last extension, appellants requested from appellee Riley a declaration in writing that he would reconvey said lands upon payment in full of the indebtedness. Riley declined to make such declaration, whereupon appellants announced they would be compelled to resort to court for protection, and whereupon appellee Riley declared no further time for redemption would be allowed.

The lands in controversy were all the lands owned by appellants, and in order to raise money to pay appellee Riley's debt it was necessary to secure its payment by the usual lien thereon, and appellant did procure the promise of loans from several parties suffi-

cient to pay appellee's debt in full before the time agreed upon expired, and said parties were ready, willing, and able to pay appellee said amount upon the transfer of said lands to appellant, or upon a written statement by Riley that he would do so. This appellee Riley refused to do, intending secretly at all times to retain the lands and defeat the efforts of appellant to redeem same. Appellee Riley discouraged prospective lenders, by untrue statements to the effect that appellants would never be able to repay any loan, and by disparaging the value of the lands, and did in such manner and methods prevent appellants, within the time agreed, from securing a loan from T. J. Cole in December, 1915, from Capt. Garrity in December, 1915, from C. Roe Hall in January, 1916, from the American National Insurance Company and others in February, 1916, and but for which the debt would have been paid and the land redeemed. Appellants offered to pay into court all moneys found to be due appellee Riley. Other facts on other and alternative issues were pleaded, but it is not, in the view we take of the case, necessary to recite same.

Among other defenses urged by appellee Riley to appellants' suit was the general demurrer, which on call of the case was sustained, and, appellants declining to amend, judgment was entered against them, and for appellee for costs, from which action this appeal is taken, and error assigned by appellants, but which appellees contend cannot be considered, for the reason that the record discloses affirmatively a want of jurisdiction in this court to consider the appeal.

[1, 2] The first point is that the judgment entry shown in the record was not approved by the district judge, and is hence one that cannot be reviewed by this court. The judgment copied in the transcript is the form that usually follows when the general demurrer is sustained and no amendment made. Following the judgment, and obviously a part of the form required by rule 48, district courts (142 S. W. xxi), to be prepared by counsel for the successful party are the words: "Approved. —, Judge 77th Judicial District." The district judge's name does not appear in the blank left for that purpose. Upon that fact apparently appellees contend that this court is without jurisdiction. In our opinion the claim is without merit. By article 1694, Vernon's Sayles' Civil Statutes, it is provided that district clerk "shall enter all judgments of the court, under the direction of the judge." Such entry has reference, not to the judge's docket entry, but to the amplified decree, which goes upon the minutes. The article does not require that the judge shall indorse his approval in writing on the form of such amplified decree. It is only required to be entered under his direction, and clearly such direction may be oral, and when the transcript, made out



by the clerk and certified by him as required by articles 2108 and 2114, is filed in this court, the presumption will be indulged that the clerk performed his duty and that the judgment was entered "under direction of the judge," in the absence of such attack on the verity of the record as is permitted by law.

[3] The claim is also made that the affidavit in lieu of appeal bond was never filed in the district court, and for that reason this court is without jurisdiction. In preparing and arranging the transcript, the clerk, instead of showing the time of filing instruments on the margin of the transcript sheets, indicated such dates at the end of each pleading contained in the transcript. The affidavit in lieu of appeal bond is the last paper or pleading shown in the transcript. The time it was filed does not appear immediately beneath the affidavit, as in case of other papers; that which does follow immediately being the judgment of the court that appellants were unable to pay costs, which was in turn followed by a file mark. Judgments are not filed. It is obvious, therefore, that the file mark has reference to the affidavit, and such file mark, showing that the affidavit was filed within the time required by law, did confer jurisdiction upon the court.

It is also urged that we are without jurisdiction because motion for new trial was not filed. It has been held repeatedly that such motion is not necessary to confer jurisdiction on appeals from the action of the trial court in sustaining a general demurrer challenging the sufficiency of the cause of action alleged in the petition.

It is also claimed that the record fails to show notice of appeal. The record does show such notice. We assume the contention is due to oversight.

[4] We will now consider appellants' assignments of error, the first of which challenges the action of the court in sustaining the general demurrer, the effect of which was to declare that the facts related disclosed no legal right in appellants to the relief sought. Appellants argue that the facts related disclose in equity a constructive trust for their benefit, which they were entitled to have enforced at the time suit was commenced, upon their offer to pay whatever money the court might adjudge was due appellee in equity. Constructive trusts, those arising by operation of law from deeds, contracts, acts, or conduct, and enforceable in equity, are, as said by the author presently referred to, "as numberless as the modes by which property may be obtained, through bad faith and unconscientious acts." Various facts have been held to constitute such a trust in as many cases. The underlying rule, however, is of greater importance than the cases:

"In general, whenever the legal title to property, real or personal, has been obtained

through actual fraud, misrepresentation, concealments, \* \* \* taking advantage of one's \* \* \* necessities, or through any other similar means or under any other similar circumstances, which renders it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust upon the property thus acquired in favor of one who is truly and equitably entitled to the same. \* \* \*" Pom. Eq. Juris., vol. 8, § 1053.

[5] A common form of constructive trusts is that which results when—

"a person acquires the legal title to land \* \* \* by means of an intentionally false and fraudulent verbal promise to hold same for a certain specified purpose, as, for example, a promise \* \* \* to reconvey it to the grantor, \* \* \* and having thus fraudulently obtained the title, he retains, uses, and claims the property as his own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit. \* \* \*" Pom. Eq. Juris. vol. 8, § 1055.

In a footnote commencing on page 2038 of the volume just cited, it is said in substance that the doctrine is used with great efficacy to prevent fraud and protect persons under necessities in cases, among others, of execution sale, when land is bought in under prior fraudulent promise that the purchaser will take the title, hold the property for the benefit of the owner, and reconvey upon payment of the amount advanced for the purchase price, and having thus by fraudulent contrivance cut off competition and prevented the owner from making other arrangements to protect his property, and having obtained the property perhaps for much less than its real value, refuse to abide by his verbal promise and retains the land as absolutely his own.

[6] The rule stated is and always has been the rule in this state and all others which we have noticed, and for that reason we consider it unnecessary to cite cases. *Brown v. Jackson*, 40 S. W. 162, is, however, a case nearly parallel in its facts with the case at bar applying the rule. The facts which we are to accept as true in considering the court's action in sustaining the demurrer have been related. They speak for themselves, and we can add nothing to their meaning or force by presenting them and the inferences and deductions to be drawn therefrom in other, but similar, language and relation. That they disclose a constructive trust, or one *ex maleficio*, we think is obvious. The request to sell in parcels, the allegations of the petition show, would have realized sufficient funds to pay the indebtedness, and left appellants several hundred acres of land; but, due to the agreement of the parties, on which appellants relied, appellee bid in the land without competition for a sum much less than its real value. Subsequently it was agreed that appellee Riley should have pos-

session and use of the lands during the year 1916, and the time for payment was extended by appellee on three several occasions, at the expiration of the latter of which appellee, upon the failure of appellants to pay the money admitted to be due, declined to grant a further extension of time, and inferentially, at least, asserted title and ownership to the lands. The failure to secure the money to repay the debt up to the time of filing the suit was due, according to the allegations, to the conduct of appellee in defeating the loans sought by appellants on the land, by disparaging appellants' ability to repay and misrepresenting the value of the lands to prospective lenders.

Counsel for appellee, however, for a number of reasons, takes issue with us on the legal conclusions reached, which we will now consider.

[7] It is first contended that the facts alleged at most show a mere verbal promise to purchase and convey land, and that the doctrine of trusts, *ex maleficio* does not apply. If the facts alleged comprehended no more than a naked promise by appellee to purchase and convey land to appellants, the trust relation would not exist. In every case "there must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is consummated." 3 Pom. Eq. Jur. § 1056. There is such element in the case at bar, and it is found in the allegation that appellee acquired the title under promise to reconvey, and but for which promise he would not have acquired the title. If the facts alleged be true, the promise to reconvey was false, and hence the title was fraudulently acquired, and the trust relation arises as matter of law.

Appellee asserts that the right to have lands sold in parcels applies only in cases where the land is seized under ordinary execution, and does not apply in cases where land is sold under process issued upon judgments foreclosing liens upon lands, and that as a consequence the alleged agreement is void and unenforceable, because based upon a right that did not exist. By statute it is provided in substance that when lands, not in towns and cities, are taken "in execution," the defendant in the writ may have the same sold in lots by furnishing the officer, at a time that will not delay the sale as advertised, a plat of the land as actually surveyed by the county surveyor in lots of not less than 50 acres, accompanied by field notes of each lot and the certificate of the county surveyor that same is correct. Article 3754, Vernon's Sayles' Civil Stats.

[8] Appellants proceeded under the article cited when they demanded the sale of their lands in parcels, and the contract between appellants and appellee Riley was entered into under the assumption that appellants

were entitled to have the lands sold in lots as directed by that article. We conclude that process issued upon judgments of the kind recited are in contemplation of article 3754, *supra*, an execution. The requisites of an execution are set out in article 3729, Vernon's Sayles' Civil Statutes, subdivision 3 of which provides, among other requisites, that in case the judgment commands the sale of particular property the writ shall be framed accordingly. The subdivision, it occurs to us, contemplates sales under foreclosure proceedings. It is true that article 2,000, Vernon's Sayles' Civil Statutes, amplifies and deals particularly with the method and manner of selling property under judgments foreclosing mortgages and other liens and declares that in such cases an "order of sale" shall issue; but it also declares that land seized under such order of sale shall be sold as "under execution," and if the property directed to be sold is insufficient to satisfy the judgment to levy such writ "as in case of ordinary executions" on other property of the defendant, which is but to say in final analysis it is an execution. It is true that article 2000, *supra*, restricts the use of an order of sale as an ordinary execution, since it cannot function in that respect until after sale of the land described therein. *Bailey v. Block*, 104 Tex. 101, 134 S. W. 323. But that it is equally an execution and an order of sale from the time of its issuance we think is obvious. Executions are judicial writs for the enforcement of judgments, decrees, orders, etc., and are largely what the Legislature declares they shall be.

[9, 10] It is next urged that, even though appellants were entitled to have the lands sold in parcels under article 3754, *supra*, the demurrer was properly sustained, for the reason that the petition failed to show a compliance with the article. The precise point is that the petition failed to disclose that the county surveyor certified to the correctness of the plat and field notes alleged to have been prepared by him. The petition, while alleging the demand for the sale in parcels, did omit to allege that the plat and field notes tendered to the sheriff were certified to by the county surveyor, though it did allege the survey, preparation of field notes, and platting by that officer. The contention is, in our opinion, without merit, for the reason that the defect pointed out in the brief could not be reached by the general demurrer. Any defect in the form or manner of stating a fact should be pointed out by special exception, since a good cause of action, defectively stated; or the omission of a formal, but necessary, averment, is good against the general demurrer. Appellant's allegation was that he had demanded a sale of the lands in lots, which was sufficient against the general demurrer, but failed to allege that the plat furnished was certified by the county-

surveyor. Such failure was the omission of a formal fact, which could be challenged only by special exception.

[11] It is also urged that time was necessarily of the essence of the contract alleged by appellants, and it appearing from the allegations of their petition that they failed to comply with their original agreement, or the several extensions thereof, by payment of the money at the time agreed on, they were not entitled to the relief sought. The tendency of modern decisions is to hold that time is not ordinarily of the essence of contracts, "unless made so by express stipulation, or unless there is something connected with the purpose of the contract and the circumstances surrounding it which makes it apparent that the parties intended that the contract must be performed at or within the time named." 13 C. J. 687. Such seems to have been the rule in even the earlier cases in our courts. *Edwards v. Atkinson*, 14 Tex. 373; *Primm v. Barton*, 18 Tex. 206; *Kirchoff v. Voss*, 67 Tex. 320, 3 S. W. 548. There is in the contract alleged by appellants no express stipulation that time was of the essence of the contract, and hence, if time was important, it must be found in the purpose of the contract and the circumstances surrounding it. The purpose of the contract was, of course, to allow appellants further time in which to pay the debt and render appellees' security more efficacious. Some of the circumstances connected with and surrounding the contract tend to indicate that time was important, as witness the brief time allowed originally in which to redeem and the fact that the land was incumbered with a large prior lien. On the other hand, after appellee acquired the land, he not only extended the time for payment, but by agreement with appellants secured the use and possession of the lands for the year 1916, by which he was to apply the rentals and use thereof to, the payment of the interest on appellee's debt. We do not believe the facts alleged warrant us in holding as matter of law that time was or was not of the essence of the contract, but that that issue is one of fact for the jury, under appropriate charge.

[12, 13] It is also contended that the agreement alleged is without consideration, and hence unenforceable. A sufficient consideration is a benefit to the party promising or some trouble or prejudice to the party to

whom the promise is made; also a mutual promise is sufficient, if concurrent in point of time. *James v. Fulcrod*, 5 Tex. 512, 55 Am. Dec. 743. The benefit moving to appellee was the acquisition of the title to the land without competition at public sale. The prejudice suffered by appellants was foregoing their legal right to have the lands sold in parcels and the consequent benefits probably resulting therefrom. The rule and the authorities on the point in great number will be found in 13 C. J. 311.

[14, 15] It is next argued that even though the agreement alleged was made it appears from appellants' petition that they never offered to comply with the conditions annexed to the alleged trust until the filing of the suit, and that as a consequence such right was forfeited. The agreement alleged constituting in equity a trust, failure to pay the money at the time agreed upon would not prevent its enforcement unless as we have said at another place time was of the essence of the contract, which we have also said is an issue of fact to be submitted to the jury. Ordinarily suits to enforce the relief here sought, or to rescind contracts, etc., for fraud, must be prosecuted in a reasonable time under all the circumstances. What is a reasonable or unreasonable time is also an issue of fact for the jury. *Tex. & Pac. Ry. Co. v. Jowers*, 110 S. W. 946; *Galveston H. & S. A. Ry. Co. v. Cade*, 100 Tex. 37, 94 S. W. 219.

[16] Under the rule as announced in *Spann v. Stern*, 18 Tex. 556, and followed by all subsequent cases, it was not necessary, in our opinion, for appellants to actually tender into court the money admitted to be due and owing to appellee. An offer to do equity and perform such decree as the court may enter is sufficient.

In the view we take of the case, it is not necessary to review appellants' other assignments of error.

We are also to be understood, when referring to the facts, as having reference to what the allegations of the petition show. The facts will, of course, be developed upon trial.

For the reasons indicated the judgment is reversed, and the cause remanded, for further proceedings consistent with the views herein expressed.

Reversed and remanded.

**GILL v. McFADDIN. (No. 422.)**

(Court of Civil Appeals of Texas. Beaumont.  
March 19, 1919.)

**1. INJUNCTION ⇨143(2)—EX PARTE HEARING—PLEADING.**

To be entitled to an injunction upon an ex parte hearing, and without notice, the plaintiff must show by proper allegations a right in himself to do the act which he seeks to perpetuate, and must negative every possible hypothesis upon which defendant might lawfully do the act which he seeks to enjoin, and plaintiff must show immediate and pressing necessity which prevents a hearing.

**2. INJUNCTION ⇨143(2)—EX PARTE HEARING—REMOVAL OF DAM.**

Petition of pasture land owner to restrain removal of dam, erected to impound water for his cattle in dry season, held insufficient to entitle him to injunction upon an ex parte hearing, not showing, except by inference, that his land abutted upon the bayou, or that defendant was not the owner of the land or entitled to the water.

Appeal from District Court, Jefferson County; E. A. McDowell, Judge.

Injunction suit by W. P. H. McFaddin against George Gill. From decree for plaintiff, defendant appeals. Reversed, and injunction dissolved.

W. G. Reeves, of Beaumont, for appellant.  
O. W. Howth, of Beaumont, for appellee.

**HIGHTOWER, C. J.** On July 1, 1918, appellee, W. P. H. McFaddin, presented to Hon. E. A. McDowell, judge of the Sixtieth judicial district of Texas, the following petition and prayer for injunction:

"Now comes W. P. H. McFaddin, plaintiff, complaining of George Gill, defendant, and respectfully represents

"(1) Plaintiff alleges that he is the owner of the south half of T. & N. O. section 143, and has under lease section 155, and has the right to use and occupy both sections 155 and 143, and that said sections of land are within a pasture owned and controlled, occupied, and used by the plaintiff as a feeding ground for cattle belonging to the plaintiff and others; that there are now upon said land within said pasture about 2,000 head of range cattle; that the only water available for said cattle to drink comes from what is known as Mayhaw bayou, that is to say, the northeast and southwest prongs of Mayhaw bayou; that said bayou empties into what is known as Taylor's bayou; that there is now, and has for some time been, a great drouth and scarcity of water in Jefferson county, and especially in which portion of Jefferson county in which said pasture is located; that the said bayou and said prongs of said bayou are low, and that in order to preserve the lives of said cattle, and keep them from dying of thirst, it became necessary to dam up said prongs of said bayou by means of what is

known as a sack dam about two feet high, which is composed of grain sacks filled with dirt, in order to hold in said prongs of said bayou sufficient water to water said cattle and to prevent them from dying of thirst.

"(2) That the said dam across said prongs of said bayou does not cause the said bayou or any branch or tributary thereof to overflow, either above or below said dam, and that no one is in need of the water, except the plaintiff and other owners of cattle in said pasture, and that unless said dam existed the water would waste into the Gulf, and would not be available to any one, and said cattle would die of thirst, and that the plaintiff and other owners of cattle in said pasture would suffer irreparable injury, and that the public at large, and especially the American soldiers and the Allies in Europe, by reason of the loss of about 2,000 head of cattle, which are now being prepared for market.

"(3) That the defendant is maliciously and wantonly threatening to remove said dam and permit the waters now held thereby to drain into and be wasted in the waters of the Gulf, and will do so unless restrained by the writ of injunction.

"(4) Premises considered, plaintiff prays that your honor enter an order directing the clerk of this court to issue and cause to be issued and served upon the defendant a writ of injunction, restraining the defendant from removing said dam or any part thereof, or going about the same, or doing or performing any other act which would diminish the supply of water available to said cattle in said pasture."

The foregoing petition was properly verified by the appellee. Upon presentation of this petition to Judge McDowell, and without notice to appellant, he granted the writ of injunction as prayed for, and appellant thereafter and in due time filed his appeal bond, and brought the case to this court.

It is the contention of appellant that the judgment should be reversed, and the injunction dissolved, for the following reasons:

(1) Because the petition is bad on general demurrer; (2) because it does not negative the right of appellant to remove the dams mentioned; (3) because the judge erred in granting the writ without notice of hearing.

The proposition is that the plaintiff's petition averred no fact showing any right on the part of plaintiff to maintain the dams in question, and showed no obligation on the part of defendant to permit the channel of said bayou to be blocked, and that such petition was therefore bad on general demurrer. We have concluded, after consideration, that appellant's contention to the effect that the petition was bad on general demurrer is correct, and must be sustained.

[1] As argued by appellant, it is fundamental that, in order to be entitled to an injunction upon an ex parte hearing and without notice, the plaintiff must show by proper allegations a right in himself to do the act which he seeks to perpetuate, and must nega-

tive every possible hypothesis upon which defendant might lawfully do the act which he seeks to enjoin, and plaintiff must show immediate and pressing necessity which prevents a hearing, before such injunction should be granted.

[2] While appellee's petition alleged that he was the owner of the south half of T. & N. O. section No. 143, and that he had under lease section No. 155, and that these sections were in a pasture used and controlled by him as grazing ground for his cattle, it does not allege, except by mere inference, that either of these sections abuts upon Mayhaw bayou, or except by mere inference that Mayhaw bayou is within the pasture of appellee, and therefore the petition fails to clearly allege any lawful right in appellee to the use of the water of Mayhaw bayou for his cattle, and fails to clearly show any right in appellee to perpetuate said dams in Mayhaw bayou.

Neither does the petition negative any right in appellant to remove the dams placed by some one in Mayhaw bayou. It is true the petition does state that appellant was not in need of the water in Mayhaw bayou, and that his act in removing the dams, if permitted, would be malicious and wanton on his part. Such allegation does not negative any right in appellant to remove these dams, for, in so far as the petition shows, appellant may be the owner of the land upon which these dams are erected, or may be otherwise entitled to remove these dams.

For both reasons, the petition was not sufficient to authorize the granting of the writ of injunction without hearing or notice, as was done. The order of the judge not only enjoined appellant from removing the dams complained of, but even further enjoined the appellant from in any manner interfering with the supply of water in Mayhaw bayou, to which, so far as the petition shows, he might be as much entitled as appellee; but under the judge's order he was not permitted to use a particle of water for any purpose.

The injunction was improperly granted, and the judgment will be reversed, and the injunction dissolved; and it is so ordered.

#### BOWMAN & BLATZ v. RALEY. (No. 6187.)

(Court of Civil Appeals of Texas. San Antonio. March 26, 1919.)

#### 1. EVIDENCE ⇐117—FOUNDATION—DAMAGES FROM TRESPASS.

In action for injury to cotton crop from trespassing cattle, where plaintiff testified that the cattle were not permitted to stay in the cotton, but were from time to time driven out as soon as discovered, testimony as to how much

cotton a cow could destroy in a day was inadmissible, because there was no basis in prior testimony for calculating the time the cattle were in the cotton.

#### 2. DAMAGES ⇐112—CROPS.

Generally the measure of damages when a crop is totally destroyed, whether it is matured or growing, is its market value, if it has one, at the time and at the place it is destroyed and legal interest thereon from the date of its destruction; and, when the crop is partially destroyed, it is the difference between its market value if it had one, as it stood immediately preceding and its market value immediately following the injury, with legal interest on the amount of such difference.

#### 3. DAMAGES ⇐112—VALUE OF GROWING CROP.

To arrive at the value of a growing crop is to prove its probable yield under proper cultivation, the value of such yield when matured and ready for sale, and the expense of such cultivation, as well as the cost of its preparation and transportation to market.

#### 4. EVIDENCE ⇐505—EXPERTS—FARMERS.

The testimony of a farmer who qualifies as an expert, testifying from his common experience with, and result of his observations made at the time as to the usual and common appearance or facts and condition of things, which cannot be reproduced to the jury, is admissible under an exception to the general rule excluding the conclusions of a witness.

#### 5. EVIDENCE ⇐536—EXPERTS—FARMERS—QUALIFICATIONS.

As farmers testifying as experts can only testify as to things they have the necessary special knowledge about, great care must be used in qualifying such a witness as to his knowledge, observation, and experience in respect to the matters about which he may be called to testify.

Appeal from Medina County Court; R. J. Noonan, Judge.

Suit by H. L. Raley against Bowman & Blatz. From judgment for plaintiff, defendant appeals. Reversed and remanded.

De Montel & Fly, of Hondo, for appellant. Briscoe & Morris, of Devine, and Louis J. Brucks, of Hondo, for appellee.

OOBBS, J. This suit was brought by appellee, H. L. Raley, in the justice court of precinct No. 5, Medina county, Tex., on October 4, 1917, against appellants, Bowman & Blatz, for damages in the sum of \$75. On November 20, 1918, judgment was rendered by the justice court for plaintiff for the sum of \$75, and an appeal was duly perfected by appellants to the county court of Medina county. On July 1, 1918, appellee filed an amended claim or petition in the county court, asking for damages in the sum of \$128.05, alleged to have been caused to his crops by cattle belonging to appellants, and on the 2d day of July, 1918, a judgment was

rendered by the county court in favor of plaintiff for the sum of \$106, the same being based on a verdict of a jury rendered on special issues submitted; and on the 8d day of August, 1918, appellants' amended motion for a new trial was overruled by the court, notice of appeal to this court was given, and the appeal duly perfected.

Appellants' first assignment of error in their amended motion for a new trial is as follows:

"Because the court erred in admitting the testimony of plaintiff, H. L. Raley, over the objections of defendants that cattle would eat and destroy as much as 25 pounds of cotton per head per day in the seed and before picked, and that the price of said cotton was from ten to twelve cents per pound, for the reason:

"(a) Because such testimony was irrelevant, immaterial, and not the proper measure of damages, and not the proper manner of arriving at the damages, if any.

"(b) Because the same would be evidence of a nonexpert, and the facts upon which he based his evidence had not been stated, and was not stated, to the jury.

"(c) Because such evidence was a conclusion of the witness, and not based upon facts sufficiently intelligent upon which to base an opinion with respect to the subject."

The first proposition under that assignment challenges the admissibility of testimony that cattle would eat and destroy as much as 25 pounds of seed cotton per head per day before picked, as contrary to the rule established by law for the purpose of arriving at the quantity of cotton lost by reason of the depredations of appellants' cattle.

The second proposition is that the market price of cotton in the seed at Devine, Tex., without evidence of the expense of gathering and placing same on the market at Devine, Tex., was insufficient, improper, illegal, not the proper manner of arriving at the damages, and not the measure of damages, and such evidence should have been excluded.

The correct rule for measuring damages in a case like this was not given, nor any special request made by either party to instruct the jury how to ascertain the same, and their verdict was rendered on an improper apprehension of the rights of the parties.

The substance of the testimony is:

"Sometimes there would be two or three head of defendants' cattle in the field, and sometimes there would be eight or nine or more. When we would find the cattle in the field we would run them out and tell the defendants about it, and though they would always promise to do something about it, they never did anything. About the latter part of September I made a trip to the Brownsville country, and was gone about two weeks, and when I came back I found defendants' cattle continuing to break into my field. I again went to see Mr. Bowman and Blatz, but they would do nothing. The cattle were in the field as many as six times during the day and night. They would be in the field

when we would get up in the morning. The cattle were in the cotton off and on from about the 15th day of September, 1917, to the 4th of October, 1917. In my opinion a cow will eat and destroy from 20 to 25 pounds of cotton a day, and I estimate that amount as being a fair estimate of what each of these cattle ate and destroyed of my cotton each day. At this time there were about 8 or 10 bales open in the field and unpicked. The market value of seed cotton at Devine, at the time this cotton was destroyed, were 10 and 12 cents per pound. \* \* \* We would always drive them out of the field as soon as we would see them. This occurred as many as five or six times a day. They did not break in every day, but on various days and nights. I have seen as many as nine head at one time in our cotton. There was a great deal of grass in our corn land, and after I cut the corn I grazed my stock on the land, but I always had a herder with them. My cows got into the cotton once or twice, and sometimes the mules and horses got into the cotton, but mules and horses did not eat the cotton. They might have knocked some out. I estimated my damages by the number of pounds of cotton that from my experience as a farmer I think that a cow will eat and destroy in a day from 20 to 25 pounds in a day."

[1] The testimony, as it stood, without facts that entered into the costs and expenses of its making, gathering, and preparing, was subject to the defendants' objection to such testimony without further proof as to its costs; more especially is it objectionable because the testimony as to how much cotton a cow could eat in a day was improper, because it would not be in keeping with the measure of damages named in the opinion, and because there was no basis in the testimony for calculating the time the cattle were in the cotton. They were not permitted to stay in the cotton, but they were from time to time driven out as soon as discovered. The evidence, we think, should have been excluded, and the court erred in not doing so.

[2, 3] The rule is, generally, as said in *K. C., M. & O. Ry. Co. of Texas v. Mayfield*, 107 S. W. 940:

"The measure of damages when a crop is totally destroyed, whether it is a matured or a growing crop, is its market value, if it has one, at the time and at the place it is destroyed, and legal interest thereon from the date of its destruction, and that the measure of damages when the crop is partially destroyed, but not wholly destroyed, is the difference between its market value, if it had one, as it stood immediately preceding and its market value immediately following the injury, with legal interest on the amount of such difference."

To arrive at the value of a growing crop is to prove its probable yield under proper cultivation, the value of such yield when matured and ready for sale, and also the expense of such cultivation, as well as the cost of its preparation and transportation to market. *Railway Co. v. Pape*, 73 Tex. 501, 11 S. W. 526.

[4] While it is extending the doctrine of expert testimony in this case to the very limit, it seems to be the settled law that the testimony of a farmer who qualifies himself as an expert, testifying from his common experience with, and result of his observations made at the time as to the usual and common appearance or facts and condition of things, which cannot be reproduced to the jury, is admissible under an exception to the general rule excluding the conclusions of a witness. *McCabe v. San Antonio, etc.*, 39 Tex. Civ. App. 614, 88 S. W. 387, writ of error denied 101 Tex. 647, 88 S. W. 387.

[5] As such experts can only testify as to things they have that special necessary knowledge about, great care must be used in qualifying such witness as to his knowledge, observation, and experience in respect to the very matters about which he may be called to testify. As this case, it is seen, will be reversed, from what we have said, all the other assignments of error are overruled.

Reversed and remanded for a new trial.

# CITY OF DALLAS v. HALFORD et al. (No. 8090.)

(Court of Civil Appeals of Texas. Dallas.  
March 1, 1919. Rehearing Denied  
April 5, 1919.)

## 1. MUNICIPAL CORPORATIONS §757(1) — MAINTENANCE OF STREETS—DUTY OF CITY.

It is the duty of a city to see that its streets be made and maintained in a reasonably safe condition for use by the public.

## 2. MUNICIPAL CORPORATIONS §821(3)—USE OF STREETS—ACTION FOR NEGLIGENCE—JURY QUESTION.

In action against city for negligence in maintenance of street, whether acts constitute negligence is a jury question, where there is no statutory law making such acts negligence.

## 3. MUNICIPAL CORPORATIONS §821(13) — MAINTENANCE OF STREETS—COURT RULE.

Whether city was negligent in failing to provide a railing or barrier along a street adjacent to a deep ravine was a question for the jury in the absence of statute making such failure negligence.

## 4. DEATH §11—ACTIONS FOR—COMMON LAW.

Under the common law, damages were not recoverable for death; the right of action having died with deceased.

## 5. DEATH §33—RIGHT OF ACTION—"PER- SON" OR "CORPORATION."

A municipal corporation is not a "person or corporation" within Vernon's Sayles' Ann. Civ. St. 1914, art. 4694, giving action for death

"caused by the wrongful act \* \* \* of another person or corporation."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corporation; Person.]

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Consolidated actions by Charles M. Halford, as husband, and as next friend of his three minor children, and by Mrs. Maxwell and husband, against the City of Dallas. Judgments for plaintiffs, and defendant appeals. Reversed and remanded as to Maxwells, and reversed and rendered as to Halfords.

A. S. Hardwicke, Edward P. Dougherty, and Edward M. Browder, all of Dallas, for appellant.

McCutcheon & Church, of Dallas, and W. D. Cardwell, of Wichita Falls, for appellees.

RAINEY, C. J. This appeal embraces two suits to recover damages for personal injuries resulting in the death of Mrs. Annie M. Halford and injuries to Mrs. Laura Maxwell. Charles M. Halford, as husband and as next friend of his three minor children, and Mrs. Maxwell and her husband, brought the respective suits against the city of Dallas, which suits were consolidated and tried together in the district court.

As stated by appellant's brief, the plaintiffs' petition charged that the injuries complained of proximately resulted from the overturning of a jitney or motorbus, and the precipitation thereof down a deep ravine adjacent to Carlisle street within the limits of the city of Dallas, which overturning was alleged to have been caused by the failure of the defendant to provide suitable curbing, barriers, and guard rails along said street at said point, and also in failing to have said place properly lighted at said time. The defendant, after pleading general and special demurrers and exceptions and general denial, specially pleaded that said street at the place in question was in a good and safe condition for use by the general traveling public, that same was properly lighted, and that the accident resulted wholly from the negligence of the driver operating the motorbus or jitney in question, in that same was being operated at a high and excessive rate of speed, and that said driver, instead of controlling said jitney, had diverted his attention to other business, and thereby permitted said jitney to leave the paved street and run into said ravine, thereby causing the injuries complained of by plaintiffs.

The case was tried to a jury and resulted in a verdict and judgment for the plaintiffs, from which the city of Dallas has appealed.

As the disposition of the two cases will

be different, we will first consider the case from the Maxwell standpoint.

Appellant assigns as error paragraph 4 of the court's charge, where it in effect states:

"That it is the duty of the defendant when it opens a street to public travel that same be made and maintained in a reasonably safe condition for such use, and if there be a steep precipice or gulch near to the street such as to render it dangerous or unsafe for travel, in the absence of a railing or barrier, then the failure to place such railing or barrier constitutes a defect in the street itself, and injuries proximately resulting therefrom would render the defendant liable."

[1, 2] It is the duty of a city to see that its streets be made and maintained in a reasonably safe condition for use by the public, but, as the statute furnishes no certain way a street is to be fixed, the court erred in charging that the failure to do certain things to make it safe for travel would be negligence. Where there is no statutory law stating what acts constitute negligence the court should not assume that such acts are negligence. Whether such an act constituted negligence was a question of fact which should be determined by the jury. *Railway Co. v. Barnett*, 19 Tex. Civ. App. 628, 47 S. W. 1039; *Railway Co. v. Williams*, 17 Tex. Civ. App. 675, 40 S. W. 161; *Railway Co. v. Reich*, 32 S. W. 817; *Railway Co. v. Gentry*, 197 S. W. 482; *Lee v. Railway Co.*, 89 Tex. 583, 36 S. W. 63.

[3] The evidence shows that Carlisle street, where the accident happened, was kept in good repair, except as to the gulch side of the street, and as to that there was no railing or barrier there to prevent travelers from leaving the street. Whether or not such absence of railing or barrier was negligence on appellant's part should have been submitted to the jury to determine, and not assumed by the court.

The judgment as to the Maxwells is reversed, and cause remanded.

Appellant in its twentieth and twenty-first assignments of error complains as to the judgment of appellee Halford, in that the court erred in overruling a special exception to the petition, as follows:

"The defendant excepts specially to plaintiffs' said original petition because it is affirmatively shown therefrom that this is a suit against a municipal corporation for actual damages on account of injuries causing death of a person, and no action at law lies against defendant as alleged by plaintiff; and of this defendant prays judgment of the court"

—and of the refusal to charge the jury as follows:

"Gentlemen of the jury, you are instructed, at the request of defendant city of Dallas, to return a verdict herein for said defendant."

[4, 5] Under the common law damages resulting in death from injuries received were

not recoverable, as the right of action died with the deceased. This was changed by our statute (article 4694, Vernon's Sayles' Texas Civil Statutes) when the right of action for injuries resulting in death was granted in certain cases, as stated in subdivision 2 of said article, "when the death of any person is caused by the wrongful act, neglect, unskillfulness or default of another person or corporation, their agents or servants." Under this statute it has been repeatedly held by our appellate courts that to entitle one to the right to recover he must come within its provisions, and the question here arises: Does the word "corporation," as used in the statute giving a right of action for death, embrace or include municipal corporations such as the appellant, the city of Dallas? We think not. In support of this view the appellant submits the following propositions:

(1) "The city of Dallas, a municipal corporation, is not liable in law for actual damages, on account of injuries causing the death of Mrs. Annie M. Halford."

(2) "The present Texas statute relating to 'actions for injuries resulting in death' does not render a municipal corporation, such as the city of Dallas in this cause, liable for actual damages on account of injuries resulting in the death of a person."

(3) "A municipality, such as the city of Dallas, is not a 'person' or a 'corporation' within the purview of article 4694, tit. 70, Revised Civil Statutes of Texas 1911, and the amendment thereto approved April 7, 1913 [Acts 33d Leg. c. 143], relating to injuries resulting in death."

The Attorney General of Texas in his published biennial report and opinions for 1912-14, at page 439, states that—

"The popular meaning of the word 'corporation' is private corporation, and unless there should be language used which clearly evidences the intention that the word 'corporation' shall embrace municipal corporations as well as private corporations, then the word 'corporation' should be confined in its meaning to private corporations."

And he cites the cases of *Cedar Co. v. Johnson*, 50 Mo. 225, *East Oakland Tp. v. Skinner*, 94 U. S. 255, 24 L. Ed. 125, and *Commonwealth v. Beamist*, 81 Pa. 389. And, basing his reasoning upon this proposition, he holds that the Texas "Employee's Compensation Act" (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h—5246zzzz]) is not applicable to municipal corporations.

Several cases by our appellate courts have held that municipal corporations are not included within the statute, subdivision 2 allowing actual damages for the death of any person through the wrongful act, neglect, or default of another, etc., and Const. art. 16, § 26, providing exemplary damages against any person, corporation, or company willfully or negligently committing a homicide does



not apply to cases in which no recovery can be had for actual damages. *Ritz v. City of Austin*, 1 Tex. Civ. App. 455, 20 S. W. 1029; *Searight v. City of Austin*, 42 S. W. 857; *Elliott v. City of Brownwood*, 166 S. W. 932; *Elliott v. City of Brownwood*, 106 Tex. 292, 166 S. W. 1129.

It is urged by appellee that the foregoing decisions do not apply to the law as it now stands, as article 4694, subd. 2, was amended April 7, 1913, so as to read, "when the death of any person is caused by the wrongful act, neglect, unskillfulness or default of another person or corporation, their agents or servants," which changed the law as it theretofore existed, and as changed it embraces "municipal corporations," and therefore includes the city of Dallas.

Appellant insists that said amendment, though including corporations, meant private corporations, and did not include municipal corporations; that said amendment was passed to cure a defect pointed out by the Supreme Court in *Lumber Co. v. Cooper*, 105 Tex. 21, 142 S. W. 1168, and *Cotton Oil Co. v. Camp*, 105 Tex. 130, 145 S. W. 902, in which cases it was held, in effect, that a private corporation under the then existing law was only bound by the negligence of party whom it had clothed with corporate power; one who acted and was a vice principal, and not acts of agents and servants, etc.

The two decisions just above cited were rendered in the year 1912 just before the amendment was acted on, June 7, 1913. It seems that the Legislature had in mind said two decisions, as the enacting clause of said act reads:

"An act to amend article 4694 of the Revised Civil Statutes of 1911, giving cause of action where injuries resulting in death is caused by the negligence of a corporation, its agents or servants, and declaring an emergency."

And the emergency clause reads:

"The Supreme Court having held that the present article does not allow recovery for injuries resulting in death caused by the wrongful act, neglect, unskillfulness or default of a corporation, its agents or servants, creates an emergency and an imperative public necessity," etc.

The law prior to said amendment read "when the death of any person is caused by the wrongful act, negligence, unskillfulness or default of another," and it was held that under said act the word "another" included a corporation, but would not include its agents and servants, unless said agents or servants were vice principals. So to make the law plain and clear it was necessary to add the words "corporations, their agents and servants," and we think it never intended to include municipal corporations, although the Supreme Court had for years held prior to said amendment that said law did not em-

brace municipal corporations, and it seems to us that, had the Legislature intended to embrace within said amendment municipal corporations, it would have said so by plain and certain language.

Municipalities in a sense are corporations, but, as generally used, the term "corporations" means private corporations, and does not include municipal corporations. Whether the term "corporation," as commonly used, includes only private corporations, or also embraces municipal corporations, is a disputed question, but we believe, when the courts of last resort have been called upon to decide the question, the great majority of the jurisdictions hold that it does not. *Donohue v. City of Newburyport*, 211 Mass. 561, 98 N. E. 1081; *O'Donnell v. North Attleborough*, 212 Mass. 243, 98 N. E. 1084; *Bank v. Farringham*, 212 Mass. 92, 98 N. E. 925; *Koch v. Rinaker*, 252 Ill. 266, 96 N. E. 897; *Town of Kearny v. Jersey City*, 78 N. J. Law, 77, 73 Atl. 110; *Bramlett v. City of Greenville*, 88 S. C. 110, 70 S. E. 450; *Ferguson v. Caffery*, 49 La. Ann. 1152, 22 South. 756; *McDougal v. Board of Supervisors*, 4 Minn. 184 (Gil. 130); *Sherman County v. Simonds*, 109 U. S. 735, 3 Sup. Ct. 502, 27 L. Ed. 1093; *Owners v. People*, 113 Ill. 296; *State v. District of Narragansett*, 16 R. I. 424, 16 Atl. 901, 3 L. R. A. 295; *Brown v. Gates*, 15 W. Va. 131; *People v. Turnbull*, 93 Cal. 630, 29 Pac. 224; *Smith v. Commissioners*, 146 Ky. 562, 143 S. W. 3, 38 L. R. A. (N. S.) 151; *Switzer v. City of Wellington*, 40 Kan. 250, 19 Pac. 620, 10 Am. St. Rep. 196; *Association v. Schraeder*, 87 Iowa, 659, 55 N. W. 24, 20 L. R. A. 355; *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661; *Emes v. Fowler*, 43 Misc. Rep. 603, 89 N. Y. Supp. 685.

In the case of *Donohue v. City of Newburyport*, supra, said city was sued for the negligent killing of a party under a statute similar to ours. In said case the Supreme Court uses the following language, which we think is very applicable to this case, to wit:

"But upon broader grounds the defendant must be exonerated from liability. R. L. c. 171, § 2, as amended by St. 1907, c. 375, does not apply to municipalities. It imposes liability upon 'a person or corporation.' Where these two words occur together, 'corporation' is the only word which can be contended to include a city or town. \* \* \* That is a word which in our statutes and decisions has not been used generally to include cities and towns. In a certain sense they are bodies corporate. But in common speech it is rarely that a city or town is referred to merely as a corporation. Towns in New England differ in their nature from trading, manufacturing, or public service corporations. \* \* \* They are created primarily for political purposes and the convenient administration of government. They possess few of the characteristics which distinguish the ordinary corporation. *Bloomfield v. Charter Oak Bank*, 121 U. S. 121-129, 7 Sup. Ct. 865, 30 L. Ed. 923. \* \* \* Most, if not all,

of the city charters enacted by the Legislature pursuant to this authority do not describe the city as a mere corporation, but as a body politic and corporate or a municipal corporation. The form and arrangement of our statutes show a manifest purpose not to treat cities and towns as corporations in the ordinary sense of that word. Separate titles of the Revised Laws relate to them. R. L. tit. 7, 'Of Towns and Cities,' comprehends chapters 25 to 34, both inclusive. Title 6, c. 20, relates to counties. \* \* \* Title 15, 'Of Corporations,' comprehends chapters 109 to 126, both inclusive, and relates to all kinds of general corporations, both public and private, charitable and business, those clothed with power of exercising eminent domain, as well as those having the most limited powers. \* \* \* When the Legislature has intended to include both municipal and business corporations within the scope of a statute, generally it has used plain words to that effect. For example, in St. 1909, c. 136, the language is 'a county, city or town or any corporation.' \* \* \* The decisions of this court, whenever the question has arisen, have held that a municipality commonly was not included within the word 'corporation.' *Riddle v. Proprietors of Locks and Canals*, 7 Mass. 169-187, 5 Am. Dec. 35; *Rumford v. Wood*, 13 Mass. 193. Often it is referred to as a quasi corporation. *Whitney v. Stow*, 111 Mass. 368; *Prout v. Pittfield District*, 154 Mass. 450, 28 N. E. 679; *Bishop v. North Adams Fire District*, 167 Mass. 364, 45 N. E. 925. This is sharply brought out in *Linehan v. Cambridge*, 109 Mass. 212, where it was held that the word 'corporation,' as used in the statute as to interrogatories to parties to actions, did not include cities and towns. \* \* \* Generally it has been held that the word 'corporation' does not include a municipal corporation. *Sherman County v. Simonds*, 109 U. S. 735, 3 Sup. Ct. 502, 27 L. Ed. 1093; *Switzer v. Wellington*, 40 Kan. 250, 19 Pac. 620, 10 Am. St. Rep. 196; *Brown v. Gates*, 15 W. Va. 131, 160; *Memphis v. Laski*, 9 Helsk. (Tenn.) 511, 24 Am. Rep. 327; *Iowa Electric Medical College Ass'n v. Schrader*, 87 Iowa, 659, 55 N. W. 24, 20 L. R. A. 355; *State v. District of Narragansett*, 16 R. I. 424, 16 Atl. 901, 3 L. R. A. 295; *Owners of Land v. People*, 113 Ill. 296, 314; *McDougal v. Hennepin County*, 4 Minn. 184 (Gil. 130). See *Hughes v. Auburn*, 161 N. Y. 96, 107, 55 N. E. 389, 46 L. R. A. 636. Most of the cases from other jurisdictions relied upon by the plaintiff are distinguishable either in the phrase or collocation of the statute from the one here under consideration. \* \* \* It cannot be presumed that the Legislature would intend to work such a radical change in the principles of liability for the performance of public benefit as would be wrought by construing the word 'corporations' to include cities and towns, without the use of plain and unequivocal language."

We hold that appellant Halford and children, under our statute, have no right of action for the death of Mrs. Halford against the city of Dallas, and the judgment in their favor is reversed, and judgment is here rendered for appellant, the city.

Reversed and remanded as to the Maxwells, and reversed and rendered as to the Halfords.

# CITY OF ROSEBUD v. VITEK. (No. 6045.)

(Court of Civil Appeals of Texas. Austin.

March 5, 1919. On Motion for Rehearing, April 9, 1919.)

## 1. EMINENT DOMAIN ⇨238(3) — CONDEMNATION OF LANDS—WATERWORKS—APPEAL TO COUNTY COURT.

The rule with reference to the condemnation of property for waterworks by cities is the same as that for the condemnation of rights of way by railroads, and a city may deposit the amount of an award and prosecute an appeal to the county court, although the landowner files an acceptance of the award (Rev. St. 1911, arts. 1003-1006, 6504-6523, 6527, 6530).

## 2. EMINENT DOMAIN ⇨186—DAMAGES—TAKING PART OF TRACK.

Where land is taken by a city for a waterworks, the measure of damages is the market value of the land taken and the difference, if any, of the market value of the remainder of the tract just before and after the condemnation thereof.

## 3. EMINENT DOMAIN ⇨188—DAMAGES—RESTORING IMPROVEMENTS.

In a proceeding by a city to condemn land for a waterworks, the expense and value of any labor necessary to restore improvements on remaining land and injury to the land to its use as a homestead were proper for consideration by the jury in determining the market value, but it was improper to permit the jury to consider these elements of damage for any other purpose than to determine the difference in market value before and after the taking.

## 4. EMINENT DOMAIN ⇨205—DAMAGES—EVIDENCE.

In a proceeding by a city to condemn land for a waterworks, evidence held insufficient to sustain a verdict of the jury as to the amount of damage suffered.

## 5. EMINENT DOMAIN ⇨200—DAMAGES—BURDEN OF PROOF.

In a proceeding by a city which sought to condemn land for a waterworks, the burden is on the landowner, part of whose land was taken, to show the amount of damage he suffered.

## 6. EMINENT DOMAIN ⇨219—PROCEEDINGS—ARGUMENT—OPENING AND CLOSING.

In a proceeding by a city to condemn land for a waterworks, since the burden is upon a landowner, part of whose land was condemned, to show the amount of damage, he is entitled to open and conclude upon both the evidence and the argument.

On Motion for Rehearing.

## 7. EMINENT DOMAIN ⇨245—APPEALS—PAYMENT OF AWARD.

Rev. St. 1911, art. 6530, subd. 2, providing that an award in condemnation proceeding and

a like amount must be deposited in court, which shall be held together with the award itself, etc., clearly contemplates that the award shall not be paid to the landowner pending the suit.

Appeal from Falls County Court; F. S. Heffner, Judge.

Suit by the City of Rosebud against Tom Vitek. From judgment for defendant, plaintiff appeals. Reversed and remanded.

Spivey, Bartlett & Carter, of Marlin, for appellant.

Robert M. Lyles, of Cameron, for appellee.

JENKINS, J. This is a suit for the condemnation of 3.44 acres of land owned by appellee for waterworks purposes. It was agreed by the parties that appellant had taken all necessary steps to condemn said land, and that the only issue involved in this case was the value of the same. The commissioners appointed assessed the value of said land at \$688. Appellant filed its objection to said award with the county judge, and paid to the clerk of the county court, for the use of appellee, \$688, but instructed the clerk not to pay the same to appellee until the termination of this suit. Appellant also deposited with said clerk a like sum of \$688, and gave bond as required by statute.

Appellee filed with said clerk his acceptance of said sum of \$688, and filed a motion with the county judge that the same should be paid over to him, which motion was denied.

Upon a trial in the county court, there was awarded appellee the sum of \$688, from which judgment appellant has perfected his appeal.

It is the contention of the appellee that, by his written statement that he was willing to accept the said sum of \$688, the appellant was barred from further prosecuting his suit in the county court.

[1] It has been held in several cases, and properly so, that where the owner of the land accepts the money awarded to him he cannot thereafter prosecute an appeal from said award. We do not think this rule is applicable where the party seeking to condemn land appeals from the award. The Legislature has provided how damages should be ascertained in cases of condemnation by railway companies. Articles 6504 to 6523, Revised Statutes. Article 6527 of the Revised Statutes provides that, if either party is dissatisfied, he may file his opposition to the award of the commissioners with the county judge; and thereupon the case shall be tried in said court. Article 6530 provides that the plaintiff may take possession of the land by making the payments and giving the bond, as therein required.

The rule with reference to condemnation of property for waterworks by cities is the same as that for the condemnation of rights

of way by railroads. Article 1008 to article 1005, inclusive. The statute provides in positive terms that either party may appeal, and it is evident that it contemplates that the party seeking condemnation may enter upon the land, pending litigation, by complying with the statute with reference thereto. The plaintiff cannot perfect his appeal without making the deposit to the order of the defendant. If the defendant may defeat such appeal by accepting said money, then the plaintiff is denied the right of appeal, or else must wait until the termination of the suit in order to take possession. The object of the statute, as shown by its caption, was to enable railroads and other corporations having the right of eminent domain, to enter upon and take possession of the land sought to be condemned pending litigation. *Parks v. Railway Co.*, 34 Tex. Civ. App. 341, 78 S. W. 534.

Appellee has moved to dismiss this suit for want of jurisdiction of the county court, by reason of his willingness to accept the amount of the award made by the commissioners. For the reasons stated, we overrule this assignment.

The trial court charged the jury as follows:

"(1) In this case you will find for defendant and assess his damages in such sum as you find from the evidence he sustained by reason of the condemnation of the land described in plaintiff's original petition, and such sum as you may find that defendant and other lands belonging to him sustained, if any, as consequential damages of the condemnation of his land, and the construction of the proposed dam and reservoir upon defendant's land."

There is no affirmative error in this charge. It will appear from a reading thereof that no standard is given whereby the damages may be assessed.

The second paragraph of the court's charge was as follows:

"(2) In arriving at the amount of damages sustained by defendant by reason of the condemnation of his said land and the construction of the proposed dam and reservoir, you will take into consideration any expense, and the value of any labor necessary in order to restore the improvements on defendant's said land to as good condition as they would have been, except for the condemnation of his said land and the construction of the proposed dam and reservoir; and you will take into consideration the extent of the injury to the land of defendant, if any, to its use as a homestead for defendant and his family, and the difference between the market value of the defendant's entire tract of land just before and just after the construction of the proposed dam and reservoir."

Appellant, in due season, filed its objection to these charges, and here assigns error as to the second paragraph of said charge, in that it permits a double recovery.

[2, 3] We sustain this assignment. The

true measure of damages in the instant case was the market value of the land taken and the difference, if any, in the market value of the remainder of the tract just before and just after the condemnation thereof. The elements mentioned in the second paragraph were proper to be taken into consideration by the jury in determining such market value; but it was improper to permit the jury to consider these elements of damage for any other purpose than to determine such difference in market value. *Railway Co. v. Wyrick*, 147 S. W. 732.

[4] Appellant further objects to such charge and to the verdict of the jury in response thereto, in that there is no sufficient evidence upon which such verdict could be based.

Appellee and several of his witnesses testified that the erection of the reservoir near his house and the cutting off of an irregular shaped piece of land would injure the remainder of his land as a homestead. He and other witnesses also testified that some of his improvements were situated on the land condemned; but no witness testified as to the value of such improvements, what it would cost to restore them, nor to how much in dollars and cents the remainder of his tract was injured for purposes of a homestead.

[5] The only testimony as to the difference in market value was that of two of the commissioners, who had assessed the value under the original condemnation proceedings. Neither of these witnesses professed to know the market value of the land either before or after the condemnation proceedings. The substance of their testimony was that, from inquiries made by them as to what was asked for land in that vicinity, and as to the value of the improvements destroyed, and as to the injury to the remainder of the tract of land as a homestead, they concluded that appellee was entitled to \$688 damages. Appellee ought to be able to produce more satisfactory testimony than this as to the amount of damages he is entitled to recover. The court charged the jury that the burden of proof was on appellee to show the amount of damage he had suffered by the condemnation of his land. This was correct.

[6] Regardless of the form in which this suit was brought, it was in fact under the agreement hereinbefore referred to, a suit by appellee to recover damages for taking his land, and the burden was upon him to show the amount of such damages. Such being the case, the appellee was entitled to open and conclude upon both the evidence and the argument. This he was permitted to do by the trial court. Appellant assigns

error as to this action of the court. We overrule said assignment.

For the reasons stated, the judgment of the trial court herein is reversed, and this cause is remanded for another trial.

Reversed and remanded.

#### On Motion for Rehearing.

We have examined the authorities cited by appellee, and carefully considered the able argument of his attorney on motion for rehearing, but have not been convinced thereby that we were in error in our original opinion herein.

One of the cases cited by appellee is *Oregon Electric Ry. Co. v. Terwilliger*, 51 Or. 107, 93 Pac. 834, 930. The Constitution of Oregon has two provisions in reference to taking private property for public use. Article 1, § 18, provides that private property shall not be taken for public use "without such compensation first assessed and tendered." If there was no other provision on the subject, of course the property would have to be paid for, or the tender refused. Article 11, § 4, provides that—

"No person's property shall be taken by any corporation, under authority of law, without compensation being first made or secured in such manner as may be prescribed by law."

In the case above cited the court held that the Legislature of Oregon had "failed to prescribe the manner whereby the compensation of land taken for public use may be 'secured.'" Such being the case, of course payment must have been actually made or tendered. The appeal was upon an ordinary appeal bond. Our statute has prescribed ample security in such cases.

*Russell v. Bush*, 196 Ala. 309, 71 South. 397, was a suit by a land agent for commission. The land had been condemned by the United States, from which there was no appeal. The money was paid, and both parties to the condemnation proceedings were satisfied. The issue was as to whether the broker, who did not effect a legal sale, but brought about the condemnation proceedings, was entitled to commission on the amount paid for the land.

[7] We call attention to the language of article 6530, subd. 2, R. S., wherein it is provided that the award and a like amount must be deposited in the court, "which shall be held, together with the award itself, \* \* \* to secure all damages that may be awarded or adjudged against the plaintiff." Clearly this contemplated that the award shall not be paid to the defendant pending the suit.

Motion is overruled.

**HARRISON v. SHARPE. (No. 1497.)**

(Court of Civil Appeals of Texas, Amarillo. March 19, 1919. On Motion for Rehearing, April 16, 1919.)

**1. PROCESS ⇐149—IMPEACHMENT OF RETURN—NECESSITY OF CORROBORATION.**

The return of a citation may not be impeached by the testimony of one witness unless strongly corroborated by other evidence.

**2. PROCESS ⇐149—IMPEACHMENT OF RETURN—CORROBORATING EVIDENCE.**

Corroborating evidence to impeach the return of a citation must be from other sources than from the witness who requires corroboration.

**3. WITNESSES ⇐414(1)—CORROBORATING EVIDENCE—SUFFICIENCY.**

Corroborating evidence is not required to be direct and positive; it may consist of facts and circumstances which tend to show that the direct evidence sought to be corroborated is worthy of credit.

**4. PROCESS ⇐149—IMPEACHMENT OF RETURN—CORROBORATION.**

In a suit to set aside a tax judgment and proceedings thereunder brought by the owner of the property, evidence held to corroborate plaintiff's testimony that no citation or process in the tax suit had ever been served on her, notwithstanding the recitals of the return and that she had no notice of the proceedings until after the sale.

**5. TAXATION ⇐689(3)—JUDGMENT AND SALE—PROCEEDINGS TO SET ASIDE—PLEADING—IMPEACHING RETURN OF PROCESS.**

In a suit to set aside a tax judgment and sale thereunder because no citation had been served on plaintiff, who was the owner of the property, notwithstanding the return of the citation recited service, it was not necessary for plaintiff to allege that the falsity of the return was due to any action on the part of defendant.

**6. TAXATION ⇐689(3)—JUDGMENT AND SALE—SUIT TO SET ASIDE—COLLATERAL ATTACK.**

A suit to set aside a tax judgment and sale thereunder brought by the owner on the ground that citation had not been served upon her, wherein the petition recited that the suit was in the nature of a bill of review to annul the judgment and proceedings, followed by a statement of facts upon which plaintiff relies, does not constitute a collateral attack on the tax proceedings.

**7. TAXATION ⇐689(3)—JUDGMENT AND SALE—SUITS TO SET ASIDE—PARTIES.**

Where all taxes due the state have been paid to it, it is not a necessary party to a suit by a former owner to set aside a tax judgment and sale thereunder.

**8. TAXATION ⇐689(3)—JUDGMENT AND SALE—SUIT TO SET ASIDE—PLEADING.**

The rule that one who seeks to set aside a judgment improperly rendered by default must state that he has a good defense to the cause

of action has no application to a suit to set aside a tax judgment and sale thereunder on the ground that no notice or citation was served on the owner.

**9. TAXATION ⇐648—JUDGMENT—COLLATERAL ATTACK—CONTRADICTION OF RECORD.**

Tax judgment containing recitals showing jurisdiction may not be contradicted in collateral proceedings.

**10. TAXATION ⇐648—JUDGMENT—SUITS TO SET ASIDE.**

Where a tax judgment has been rendered without citing defendant, the owner of the property, defendant may, within the period of statutory limitations, attack the judgment in a direct proceeding wherein equitable relief may be had as circumstances require.

**11. TAXATION ⇐689(2)—SALE—SUIT TO SET ASIDE—INNOCENT PURCHASERS.**

Merely because the purchaser at a tax sale did not know that it was wrongfully or irregularly made does not prevent the sale from being set aside in a direct proceeding for that purpose.

**12. TAXATION ⇐689(2)—TAX SALE—SUIT TO SET ASIDE—RIGHTS OF INNOCENT PURCHASERS.**

That property has been acquired at a tax sale by an innocent purchaser does not prevent the sale from being set aside because the owner of the property was not cited in the tax proceedings, where the purchaser will receive an unconscionable profit in the owner's loss if he be allowed to retain the property and where he can be placed in status quo.

**On Motion for Rehearing.**

**13. TAXATION ⇐689(3)—TAX SALE—SUITS TO SET ASIDE—RELIEF.**

Where property has been sold under a tax judgment without citing the owner and has been purchased by an innocent party at the tax sale, the sale merely will be set aside, and the judgment left undisturbed.

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Suit by Mary A. Sharpe against Edward T. Harrison to set aside a judgment and all proceedings thereunder in a tax suit. Decree for plaintiff, and defendant appeals. Modified and affirmed.

Goggans & Smedley and J. N. Townsend, all of Dallas, for appellant.

Walter M. Nold and Spence, Haven & Smithdeal, all of Dallas, for appellee.

**BOYCE, J.** This suit was brought by appellee, Mrs. Sharpe, a widow, against appellant, Edward T. Harrison, to set aside a judgment and all proceedings had thereunder in tax suit No. 3979b in the Forty-Fourth district court of Dallas county, styled the State of Texas v. Mrs. Mary A. Sharpe. This judgment was rendered on November 10, 1910, foreclosing a lien for the taxes of 1907

amounting to \$7.61, and accrued costs, on two acres of land in the city of Dallas owned by Mrs. Sharpe. The judgment recited, and the return on citation showed, personal service of citation on the defendant in said cause. Thereafter, on April 14, 1911, the property was sold on order of sale issued out of said suit and bought by Edward T. Harrison, defendant in this suit, for \$110, \$30.03, of which amount was paid in discharge of the judgment and costs, and \$79.97 deposited in the registry of the court. Plaintiff alleged that she was not served with citation, did not receive notice of sale, and had no notice whatever of said proceedings in the said tax suit until February, 1916. She disclaimed all interest in the said sum of \$79.97, in the registry of the court, and tendered to defendant the sum of \$33.03, with interest thereon, applied in satisfaction of the said judgment, and offered to pay whatever other sum the court might determine ought in equity to be paid the defendant upon the setting aside of said judgment. The defendant pleaded that service of citation was had in said cause, and that all proceedings therein were regular, and that he was an innocent purchaser for value.

Trial was had before the court, and the trial judge found that Mrs. Sharpe was not served with any citation in said suit, and that she had no notice whatever of said proceedings until the month of February, 1916, that the property at the time of its sale was of the value of not less than \$3,500, and that the said sum of \$110 paid therefor by the defendant Harrison was grossly inadequate, and that the said Harrison was therefore not an innocent purchaser of said property for value. Judgment was entered canceling said judgment and all proceedings thereunder upon payment to the defendant of the sum of \$110, with interest from the date of his purchase.

[1] It is first assigned that the evidence is insufficient to support the finding that Mrs. Sharpe was not served with citation in the tax suit because her testimony that she was not served is not sufficiently corroborated. It is the law that the return of a citation may not be impeached by the testimony of one witness unless strongly corroborated by other evidence. *Gatlin v. Dibrell*, 74 Tex. 36, 11 S. W. 908; *Randall v. Collins*, 58 Tex. 231; *Pierce-Fordyce Oil Ass'n v. Staley*, 190 S. W. 814; *Godshalk v. Martin*, 200 S. W. 535; *Crawford v. Gibson*, 203 S. W. 375; *Swearingen v. Swearingen*, 193 S. W. 442; *Gallagher v. Teuscher & Co.*, 186 S. W. 409; *McBride v. Kaulbach*, 207 S. W. 576. So that the consideration of this assignment requires a summary of the evidence on this issue. In support of the return on the citation, in addition to its own recitals, which showed that it was served on July 14, 1909, was the testimony of the deputy sheriff, Roddy, who made the return, to the effect that he did

serve the citation in person on Mrs. Sharpe. He testified that he called at her home several times for the purpose of making service; that on each occasion prior to the time when service was had he was met at the door by a young woman, about 30 years of age, who informed him that Mrs. Sharpe was out of town, on a visit, "up North," was his recollection of the statement; that on the occasion of the service a lady appeared in answer to his summons, who informed him that she was Mrs. Sharpe, and he identified Mrs. Sharpe in the courtroom as being in his opinion the lady upon whom such service was made at this time. Mrs. Sharpe denied ever having been served or having notice of any kind of such proceedings until they were discovered by procuring an abstract of title in contemplation of the sale of said property in February, 1916. She testified that she did not leave home on a visit during the summer of 1909, and that she and her son lived in her home together, and no other lady was ever there, except that her married daughter made her an occasional visit, but that her daughter was never at her home while she herself was off on a visit. It appears from other testimony that Mrs. Sharpe purchased this property in 1905 for consideration of \$3,000, \$2,500 in cash, and notes running four years for the balance. There was a nice cottage thereon at the time of the purchase, and she and her son, a young man between 25 and 30 years of age, lived in this as a home until long after the proceedings were had in the tax suit. During this time the son was working in a seed store in the city of Dallas, and paid the notes due on the property out of his earnings, and also contributed to his mother's support during such time. He and his mother were interested together in the property, and about the year 1912 the mother deeded a part of it to the son, who thereupon placed other valuable improvements thereon. Various parcels of the land were conveyed to other persons, who also built valuable improvements on the premises. All taxes due the city had been paid for each year after the purchase up to the time of the trial, and all state and county taxes were paid, except the taxes for the year 1907; such payments being regularly made in the month of January in each year before they became delinquent. It appears from the testimony of both the son and the mother that the son attended to the payment of the taxes and such matters, and both mother and son testified that they thought the state and county taxes for the year 1907 had been paid. The son testified that his mother did not tell him of the service of any papers on her; that his mother always kept her debts paid and was never sued in her life, "and if an officer had served a citation on her she would have come right down to the store to see me about it." He also testified that, after the purchase of the place in

1905, "my mother lived on this place continuously, I think, up until the year 1912, when she went to El Paso for a short while to visit her sister, again resuming her residence there when she came back. I do not remember exactly when my mother left her place again," etc. It reasonably appears that this property during this time represented the greater part, if not all, the material resources of the mother and son.

These facts suggest the corroboration of Mrs. Sharpe's testimony in these particulars: First, that she was not away on a visit in the summer of 1909, so that the conversations with some lady detailed by the deputy sheriff were not likely to have occurred; second, that it was more than probable that the mother, if she had been served with citation, would have called the matter to her son's attention, and the fact that she did not do this tends to disprove that she was served; third, that all the actions of the parties, mother and son, are inconsistent with a knowledge on their part of the existence of this suit and the proceedings which followed it.

[2] As to the first, it is the rule that the corroborating evidence must be from other sources than from the witness who requires corroboration. *Gabrielsky v. State*, 18 Tex. App. 428; *Enc. of Evidence*, vol. 3, p. 675; *Wigmore on Evidence*, § 2059. Had the son or daughter corroborated by their positive testimony that of the mother that she was not away on a visit during the summer of 1909, there would have been no doubt that such corroboration might have been entitled to great weight. There may be an inference from the testimony of the son, which we have quoted above, that he meant thereby that his mother was not away from home, even on a visit, during the time stated.

As to the second, the relation between the mother and son and the circumstances surrounding their living together were such as to suggest that it was highly probable, if not certain, that if the mother had been served with a citation she would have consulted her son about it. It is natural to suppose that the mother, under the circumstances stated, would have been so excited by the service of citation upon her that she would have inevitably told her son. The trial judge had the parties before him and could well judge of this matter. A New York case, *Taylor v. Crowinshield*, 5 N. Y. Leg. Obs. 209, to which we do not have access, is referred to by *Chamberlayne on Evidence*, vol. 4, § 3210, as holding that—

"On a question whether a testator alleged to have mortgaged certain property borrowed a large sum of money, his habits of living and doing business may properly be received in the absence of more primary evidence."

The footnote discloses that the evidence referred to showed that the mortgagor's

financial condition was such that he was under no necessity of borrowing the money in question; that he was lending money instead of borrowing, was of retired habits, averse to business, "relying on the advice and agency of others, to whom it is established he did not apply on this occasion." Appellant relies on the case of *McBride v. Kaulbach*, supra, as denying any weight to this character of evidence. The facts in that case were not nearly so strong as in this. There the father was transacting his own business, and not living with the children. So that the conclusion that he would have told such children of having been served with a citation was by no means necessary, or even so highly probable as that the trial court might not have rightly concluded that such negative testimony was of such slight value as to furnish no admissible evidence of corroboration.

Third, all the surrounding facts and circumstances tend to support the conclusion that Mrs. Sharpe and her son did not know of the tax suit and subsequent proceedings had thereunder. The fact that they paid all taxes for previous and subsequent years, that they put valuable improvements on this property about the time of or after the sale, the utter disproportion in the amount of the taxes and the value of the property, with no reasonable expectation of finally ridding the property of the menace of such proceedings, without the expenditure of sums of money so largely in excess of the small amounts that would have been required to have been paid in the first stages of the proceedings—all these facts tend, we think, to corroborate the testimony of the mother and son that they knew nothing of this suit until it was discovered in the manner detailed by them.

[3, 4] Corroborating evidence is not required to be direct and positive. It may consist of facts and circumstances which tend to show that the direct evidence sought to be corroborated is worthy of credit. *Wright v. State*, 31 Tex. Cr. R. 354, 20 S. W. 757, 37 Am. St. Rep. 822; *Creighton v. State*, 61 S. W. 492; *Enc. of Evidence*, vol. 8, pp. 678, 679. If the independent facts and circumstances, taken all together, are, "in the opinion of both the court and the jury, strong, that is, cogent, powerful, forcible, calculated to make a deep or effectual impression upon the mind," then the direct testimony may be said to be "strongly corroborated." *Hernandez v. State*, 18 Tex. App. 134, 51 Am. St. Rep. 295. We think the trial court was justified in concluding that the testimony of Mrs. Sharpe that she was not served with citation was strongly corroborated.

[5] The remaining assignments may be disposed of by a general discussion of the law in connection with the facts, as already stated, and such additional statements as may be necessary. It was not necessary for the plaintiff to allege that the falsity of the return of the citation was due to any action

on the part of plaintiff in the tax suit or the defendant in this case. *Kempner v. Jordan*, 7 Tex. Civ. App. 275, 28 S. W. 870, writ of error denied; *Godshalk v. Martin*, 200 S. W. 535; *Black on Judgment*, § 377.

[6, 7] This suit, we think, is to be taken as a direct attack on the judgment and the sale made thereunder. The suit was filed in the court in which said judgment was rendered. The petition recites that the suit is in the nature of a bill of review to set aside and annul the said judgment and all proceedings thereunder. These allegations are followed by a statement of the facts which plaintiff claims rendered said judgment and the sale void and by a prayer that the judgment be set aside and that the sale and deed based thereon be canceled and set aside, and the cloud upon plaintiff's title created thereby be removed. Under such allegations we cannot regard the suit as being a collateral attack on said proceedings. *Moore v. Miller*, 155 S. W. 579; *McCampbell v. Durst*, 73 Tex. 410, 11 S. W. 380; *Graham v. East Texas Land & Improvement Co.*, 50 S. W. 579; *Scanlan v. Campbell*, 22 Tex. Civ. App. 505, 55 S. W. 501. And since the claim of the state has been completely paid, and the setting aside of the proceedings cannot in any manner affect it, the state is not a necessary party to the suit. *Weaver v. Nugent*, 72 Tex. 272, 10 S. W. 459, 13 Am. St. Rep. 792; *Rowland v. Klepper*, 189 S. W. 1033.

[8] The reasons that ordinarily require that one who applies to a court of equity to set aside a judgment improperly rendered by default to state in his petition that he has a good defense to the cause of action is altogether inapplicable to the facts of this case. In the cases where such rule was announced the petitioner was seeking to open up the judgment so that he might resist enforcement of the claims of the plaintiff, and courts of equity, with considerable hesitation, even in such cases (*August Kern Barber Supply Co. v. Freeze*, 96 Tex. 513, 74 S. W. 303), came to hold that the plaintiff ought to show that he had a good defense to the cause of action, because such allegation is necessary to show that injury and damages have resulted from the entry of such judgment. *Chambers v. Gallup*, 30 Tex. Civ. App. 424, 70 S. W. 1009; *Foust v. Warren*, 72 S. W. 405.

[9, 10] It is settled that in cases of this kind the recitals of the record showing jurisdiction may not be contradicted in a collateral proceeding. *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325. This rule is not based on any real difference in the position of the defendant, for the court is equally without jurisdiction without service, whether that appears of record or not; it is a rule of public policy, being necessary to protect the judgments of the courts from indefinite suspicion and attack under circumstances when the court is without power to adjust the equities of innocent persons relying on the verity of

the recitals of the record. It is well established, however, that the defendant in such case may, within the period of statutory limitations, attack the judgment in a direct proceeding in which "the flexible powers of a court of equity \* \* \* will adjust themselves to the very right and justice of the particular case." *Crawford v. McDonald*, supra; *French v. Grenet*, 57 Tex. 278. When the powers and processes of the court have been wrongfully or irregularly exercised in the sale of a litigant's property, and as a result of this irregularity the property has been sacrificed, there can be no doubt of the power of a court of equity to undo the wrong that has been thus committed. The questions in such cases are: Has there been any irregularity in the exercise of the powers of the court in the sale? And whether these have resulted in harm to the defendant, whose property has been sold. The answers to these questions determine whether the defendant has been wronged by the transaction. This, as we understand the principles upon which the courts act in the ordinary proceeding to set aside judicial sales, is the true purpose of the inquiry in such cases as to whether the property brought at the sale an adequate price; for if it did not, and this was caused by the irregularity, then a wrong has been done, which ought to be righted. *Kauffman & Runge v. Morris*, 60 Tex. 121, 122. But it is claimed for the appellant that the rights of one who purchased at such sale without knowledge of the irregularity ought to be protected. We readily concur in this proposition; but does this protection mean that he should be allowed to take an unconscionable profit of the transaction? *Hudson v. Morris*, 55 Tex. 595; *Martin v. Anderson*, 4 Tex. Civ. App. 111, 23 S. W. 293, second column.

"The proceedings in law will, by courts of equity, be treated as valid, though they may be erroneous, but equity will relieve against their consequences, because the rights thereby acquired cannot be retained in conscience. The purchaser will be treated as a trustee; and he will not be compelled to surrender until equity is done him." *Howard v. North*, 5 Tex. 316, 51 Am. Dec. 769.

[11] So the courts do not hold that a judicial sale, wrongfully or irregularly made, may not be set aside in a direct proceeding for that purpose, merely because the purchaser thereat did not know of the irregularity. *Owen v. City of Navasota*, 44 Tex. 522; *Allen v. Pierson*, 60 Tex. 604; *Kendrick v. Wheeler*, 85 Tex. 247, 20 S. W. 44; *Kauffman & Runge v. Morris*, 60 Tex. 121, 122.

"The general rule is believed to be that a purchaser at execution sale who looks to the record and finds there was a valid subsisting judgment authorizing the execution under which the officer proceeds and who in good faith buys, pays the purchase money, and receives a deed,



takes a title which is valid until the sale is set aside. \* \* \* If the officer has either willfully or negligently proceeded to sell in violation of instructions, and as a result the property is sacrificed, the parties are not without remedy. By motion in the court from which the execution issued, with notice to the purchaser, the sale may be, for good cause, set aside. The same end may be accomplished by an application to the equitable power of the court in which title under such a sale is set up showing good equitable grounds for relief, and of course preferring to do equity, whilst the remedies are thus ample to protect the parties to the judgment, and at the same time protect the bona fide purchaser." *Owen v. City of Navasota*, 44 Tex. 522.

Again:

"A court of equity, in dealing with the subject would strip it of all technicalities and go directly to the real and substantial justice of the case, and will, in decreeing that the sale be vacated, so far as substantial justice requires, restore the parties as well as may be done to their former status." *Allen v. Pierson*, 60 Tex. 609.

See, also, *Northcraft v. Oliver*, 74 Tex. 162, 11 S. W. 1122, and authorities there discussed; *French v. Grenet*, 57 Tex. 273; *Freeman on Void Judicial Sales*, § 49a; and 18 R. C. L. pp. 103, 104.

The cases we have referred to deal largely with irregularities in the process of the sale, and not in the rendition of the judgment itself. The judgment is the basis of the execution or order of sale, and if the wrong consists in the entry of the judgment, and this itself results in the wrongful sale, we see no reason why the courts would not on the same principles grant relief in such cases. In the case of *Allen v. Pierson*, 60 Tex. 607, it is said:

"If by reason of the failure to demand a levy, etc., appellee's land was sold without his knowledge and this failure of the officer, as a matter of fact, in any degree conduced to the inadequacy of consideration, it would entitle him to a decree vacating the sale."

It is a reasonable conclusion in this case that the want of service of citation in the suit and the failure of the plaintiff to receive any notice whatever of the proceedings and of the sale was the cause of the predicament in which the owner of the property is now placed, so that as a direct result of this wrong the appellee is about to lose her property without receiving practically anything therefor, and we cannot think that there is any rule of public policy or law that would prevent a court of equity from setting the sale aside where the purchaser may be placed in statu quo.

We have discussed this matter on general principles at this length because of the fact that there seems to be some confusion in the decisions as to the rights of the purchaser in such cases. In the case of *Scanlan v.*

*Campbell*, 22 Tex. Civ. App. 505, 55 S. W. 501, decided by the Court of Civil Appeals for the Fourth District it was distinctly held in the opinion on motion for rehearing that a sale made under order of sale issued on a judgment rendered without service of process on the defendant, though the return and judgment showed service, might be set aside as to an innocent purchaser upon return of the consideration paid by him on such purchase. A writ of error was denied by the Supreme Court in such case. This holding was severely criticized by the Court of Civil Appeals for the First District in the case of *Carpenter v. Anderson*, 33 Tex. Civ. App. 484, 491, 77 S. W. 291, in which writ of error was also denied, and it was asserted that the contrary rule had been established by a long line of decisions. A reference to the decisions cited shows that it appears in each of them, with the exception of the case of *Lawler's Heirs v. White*, 27 Tex. 251, that the attack on the judgment was in a collateral, and not a direct, proceeding, and it is inferable from the opinion in the case of *Lawler v. White* that the court considered the attack as being collateral. The learned judge who wrote the opinion in the case of *Carpenter v. Anderson*, in explaining why he thought the Supreme Court denied a writ of error in the case of *Scanlan v. Campbell*, stated that this must have been done on the theory that the purchaser was not an innocent purchaser, since it was found that the purchase was first made by the city of Houston, the plaintiff in the suit, and the claimant under the sale bought the property from the city under "a quitclaim deed." He appears to have overlooked the opening paragraph of the opinion on motion for rehearing in said case of *Scanlan v. Campbell*, in which it was stated, under an authority cited:

"That the deed in question from the city to Scanlan is not a quitclaim deed. We withdraw what is said to the contrary in the opinion."

The decision in the case of *Carpenter v. Anderson* was not finally rested on the court's position on this matter, but on another proposition. It also appears that the plaintiff in said case did not offer to reimburse the purchaser for his payment made on acquisition of the property. In *Williams v. Young*, 41 Tex. Civ. App. 212, 90 S. W. 940, a decision also by the Court of Civil Appeals for the First District, the holding in the case of *Carpenter v. Anderson* was referred to with approval. In this case "the vendee of the purchaser at the tax sale bought the land in good faith, paying full value therefor, believing that he was getting a good title," and there was no offer on the part of plaintiff attacking the sale to do equity by repaying him. The same may be said of the facts in the case of *Dean v. Dean*, 185 S. W. 90. *Rowland v. Klepper*, 189 S.

W. 1088, is a case very similar to this, though it does not appear that the party moving to set aside the tax sale in that case offered to repay the purchaser the amount paid on the purchase, the court in the final disposition of the case requiring this to be done, however, and the Court of Civil Appeals in that case upheld the action of the trial court in setting aside the judgment and sale. A writ of error has been granted in that case, on what grounds we are not informed. It may be on the holding that the inadequacy of the consideration prevented the purchaser from being a purchaser in good faith. This proposition stated by the court in the decision may not be an accurate statement of the law, particularly in this character of case. *Rogers v. Moore*, 100 Tex. 220, 97 S. W. 685; *Ross v. Drouilhet*, 84 Tex. Civ. App. 327, 80 S. W. 241. But under our conception of the matter the good faith of the purchaser is not an insuperable objection to the setting aside of the sale, and, as we have stated, the inadequacy of price is material only in determining whether injury has been, in the particular case before the court, inflicted by the irregular exercise of the court's powers and processes. Now, if the party has knowledge of the suit and opportunity to redeem within the two years allowed by law in these cases, it may not be said that he has been wronged by the sale of the property at an inadequate price. *Rogers v. Moore*, 100 Tex. 220, 97 S. W. 685. But where, by the wrongful or irregular act, the defendant has been deprived of any notice whatever of the judgment and the sale until after the lapse of the two years for redemption, the wrong certainly results in the injury where the property is sold for practically no consideration. In *Rogers v. Moore*, 100 Tex. 220, 97 S. W. 685, a motion was made within the two-year redemption period to set aside the tax sale because the defendant had not received the notice of the sale which the sheriff had mailed him, and the property sold at an inadequate price. It was held that the statute only required the sheriff to "mail the notice," so that when this was done, the law was complied with, and there was really no irregularity in the sale, but we find this significant language in the opinion:

"As it was intended, however, that defendants should have the benefit of personal notice to give them further opportunity for protecting their interests to be affected by intended sales, it may be true that the failure to get the notice might furnish the basis for setting aside a sale, although regular, where, as, the result of the miscarriage, great and irreparable loss is threatened, and a harsh and unconscionable advantage is being taken; and if the result of the sale were to be the loss to plaintiff in error of his title to the property for the small sum paid for it, the facts would present a strong appeal for the exercise by the court of its inherent power to control its processes, and to prevent

undue advantage being taken of them. But the only right acquired by the purchaser at this sale is subject to that of the plaintiff in error to redeem at any time within two years by paying double the amount of the bid, and this takes away a reason for interfering that might otherwise be sufficient."

[12] So we do not believe that our courts are finally committed to the proposition that the protection to the purchaser in good faith in this character of case requires that he be allowed to retain the property where this would result in an unconscionable profit to him at the loss of the owner. If the parties are equally innocent, certainly the equitable rule would be to place them in statu quo as nearly as possible, and we do not think public policy requires the courts to go further than this. According to the findings of the court in this case, the plaintiff not only did not receive the notice of the sale, but had no notice whatever of the suit. No opportunity for redemption was left to her, and we think good "reason for interfering" does exist, and are of the opinion that the judgment of the trial court should be affirmed.

#### On Motion for Rehearing.

We have before us a copy of the notation made by the committee of judges from the Courts of Civil Appeals in granting the application for writ of error in the case of *Rowland v. Klepper*, 189 S. W. 1033, referred to in the opinion. This notation was as follows:

"Application granted. The Court of Civil Appeals erred in holding that the judgment could be annulled without the state being a party and without a meritorious defense."

We do not doubt that, if this proceeding had been brought to set aside the judgment before there was any sale thereunder and before it had been discharged, plaintiff could only have maintained the suit by alleging that she had a meritorious defense. The reason for this would be that, if the defendant had no defense to the suit, another trial would produce the same result, no real damage was inflicted by the rendition of the judgment without service of citation, and a court of equity will not interfere to set aside a just judgment, though it may have been irregularly secured. But when property has been sold under the judgment for a grossly inadequate consideration, and this result was due to the lack of notice by the defendant of the pendency of the suit, which she otherwise would have had had citation been served upon her as required by law, then it certainly is true that "injury and damages have resulted," and we believe that a court of equity can grant appropriate relief. It may be, as we shall hereafter state more particularly, that such relief would not require the setting aside of the judgment itself.

If any real right of the plaintiff in the judgment is to be affected by the suit to set aside the proceedings, then, of course, such plaintiff is a necessary party; for instance, if the judgment had not been fully discharged, or if the defendant, upon the setting aside thereof, could proceed against the judgment plaintiff to recover what had been received from the sale in discharge of the judgment. It is only under the latter suggestion that it could be said that the state in this case has any real interest that might be affected by this proceeding. Its claim was fully paid, and its only interest in the matter would be to prevent a claim in the future for the refund of the payments made to it. The same reason that makes it impossible for the plaintiff in this suit to make the state a party would make it impossible for her to recover from it the payments made. Besides, the plaintiff in this suit, by alleging, as a reason for not making the state a party thereto, that the claim of the state had been fully paid and tendering to the defendant the sum of money he had paid as "taxes and costs in said suit," would probably be estopped from hereafter asserting any such claim. So that, as a practical matter, the interest of the state is so remote that under the particular circumstances it might well be held that it is not a necessary party.

[13] We are inclined to think, however, that the proper judgment in cases of this kind would be merely to set aside the sale, leaving the judgment itself undisturbed. Such action would afford all the relief necessary and would eliminate any question as to the necessity of alleging a meritorious defense to the judgment and of making the state a party to the proceeding. In the case of *Weaver v. Nugent*, 72 Tex. 277, 10 S. W. 459, 13 Am. St. Rep. 792, where the suit was to set aside an execution sale under judgment in which the state was plaintiff, it was said:

"The tender of the purchase money obviates the necessity of the presence as a party of the state, the nominal plaintiff in execution. This is in accordance with the decision in *Miller v. Koertge*, 70 Tex. 162, 7 S. W. 691 [8 Am. St. Rep. 587]."

In the said case of *Miller v. Koertge*, which was also a suit to set aside the sale in a case in which the state was a party, it was said:

"The plaintiffs in this suit tender the bid to the purchaser, and this may relieve them of the necessity of making the state a party."

If a court of equity has the power to set aside a sale because of some irregularity in the manner of conducting it or in issuing the process, we can see no reason why, if the judgment itself was obtained without no-

tice, and this resulted in a sale of property for an inadequate price, the court may not for this reason set aside the sale, though it may, if the equities of the case demand it, leave the judgment itself undisturbed.

While it was recited in the preface to the judgment in this case that the plaintiff was entitled to a decree annulling the judgment, the judgment as actually rendered only sets aside the sale and conveyance of the premises to the defendant. If the judgment did improperly set aside the former tax judgment, we do not think the defendant in this case is in any position to complain of such matter as that portion of the judgment does not injuriously affect him. However, we will modify the judgment heretofore rendered so as to only annul the sale itself and the sheriff's deed made to the defendant thereunder, and the motion for rehearing will be overruled.

#### PETERSON v. GRAHAM-BROWN SHOE CO. (No. 6151.)

(Court of Civil Appeals of Texas. San Antonio. Jan. 29, 1919. On Motion for Rehearing, March 19, 1919. Further Rehearing Denied, April 9, 1919.)

#### 1. SALES $\S$ 23(3)—ORDER—ACCEPTANCE.

Where buyer's order for shoes given to seller's salesman was received by the seller, the seller was bound thereby, where no notice was given the buyer that the order would not be filled.

#### 2. SALES $\S$ 23(3) — ORDER — ACCEPTANCE — REPUDIATION.

For a seller to effectively repudiate a buyer's order for goods given to the seller's salesman and received by the seller, the seller must repudiate the order in a reasonable time.

On Motion for Rehearing.

#### 3. PLEADING $\S$ 376 — BURDEN OF PROOF — ADMISSIONS—GENERAL DENIAL.

Where defendant pleaded a general denial, any admissions thereafter pleaded in the answer would not lift the burden from plaintiff of proving his case against the general denial.

#### 4. APPEAL AND ERROR $\S$ 215(1) — OBJECTIONS BELOW—INSTRUCTIONS.

On appeal, objections to a charge not embodying fundamental error cannot be considered, where error in the charge was not called to the notice of the court below by any objection.

Appeal from Bexar County Court for Civil Cases; John H. Clark, Judge.

Action by C. T. Peterson against the Graham-Brown Shoe Company. From a judgment for defendant, plaintiff appeals. Affirmed.



**LAIDACKER v. PALMER et al. (No. 436.)**

(Court of Civil Appeals of Texas. Beaumont.  
March 25, 1919. Rehearing Denied  
April 16, 1919.)

**1. TRESPASS TO TRY TITLE ⇨38(2)—ACTION  
—EVIDENCE—BURDEN OF PROOF—SUPERIOR  
TITLE.**

In trespass to try title, where the parties agreed as to a common source, it was incumbent upon plaintiff to show superior title from such source.

**2. JUDGMENT ⇨533—CONSTRUCTION—TITLE  
TO LAND.**

In trespass to try title, a judgment in a former case between other parties held a mere recital, and not an adjudication of title to the land in question.

**3. TRESPASS TO TRY TITLE ⇨41(2) — EVI-  
DENCE—BURDEN OF PROOF.**

In trespass to try title, evidence held not to show that plaintiff had discharged the burden of showing title from the agreed common source superior to that of defendants.

Appeal from District Court, Liberty County; J. L. Maury, Judge.

Trespass to try title by N. E. Laidacker against V. K. Palmer and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Thos. J. Baten, R. L. Durham, and Crook, Lord, Lawhon & Ney, all of Beaumont, for appellant.

D. J. Harrison, of Liberty, A. W. Marshall, of Anahuac, and H. E. Marshall, of Houston, for appellees.

**HIGHTOWER, C. J.** This is an appeal from a judgment of the district court of Liberty county. The suit was one in the ordinary form of trespass to try title, and appellant, Laidacker, was plaintiff below, and the appellees, Palmer and Reavis, were the defendants. The suit involves 25 acres of land, a part of the Jesse Devore league in Liberty county, which 25 acres is specifically described by metes and bounds in the plaintiff's petition. A jury was demanded, but upon conclusion of the evidence the trial judge peremptorily instructed a verdict in favor of the defendants, Palmer and Reavis, and judgment was entered accordingly.

[1-3] It was agreed by the parties that one Emile Bourdreaux was the common source of title, and, this being true, it was incumbent upon appellant, as plaintiff below, to show superior title from the agreed common source. Appellant, by proper assignments, here insists that he fully discharged the burden resting upon him as plaintiff, and showed superior title as against appellees from the agreed common source, and that,

having done so, the trial court was in error in instructing a verdict in favor of appellees, and, on the contrary, should have instructed a verdict in his favor.

The first link in the chain of title out of the common source relied upon by appellant for recovery was a judgment rendered by the district court of Liberty county at its February term, 1903, in a cause numbered 3409 on the docket thereof, and styled W. L. Hills et al. v. Chas. G. Bruce et al. It is the contention of appellant that by said judgment title to the 25 acres of land in controversy in this suit was divested out of the common source, Emile Bourdreaux, and vested in one Jacob C. Baldwin, who was a party to the Hills v. Bruce suit, and appellant claims by mesne conveyances from said Baldwin. It is the contention of appellees that the judgment rendered in the Hills v. Bruce suit does not show that the title to the land in controversy was divested out of Emile Bourdreaux, the common source, and vested in the said Baldwin, and that therefore appellant failed to show superior title to the land in controversy here as against appellees, and that the trial court was not in error in so holding and instructing a verdict in their favor.

There appears in the statement of facts in this record the judgment, in part, which was rendered in the Hills v. Bruce suit above referred to, and although only a part of that judgment, still it is quite lengthy, and for that reason we do not copy it in full in this opinion. We have, however, considered this judgment very carefully, and we have reached the conclusion that it does not appear with reasonable certainty therefrom that title to the 25 acres of land here in controversy was divested out of the common source, Emile Bourdreaux, and vested in the said Baldwin, or that there was even any issue or controversy between the said Emile Bourdreaux and the said Baldwin in said Hills v. Bruce suit. The judgment as a whole in said Hills v. Bruce suit, or at least that part of it which is brought here, leaves it very doubtful and indefinite as to who all the parties were to that suit, and as to their relations to each other in that suit. It is apparent that there were a number of plaintiffs in that suit and a great number of defendants. It is the contention of appellant that Jacob C. Baldwin was one of the plaintiffs in that suit, and that Emile Bourdreaux, the common source here, was one of the defendants in that suit, and it is his contention that it does appear with reasonable certainty from the judgment relied on that Baldwin, as a plaintiff in that suit, recovered the land in controversy from Emile Bourdreaux as one of the defendants. It is true that in said judgment at one point Jacob C. Baldwin was named as a plaintiff, but in another portion of the judgment, which pur-

ports to name the plaintiffs, Jacob C. Baldwin's name is not mentioned as one of them, and nowhere in the judgment does it appear that Jacob C. Baldwin, as a plaintiff in the Hills v. Bruce suit, recovered the 25 acres of land in controversy as against Emile Bourdreaux, the common source here. All the papers in the Hills-Bruce suit were lost, and not one of them could be found at the time this suit was tried below, and therefore the parties were unable to show, by the pleadings or any other papers in the Hills-Bruce suit, what was really in controversy, if anything, as between Jacob C. Baldwin and the common source, Emile Bourdreaux, and appellant did not offer any other character of evidence for that purpose. Among other things, it appears from the judgment in the Hills-Bruce suit that the defendant Bruce filed a cross-action, and that Jacob C. Baldwin and Emile Bourdreaux were made defendants to that cross-action, and in disposing of such cross-action the judgment in that cause reads as follows:

"It is further ordered, adjudged, and decreed by the court that the defendant Charles G. Bruce take nothing by reason of his cross-bill against the defendant Emile Bourdreaux and Jacob C. Baldwin, and that said Emile Bourdreaux and Jacob C. Baldwin do have and recover of and from the said defendant Charles G. Bruce the following described tract of land, to wit: 50 acres of land, it being a part of the east  $\frac{1}{2}$  of said Jesse Devore league of land and being the same tract marked on the map as Bourdreaux 25 acres and Baldwin 25 acres and more particularly described by metes and bounds as follows: [Here follows a description of said 50-acre tract.]"

That part of said judgment then proceeds:

"That as to said defendants Jacob C. Baldwin and Emile Bourdreaux that the said Baldwin is the owner of the west one-half of said 50-acre tract and the said Bourdreaux is the owner of the east one-half thereof as will appear from their answer to said cross-bill now on file in this cause."

It is the contention of appellant that the portion of the judgment just above quoted disposing of the cross-action of Charles G. Bruce itself is a sufficient adjudication of the title to the land here in controversy in favor of Jacob C. Baldwin as against Emile Bourdreaux; while, on the other hand, it is the contention of appellees that the same, at the most, is no more than a mere recital, and is not an adjudication by the court of the title in favor of Baldwin as against Bourdreaux. After careful consideration of these respective contentions, we have concluded that appellees are correct, and that said portion of the judgment, neither by itself nor by anything that appears elsewhere, amounts to an adjudication of the title to the 25 acres in controversy in favor of Baldwin as against

Emile Bourdreaux, the common source here. Therefore it follows that appellant, who relies alone upon said judgment in the Hills-Bruce suit as a necessary link in his chain of title to the land in controversy, failed to show title thereto, and, being the plaintiff in the case, he was not entitled to recover, and the trial court did not err in instructing a verdict in favor of appellees.

It also appears from the record in this case that on the same day on which the judgment in the Hills-Bruce case was rendered Emile Bourdreaux made a deed to Jacob C. Baldwin by which he attempted to convey to Baldwin the 25 acres of land in controversy in this suit, but it is conceded by appellant that such deed passed no title, for the reason that the land at that time constituted the homestead of Bourdreaux and wife, and the wife did not join in said deed. There is no explanation in the record as to why this deed was executed by Bourdreaux, and we are inclined to think that the fact that this deed was executed by Bourdreaux to Baldwin on the day that the judgment above mentioned was rendered rather indicates that Baldwin and Bourdreaux understood at that time that the judgment in that case did not and was not intended to pass the title to the land in controversy here from Bourdreaux to Baldwin.

Upon the whole, we have concluded that appellant, as plaintiff below, did not discharge the burden resting upon him to show title to the tract of land in controversy as against the appellees, who hold by mesne conveyances from Bourdreaux and wife.

Other questions are raised by appellees in support of the action of the trial judge in instructing a verdict, but we deem it unnecessary to mention or discuss them.

Finding no error in the judgment appealed from, the same will be affirmed; and it is so ordered.

#### WESTERN UNION TELEGRAPH CO. v. PARHAM. (No. 6738.)

(Court of Civil Appeals of Texas. Dallas. March 29, 1919.)

#### 1. APPEAL AND ERROR $\S$ 1004(1)—DAMAGES—MENTAL SUFFERING.

There is no fixed rule for measuring damages to be allowed for mental suffering, and, jury being exclusive judges of facts, it must clearly appear that amount awarded is excessive before an appellate court will be authorized to disturb a verdict.

#### 2. TELEGRAPHS AND TELEPHONES $\S$ 71—DAMAGES—MENTAL SUFFERING—AMOUNT.

In an action against a telegraph company for damages by reason of delay in a message whereby plaintiff was prevented from attending

the funeral of her father, a verdict of \$1,627 held not excessive.

Appeal from District Court, Hill County; C. M. Smithdeal, Judge.

On remand from the Supreme Court (206 S. W. 839). Judgment of trial court affirmed. For former opinion, see 152 S. W. 819.

E. G. Senter, of Washington, D. C., for appellant.

R. M. Vaughan, of Hillsboro, H. G. Hart, of Houston, and H. C. Bishop, of Hubbard, for appellee.

TALBOT, J. This suit was instituted by the appellee to recover damages alleged to have been sustained on account of the failure of the appellant to properly transmit and deliver to appellee's wife, Mrs. Fannie Parham, a telegram announcing the death of her father, by reason of which she was prevented from attending his funeral. The case was submitted to this court and an opinion rendered November 30, 1912, reversing the judgment and remanding the cause for a new trial. To that opinion, which is reported in 152 S. W. 819, we here now refer for a full statement of the nature of the case, the questions discussed, and the facts upon which our decision was based. The judgment of the district court was reversed, and cause remanded, as the opinion referred to will show, because this court reached the conclusion that error was committed in the court's refusal to give a special charge requested by the appellant; all other questions raised on the appeal being definitely decided against appellant except the complaint that the verdict was excessive. Upon application of the appellee a writ of error was granted by the Supreme Court, and in an opinion written by Judge Taylor of the Commission of Appeals and adopted by the Supreme Court our holding that the trial court erred in refusing the special charge requested by the appellant, to which we have referred, was reversed, and, in view of an expression in our opinion to the effect that we were inclined to agree with the contention of the appellant that the verdict is excessive, the cause was remanded to this court "for disposition on its merits." The opinion of the Commission of Appeals will be found reported in 206 S. W. 839. The question now to be decided is whether or not the verdict and judgment are excessive. As stated above, we heretofore reversed and remanded the case because we were of opinion that the district court erred in refusing the special charge quoted in our original opinion, which was requested by appellant. Having concluded that the case should be reversed and remanded for that reason, the question of the excessiveness of the verdict was not as fully and carefully examined and considered as it otherwise would have been. Since the return of the record to this court

from the Supreme Court, however, a thorough examination and consideration of the evidence has been made with the conclusion reached that we would not be authorized to reverse the judgment on the ground that the verdict is excessive. Mrs. Parham was six years old when her mother died. Soon thereafter she and the other children went to their grandmother's home near Hubbard City to live. Two or three years after this her father, E. Chisenhall, married again. This marriage took place in Arkansas, where the couple lived six or seven years, and then removed to east Texas. About a year after his removal from Arkansas to Texas Mr. Chisenhall's second wife died. After the death of his second wife he lived near Brownboro, Tex. About ten years after the death of Mr. Chisenhall's second wife, he married again, and lived at Pollock, Tex. His third wife lived about four years, and died at Pollock, Tex. From the time Mrs. Parham went to her grandmother's home her grandmother and uncle took care of and supported her. Her father, however, sent her money at times. Mrs. Parham's grandmother died when Mrs. Parham was eighteen years old, and after that time she continued to live with her uncle about nine or ten years, when she married and went to her own home. Mrs. Parham never saw her father's last wife. Her father and his second wife visited her at her grandmother's home. The evidence fails to show any estrangement or unkind feelings between Mrs. Parham and her father, but indicates a kindly and affectionate feeling the one towards the other. Mrs. Parham, among other things, testified:

"I heard from my father after we were living with our grandmother at Hubbard. He visited us right soon after he went back and then every year or two afterwards. I heard from him by letter. I do not remember how often our father visited his children while they were at Hubbard up to the time of the death of his second wife; I was small; I suppose it was two or three times, but I know he visited us often."

She further said:

That after she and her husband moved to Hubbard City her father visited them in September and December just prior to his death; that the relationship between herself and father "was as a daughter and father should be; that she treated him just as well as she knew how; that he was sick during the time he was at her home, and that she waited on him and attended to his wants; that she gave him her room where the fire was and kept a fire for him all night and provided medicine for him."

She further testified:

"It was my desire to be present at the funeral services over my father's remains. I was grieved very much to know that I could not be at his funeral. After learning that I could not attend his funeral, I was grieved very much. I can't explain just how I did feel;

I have not in my possession any keepsake or relic of my father. I had written to him just before he died, a few days; I don't remember the date."

[1, 2] The question of damages for mental suffering is largely in the discretion of the jury. In such cases there is no fixed rule for measuring the damages to be allowed, and the jury being the exclusive judges of the facts, it must clearly appear that the amount awarded is excessive before an appellate court would be authorized to disturb the verdict upon an assignment of error urging that objection to it. So that applying this well-settled rule, we cannot say that the verdict is excessive, although it appears to us to be large. *Western Union Tel. Co. v. McDavid*, 121 S. W. 898; *Western Union Tel. Co. v. Hill*, 162 S. W. 382. In the last case cited the plaintiff's wife was ill, and, because of the delay in transmitting and delivering a telegram to him announcing her illness, plaintiff was prevented from reaching her bedside until she had become unconscious and unable to recognize and converse with him before she died, and a verdict for \$1,500 was held not to be excessive. In the similar case of the *Western Union Tel. Co. v. Piner*, 9 Tex. Civ. App. 152, 29 S. W. 66, a verdict for \$2,150 was allowed to stand.

The Supreme Court having held that appellant was not entitled to have the jury instructed as it requested in the special charge, for the refusal, of which we reversed the judgment and remanded the case, and believing the other questions raised were correctly decided in our original opinion, the judgment of the district court is affirmed.

Affirmed.

**O. J. GERLACH & BRO., Inc., v. DU BOSE et al. (No. 434.)**

(Court of Civil Appeals of Texas. Beaumont. March 18, 1919.)

**1. JUDGMENT ⇐486(1)—COLLATERAL ATTACK—ERRONEOUS JUDGMENT AGAINST SURETIES—VALIDITY.**

If judgment, entered in county court on defendant's appeal from justice court, against defendant and sureties on his appeal bond, was erroneous as to the sureties because of its form, or its entry, or because obtained by agreement from the defendant without sureties' knowledge or consent, it was not therefore void, but at most only voidable.

**2. JUSTICES OF THE PEACE ⇐191(4)—APPEAL—JUDGMENT—SURETIES ON APPEAL BOND.**

On defendant's appeal from justice court to county court, judgment being rendered against defendant, as a matter of law it followed against the sureties on his appeal bond.

**3. JUDGMENT ⇐865—REVIVAL—PARTIES LIABLE.**

On showing that judgment obtained by him against a defendant and sureties on defendant's bond on appeal from a justice court was on its face valid, and at most only voidable for errors, plaintiff was entitled to an order reviving his judgment against all defendants in the original judgment as the same appeared of record.

**4. JUDGMENT ⇐481—ORAL COMPROMISE.**

A judgment rendered in pursuance of a parol agreement of compromise is not void, and can be attacked only by a direct proceeding.

**5. JUSTICES OF THE PEACE ⇐191(2)—BOND ON APPEAL—LIABILITY OF SURETIES.**

Sureties on a bond given on appeal from justice court to county court are not relieved from liability by the fact that the appealing principal and his adversary agree upon a judgment against the principal with stay of execution, and that such agreement is made without the knowledge or consent of the sureties; the sureties' obligation being presumably assumed with a view to control by the principal of the litigation on the appeal.

Appeal from Polk County Court; B. F. Bean, Judge.

Action by C. J. Gerlach & Bro., Incorporated, against J. P. Du Bose and others. From judgment granting only partial relief, plaintiff appeals. Reversed and remanded.

McKinnon & Campbell, of Livingston, for appellant.

Feagin, German & Feagin, S. F. Hill, and Cade Bethea, all of Livingston, for appellees.

**WALKER, J.** This action was begun by appellant suing out a writ of scire facias, without petition, on the 16th day of April, 1917, in the cause of C. J. Gerlach & Bro., Incorporated, v. W. C. Mullin et al. on the docket of the county court of Polk county, to revive a judgment against all the defendants. The original suit was begun in justice court, precinct No. 4, by appellant against W. C. Mullin, and in this suit in the justice court appellant recovered judgment for the amount of his debt. W. C. Mullin appealed to the county court, and appellees, J. P. Du Bose, T. M. Sawyer, S. F. Hill, and H. A. Still were the sureties on his appeal bond. In this proceeding to revive the judgment, the sureties answered, alleging that the judgment was void on its face as being without a verdict and finding of the court to support it, and because, while the case was pending trial in the county court, appellant had agreed with W. C. Mullin to take judgment against him and release the sureties; if mistaken in this, then they further pleaded that he had agreed with W. C. Mullin to take judgment against him in April and stay execution until fall of that year; that this agreement was made without the knowledge



or consent of the sureties; and that the legal effect of this agreement was to release the sureties. Appellant denied making the agreement.

This cause was tried before the court without a jury, he filing the following findings of fact and conclusions of law:

"In this cause which was tried before the court on the 3d day of August, A. D. 1918, upon the request of attorney for plaintiff, the court files the following as his findings of fact and conclusions of law.

"I find that on April 16, 1917, there was written into the minutes of the county court of Polk county a judgment, purporting to be a judgment of this court, as follows:

"C. J. Gerlach & Bro., Inc. v. W. C. Mullin.  
No. 124.

"April 16, A. D. 1917.

"On this day this cause came on for trial, and both parties appeared by counsel and announced ready for trial. A jury having been waived, the questions of fact as well as of law were submitted to the court, who after hearing the pleadings, proof, and argument is of the opinion that the plaintiff, C. J. Gerlach & Bro., Incorporated, should recover of the defendant W. C. Mullin the sum of \$162.66. And it further appearing to the court that the defendant W. C. Mullin on the 26th day of June 1916, executed and filed in this cause in justice court, precinct No. 4, Polk county, Tex., an appeal bond in the sum of \$325.32, conditioned as required by law, with W. C. Mullin as principal and S. F. Hill, J. P. Du Bose, T. M. Sawyer, and H. A. Still as sureties.

"It is therefore ordered, adjudged, and decreed by the court that the plaintiff, C. J. Gerlach & Bro., Incorporated, do have and recover of and from the defendant, W. C. Mullin and S. F. Hill, J. P. Du Bose, T. M. Sawyer, and H. A. Still as sureties on said appeal bond the sum of \$162.66, together with interest at the rate of 6 per cent. from date hereof and all cost in this behalf expended, for which execution may issue.

"\_\_\_\_\_, Trial Judge."

"I find upon the docket of the court the following notation: 'April 16, 1916. On this day this cause was called for trial; both parties announced ready. Judgment rendered by the court in favor of plaintiff, C. J. Gerlach & Bro., Incorporated, against W. C. Mullin for the sum of \$162.66 and cost.'

"I find that the only judgment that could have been properly entered in this case was an agreed judgment, based upon the terms of an agreement made between the defendant, W. C. Mullin, and L. F. Gerlach, president of C. J. Gerlach & Bro., Incorporated.

"The form of judgment set out above was never submitted to me for approval, and as appears above was not signed by me as trial judge. The minutes of the April term, 1917, were signed by me, but I made no particular examination of any special judgment or decree.

"I further find that the judgment which was written into the minutes was never submitted to the attorneys for defendant Mullin, nor any of the bondsmen, and that the attorneys for defendant and the bondsmen knew nothing about

the contents of this judgment until a short time before the scire facias was filed.

"I find that during the April term, 1917, of the county court of Polk county, this cause was being considered by attorneys for trial; that defendant W. C. Mullin went to the office of L. F. Gerlach, and they entered into an agreement to settle the cause, by the terms of which Gerlach was to allow Mullin until fall to pay the debt and Mullin was to waive such matters of defense as he might have. Nothing was said in the course of this agreement to indicate that the bondsmen were to be held liable, and defendant Mullin understood that plaintiff was looking to him solely for the debt. He says positively that the settlement was made solely for himself, and would not have been made if he had known the bondsmen were to be held liable.

"I find that the defendant Mullin reported to his attorneys, C. Bethea and S. F. Hill, that he and Gerlach had settled the case, and that they consented to the same with the understanding that Mullin alone was to pay the debt. I find that neither Bethea nor Hill, who was one of the bondsmen, ever intended to agree to a judgment binding the bondsmen, and that if they had understood that the bondsmen were to be held liable, they would not have consented to an agreed judgment.

"I further find that the judgment intended to be entered was a compromise judgment by which Mullin was to waive any matter of defense which he might have, in consideration on the part of plaintiff that he was to be allowed further time in which to pay the debt.

"I find that no execution has ever been issued on the judgment against the defendant Mullin or any one of the sureties.

#### "Conclusions of Law.

"I conclude that the judgment written into the minutes of the court is void as to the sureties S. F. Hill, J. P. Du Bose, T. M. Sawyer, and H. A. Still, because there was no agreement ever made by which these parties were to be bound.

"I conclude that this was an agreed judgment, and that, the agreement being intended to bind only the defendant W. C. Mullin, a judgment against W. C. Mullin does not by operation of law entitle plaintiff to a judgment against sureties on the appeal bond.

"I further find that the purported judgment dated April 16, 1917, is void as against S. F. Hill, J. P. Du Bose, T. M. Sawyer, and H. A. Still as sureties, for the reason that no formal judgment against them was ever given by the court, no entry on the docket was ever made by the court or under its instructions against them, and the judgment which was sought to be entered against them was obtained without their knowledge or consent and in no manner is binding on them.

"The defendant Mullin consented to the revival of the judgment, and I conclude to revive the judgment as against him, but not to revive same against the sureties; the same being wholly void as to them.

"B. F. Bean, Trial Judge."

On these findings of fact the court entered judgment declaring the original judgment as against the sureties void, and decreeing that

the same should not be revived, but revived the same in all things against W. C. Mullin.

[1] Appellant contends that the original judgment in Gerlach & Bro., Incorporated, v. Mullin was not void, but at the most only voidable. This proposition is well taken.

In Rowlett v. Williamson, 18 Tex. Civ. App. 28, 44 S. W. 624, two sureties joined with the principal in the execution of an appeal bond. One of the sureties, without the knowledge or consent of the other surety, but with the knowledge and consent of the principal, erased his name from the bond, and a new surety was substituted. After judgment had been rendered against him, the original surety obtained an injunction to restrain the enforcement of an execution against him on the judgment, insisting that the judgment against him was void because he had been released from the bond by the change in sureties. The court said:

"As this court had jurisdiction over that appeal and the signers of the appeal bond, it must follow that its judgment, determining their liability, even if erroneous, because of the existence of facts not made to appear, was yet valid until set aside by some proper proceeding."

Justice Wheeler, in Hopkins v. Howard, 12 Tex. 7, said:

"The want of an affidavit of the justness of the debt was error, for which the judgment must have been reversed on appeal or writ of error. But though erroneous by reason of the omission, the judgment was not thereby rendered void. It is valid and binding until reversed."

In Flores v. Maverick, 26 S. W. 816, the court said:

"When once the jurisdiction of the court has attached, no subsequent irregularity in the exercise of that jurisdiction can make its judgment void."

In Clayton v. Hurt, 88 Tex. 595, 32 S. W. 876, the following rule is announced:

"Where a court of general jurisdiction, in the exercise of its ordinary judicial functions, renders a judgment in a cause in which it has jurisdiction over the person of the defendant and of the subject-matter in controversy, such judgment is never void, no matter how erroneous it may appear from the face of the records or otherwise."

Without quoting further authorities, we cite Michie's Enc. Dig. vol. 11, pp. 138-145.

Appellees insist that the original judgment is void because the trial court never rendered judgment against the sureties. In disposing of this case originally, the following notation was made on the docket by the judge:

"April 16, 1916. On this day this cause was called for trial. Both parties announced ready. Judgment rendered by the court in favor of plaintiff O. J. Gerlach & Bro., Incorporated, against W. C. Mullin for the sum of \$162.66 and cost."

[2] This order was sufficient for the court to render the judgment as given in his findings of fact. Judgment being rendered against the principal, as a matter of law, it followed against the sureties.

[3, 4] Hence we determine that the original judgment in this cause is, until duly set aside by an order instituted for that purpose, a valid, binding, and subsisting judgment against Mullin, as principal, and all these appellees as sureties. On this showing, the appellant was entitled to an order reviving his judgment against all defendants in the original judgment as the same appears of record. Hopkins v. Howard, supra. The fact that the judgment in this cause was entered by agreement would not alter the rule as above announced, the Supreme Court, in Frisby v. Withers, 61 Tex. 134, holding that a judgment rendered in pursuance of a parol agreement of compromise is not void, and can only be attacked by a direct proceeding.

The court further erred in holding that the sureties were released by the agreement entered into by and between appellant and Mullin. If Mullin understood from the whole conversation between him and Gerlach that the sureties were to be released, and Gerlach understood that the sureties were not to be released, then no agreement was made, and the judgment was improperly entered. On such a finding, if appellees are not estopped by their subsequent conduct, this original judgment should be set aside and the original cause tried on its merits.

[5] We are not able to find any Texas decisions discussing the liability of the sureties on an appeal bond where the principal and his adversary have agreed on a judgment with a stay of execution. Neither party has cited us to any Texas authority on this point. However, the decisions from some of the other jurisdictions announce the rule as follows (see Corpus Juris, vol. 4, § 3396, p. 1285):

"An agreement for affirmance of a judgment appealed from, made in good faith, does not excuse nonperformance of the condition to prosecute nor discharge the sureties on the appeal bond. And so an agreement for affirmance, extending the time of payment and staying execution, does not discharge the sureties, although made without their express consent"—citing Drake v. Smythe, 44 Iowa, 410; Hershler v. Reynolds, 22 Iowa, 152; Ammons v. Whitehead, 31 Miss. 99.

The reason for this rule is thus given in Drake v. Smythe, supra:

"The sureties became parties to the record, and were liable to any judgment rendered in the cause within the limit of their obligation. Their relation to the action was not such as gave them any control thereof; they could not dictate to defendant the course he should pursue in the case; he had the full right to do whatever the law authorized in a case where no sureties are concerned. Their position in the case was one of obligation for debts, not of

rights in conflict with defendant's rights. They were bound for the judgment which should be rendered against defendant in the progress of the suit. That defendant had the right to stipulate for time upon the rendition of the judgment cannot be questioned. The sureties, then, are bound by that agreement, and are liable upon the judgment."

In *Ammons v. Whitehead*, supra, the court said:

"The necessary legal effect of their execution of the bonds was to confer upon the principal full power to do whatever he might deem necessary and proper in defending or determining the suits. \* \* \* And upon the same reason he was authorized to compromise the suits upon terms advantageous to himself. This was no violation of the obligation of the sureties, nor a variation of the terms of their obligation; for that was entirely contingent and uncertain, except that the parties had, by the necessary legal effect of the act, submitted themselves to whatever might be done in the determination of the suit, by their principal, under the sanction of the court. \* \* \* And whether the sureties be regarded as parties to the judgment, and as such bound by the proceedings in the suit, or as bound by the action of their principal by reason of the power necessarily conferred upon him by the purpose and legal effect of the bonds, it is clear that the sureties are not within the rule which discharges such parties in consequence of indulgence given to their principal."

In *Mentrose v. Baggott*, 161 App. Div. 494-505, 146 N. Y. Supp. 649, the parties agreed to continue the case until the next term of court, at which time plaintiff was to have judgment for the amount of his demand. The sureties on the appeal bond pleaded that this agreement released them. The court said:

"The undertaking we are considering was not to pay the claim in suit, but the judgment that might be recovered. The sureties' obligation did not arise until the judgment was recovered. The indebtedness for which they were sureties had not matured. A judgment might never have been recovered. Until its recovery the sureties would be in no position to pursue the principal debtor. They could not control the creditor's litigation. He could conduct it in accord with his best judgment to accomplish his own purposes. The rule of exoneration did not apply because the reason for it did not exist."

In announcing this rule, these decisions draw a distinction between the liability of a surety on an appeal bond and a surety on a promissory note. However, there is a distinct conflict among the decisions on this rule. Thus, as held in *Wingate v. Wilson*, 53 Ind. 78, where, pending the appeal and by agreement of the parties, without the consent of the surety, judgment is rendered against appellant and execution is stayed for a certain time, the surety is discharged from liability.

The reason for this rule is given in *Johnson v. Flint*, 34 Ala. 673, as follows:

"The principal obligor was prevented from proceeding in the attempt to prosecute his suit to effect by the agreement entered into between him and the obligee, without the knowledge or consent of the sureties. \* \* \* Now, nothing is more clear than that the surety will be discharged, at common law, in all cases where his responsibility is merely for the fulfillment by another of a contract which has been varied, without the consent of the surety, before a breach has occurred. In such case, the new or substituted obligation is not that which the surety undertook should be performed; and the party who seeks to make him liable for the breach of the original agreement has, by his own act, prevented, or, at least, waived its performance, by binding the principal obligor to do something else, in the place of that for which the surety stipulated."

This rule seems to be supported by the following authorities, some direct and others by inference, to wit: *Kendall v. Grice*, 12 D. C. 279, 47 Am. Rep. 243; *Shimer v. Hightshue*, an Indiana case, 7 Blackf. 238; *Wabaska Electric Co. v. Blue Springs*, 84 Neb. 577, 122 N. W. 21; *Lehman v. Amsterdam Coffee Co.*, 151 Wis. 207, 138 N. W. 606, Ann. Cas. 1914A, 1299.

Notwithstanding this contrary holding, we believe, in principle, all the courts recognize a difference between the obligation of a surety on an appeal bond and a surety on a promissory note. For instance, we know of no decision holding that a continuance by agreement without the knowledge or consent of the sureties releases them, though the effect of such an agreement is to postpone the time when sureties could force their principal to pay the debt. This rule is clearly announced in *Howell v. Alma Milling Co.*, 36 Neb. 80, 54 N. W. 126, 38 Am. St. Rep. 699. Our courts recognize that the principle in an appeal bond can agree to a judgment against himself and his sureties for the full amount sued for, provided the agreement is made in good faith and without collusion with his adversary. *Garner v. Burleson*, 26 Tex. 348; *Lessing v. Cunningham & Hardee*, 55 Tex. 231; *Siddall v. Goggan*, 68 Tex. 708, 5 S. W. 668; *Wandelohr v. Grayson County National Bank*, a Supreme Court decision, reported in 102 Tex. 20, 108 S. W. 1154, 112 S. W. 1046. As against this holding, appellees cite *Pilgrim v. Dykes*, 24 Tex. 383. In that case, the Supreme Court announced the rule that if parties agree to an extension after rendition of a judgment, without the consent of the sureties, this agreement releases the sureties, and to this statement of the rule we readily agree. We think the announcement as made by the court in *Howell v. Alma Milling Co.*, supra, to wit:

"By the execution of the appeal bond the surety conferred upon his principal authority to do everything that was necessary to be done in the case. The condition of the bond was sufficiently broad to include whatever judgment

might be rendered against the principal in the appeal case, whether by agreement or otherwise. In the absence of proof of fraud or collusion between the principal and the creditor, the stipulations did not have the effect to release the surety from liability on the appeal bond"

—more clearly states the nature of the obligation, and the relation between the principal and the sureties on an appeal bond, than do the contrary decisions.

For the errors indicated, we remand this cause, with instructions to the trial court, on motion of appellant, or when this cause is again called for trial, without any further proceeding or testimony, to enter judgment reviving the original judgment; then to hear testimony as to the nature and extent of the agreement entered into by and between Gerlach and Mullin; and, if it should be found that it was not the mutual understanding by Mullin and Gerlach that the sureties should be bound, then to set aside the judgment entered on the 16th day of April, 1916, and try this original cause on its merits, but, if such was their mutual understanding, then to deny the motion to set aside and thus leave the original judgment in full force and effect.

This cause is accordingly reversed and remanded, with instructions as above indicated:

#### RICHARDSON et al. v. BERMUDA LAND & LIVE STOCK CO. (No. 6190.)

(Court of Civil Appeals of Texas. San Antonio. March 26, 1919. Rehearing Denied April 9, 1919.)

#### 1. CORPORATIONS $\Leftrightarrow$ 464—FARMING CORPORATION—ULTRA VIRES—NOTE FOR RAILROAD EXTENSION — "MONEY PAID OR LABOR DONE."

Vernon's Sayles' Ann. Civ. St. 1914, art. 1165, prohibiting creation of indebtedness of private corporations except for "money paid, labor done," etc., renders ultra vires note of private corporation organized for farming and stock raising, executed to a railroad in consideration of the future construction of a railroad into the county where such private corporation had large land holdings; such an indebtedness not being one for "money paid or labor done" for the corporation.

#### 2. CORPORATIONS $\Leftrightarrow$ 388(2) — ULTRA VIRES — ESTOPPEL TO URGE INVALIDITY.

When a litigant seeks to set up the defense of equitable estoppel, by reason of benefits received, against the illegal and ultra vires acts of the corporation, it must appear that the corporation, in the operation of its franchise rights and powers, received the benefits in the line of its necessary business and operation.

#### 3. CORPORATIONS $\Leftrightarrow$ 388(2) — ULTRA VIRES — ESTOPPEL.

A private corporation was not estopped to set up the defense of ultra vires to its note, ex-

ecuted to a railroad in consideration of the future extension of the railroad through the county where the corporation owned lands, by its having received the benefit of such extension, which was in fact built, since it received no such benefits until after the execution of the note.

#### 4. CORPORATIONS $\Leftrightarrow$ 374—POWERS.

Corporations possess only such powers as are expressly granted, or such as are necessary to carry into effect the powers expressly granted.

#### 5. CORPORATIONS $\Leftrightarrow$ 370(2) — POWERS — EXPRESS VIOLATION OF STATUTE.

If a corporate act is in express violation of statute, as distinguished from being merely beyond the corporate powers conferred by express statutory terms, and if the corporation nevertheless violates the plain letter of the law, one so dealing with the corporation must take notice of the law and the statutory limitations placed upon the charter power.

#### 6. EVIDENCE $\Leftrightarrow$ 65 — PRESUMPTIONS — KNOWLEDGE OF LAW.

Every man is presumed to know the law.

#### 7. CORPORATIONS $\Leftrightarrow$ 370(1)—"ULTRA VIRES"—DEFINITION.

An act of a corporation is properly said to be "ultra vires," when it is beyond the powers conferred upon the corporation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ultra Vires.]

Appeal from District Court, Bexar County; S. G. Tayloe, Judge.

Action by Asher Richardson against the Bermuda Land & Live Stock Company. On plaintiff's death, the action was continued in the name of Mary I. Richardson and another, his executors. Judgment for defendant, and plaintiff's appeal. Affirmed.

Frank Huson and Denman, Franklin & McGown, all of San Antonio, for appellants.

Alex C. Bullitt, of San Antonio, for appellee.

COBBS, J. The petition discloses that appellee is a private corporation, organized under the laws of Texas. This action was instituted by Asher Richardson against the Bermuda Land & Live Stock Company on a note, or contract in writing, alleged to have been executed by defendant as an inducement to said Richardson to build a railroad connecting certain points in Dimmit and La Salle counties, Tex. Richardson having died prior to a trial of said cause, same was, on motion of Mary I. Richardson and Littleton V. Richardson, independent executors of Asher Richardson, ordered by the court to continue in the names of said executors.

Appellants (plaintiffs in the trial court) on November 14, 1918, filed their second amended original petition in said cause, alleging

that they were independent executors under the will of Asher Richardson; that they resided in Dimmit county, Tex.; that the defendant was a corporation duly incorporated under and by virtue of the laws of Texas, with its principal office at Beaumont, Jefferson county, Tex.; that defendant, on or about October 5, 1908, executed and delivered their promissory note or contract in writing to Richardson, the following being a substantial copy of same:

"Beaumont, Texas, Oct. 5, 1908.

"Whereas, we own the following described land, the same being situated in Dimmit county, Texas, known as survey No. ———; and whereas, said land will be greatly enhanced in value by the construction of a standard gauge railroad from a point on the I. & G. N. Railroad now in operation, into Dimmit county, Texas: Therefore, for value received, and as an inducement to Asher Richardson and his associates, and their assigns, to build a standard gauge railroad from a point on the I. & G. N. Railroad near Artesia to Asherton, on Moro creek, in Dimmit county, I, or we, agree and promise to pay to Asher Richardson and his associates at San Antonio, Texas, the sum of two thousand dollars, with eight per cent. (8%) interest per annum from maturity until paid.

"Said sum of two thousand dollars to become due and payable upon the completion of said railroad to Asherton and putting the same in operation, providing same is done on or before June 1, 1909.

"Should this note not be paid at maturity and suit is brought to collect same, then I agree to pay an additional 10% as attorney's fees.

"Bermuda Land & Live Stock Co.,  
"W. B. Dunlap, President."

The petition further alleged that the time agreed on for the completion of said railroad had been extended by agreement of the parties to a period of 90 days; that certain correspondence evidencing said extension agreement was in defendant's possession, and that notice was given defendant to produce same; that in the event that said extension agreement could not be established, or in the event that same did not have the effect of an extension, then plaintiffs alleged a substantial compliance with the terms of the note or contract; that said railroad was completed and put into operation within the time contemplated by the parties and stipulated in the contract; that by reason of the execution of said note defendant was bound and liable to plaintiffs; that said note was past due and unpaid; that it had been necessary to place same in the hands of an attorney for collection, etc.; that plaintiffs were the legal owners and holders of said note; and that by reason of defendant's failure and refusal to pay same plaintiffs were damaged.

Said petition contained further allegations as follows:

"(7) Plaintiffs allege: That, at the time defendant corporation executed the note or contract herein sued on, said defendant was the

owner of a large tract of land situated in Dimmit county, Texas, which said land was used by defendant in the furtherance of its corporate business, to wit, the raising, buying, and selling of live stock. That at the time said note or contract was executed there was no railroad running into Dimmit county, and that the railroad mentioned herein, built by Asher Richardson and known as the Asherton & Gulf, was the first railroad to enter said county. Said railroad extends from Asherton, in Dimmit county, to Artesia in La Salle county, Texas, a distance of thirty miles or more, passing next to defendant's said land, and affords a valuable means of transportation to the territory it covers. That defendant knew that a railroad connection in this county would be of extreme value to it in the conduct of its business and would greatly enhance the value of its property holdings and its facilities for pursuing its corporate purposes, and for this reason executed the note or contract in writing herein sued upon in order to induce said Richardson to build said road. Plaintiffs further say that by reason of the building of said Asherton & Gulf Railroad and its favorable location to the defendant's lands, said property of defendant has doubled in value, and that said increase in value of defendant's lands is far in excess of the amount herein sued for.

"(8) Plaintiffs further say that, by reason of the building of said Asherton & Gulf Railroad and its favorable location to defendant's lands, defendant's corporate business has greatly increased; that prior to the building of said railroad there was no modern means of transporting its cattle to the large live stock markets, and that in order to transport same, defendant was forced to drive same across country to the nearest railroad some twenty to twenty-five miles distant, or use diverse other crude methods of transporting, often resulting in a loss in weight and impairing the value of said live stock. Plaintiff alleges that the increased value of defendant's business is far in excess of the amount herein sued for, which said increased value is the direct result of said Richardson's performance of the stipulations contained in the note herein sued on; and that the sum agreed to be paid as set out in said note was not more than a reasonable expenditure for the said benefits received and was an ordinary, usual and customary expenditure for such a corporation, under such circumstances, to obtain such facilities."

The appellee excepted to said petition, first, by a general exception, that "the same shows no cause of action against it," and by special exceptions, "because it is shown by the allegations therein that the defendant is a private corporation, organized under the laws of the state of Texas, and that the instrument herein sued upon is not shown to have been executed to evidence a debt created for money paid, labor done, or property actually received, but it is shown that it was executed for neither money received, labor done, or property actually received." The court sustained both exceptions and dismissed the case.

As all the questions are raised in the first and sixth assignments of error, and said as-

signments contain appellants' position, we group them and set them out for easy discussion, as follows:

"The court erred in sustaining defendant's general exception to plaintiffs' second amended original petition, because said petition alleged a good cause of action against defendant on a valid and binding contract in writing; said contract being one that defendant corporation is not prohibited from entering into by law."

"The court erred in sustaining defendant's first special exception to plaintiffs' second amended original petition and dismissing same, because said petition alleged facts showing that Richardson had, in good faith, executed his contract with defendant and that defendant had received the benefits from same at the expense of said Richardson; such facts being sufficient to estop defendant from thereafter pleading that it was without power to perform or enter into said contract."

We also set out appellants' proposition under their fourth assignment, as follows:

"Revised Civil Statutes, arts. 1164 and 1165, providing that no corporation \* \* \* shall create \* \* \* any indebtedness or employ its means and assets except for money paid, labor done or property actually received, being general statutes and merely declaratory of the common law, by which corporations are restricted in their powers to the limits and fixed purposes of their charters, have no more force than the common law; therefore, even if appellee's contract did violate said statutes, which is denied, same would not be such an illegality as would preclude the application of the doctrine of estoppel."

The corporate business of defendant, as alleged by plaintiffs, was that of only "the raising, buying and selling of live stock." There was no railroad running into Dimmit county when this note was given. This railroad was to extend from Asherton, in Dimmit county, to Artesia, in La Salle county, Tex., a distance of 30 miles, next to defendant's land. It is alleged that the road is now built and defendant's land doubled in value.

The question for us now to decide is as to whether the contract was valid, within the power and scope of the authority of the corporation to make, and if it was would the plea of ultra vires defeat appellants' recovery on account of the benefits and improvements coming to its land and property, and for that reason was estopped from setting up the illegality of the contract.

[1] Article 1165 of the Revised Statutes (Vernon's Sayles' 1914) limits the power of private corporations in this state to—

"create any indebtedness whatever except for money paid, labor done, which is reasonably worth at least the sum at which it was taken by the corporation, or property actually received, reasonably worth at least the sum at which it was taken by the corporation."

It cannot for one minute be said aiding the building of a railroad by extending its credit comes within the powers of private cor-

porations organized for farming and stock-raising, and not railroad building, to participate in, for that is precisely what it was intended by this contract to do. By that note it "created an indebtedness," not "for money paid" or for "labor done" for it. But it is insisted on account of the increased value received by it due to the construction of that road the benefits are so great the defendant is estopped from pleading the statute to defeat the suit, and the plea of ultra vires should not thereby prevail.

It will be seen, when the note was executed and delivered, the defendant had built no railroad in Dimmit county, was receiving no benefits at the time, and its construction and operation was wholly prospective and contingent. It is not like a case where a private person may execute such a contract, but it is a case of a corporation whose state has wisely put limitations upon it to check wasteful and extravagant acts of officers who might otherwise waste the corporate property. Chief Justice Fly, in the case of McCaleb Co. v. Boerne Elec. Power Mfg. Co., 178 S. W. 1191, has given a very interesting and instructive discussion on this question generally. At the time this note was given the appellee had received no money paid nor labor done, and, as Judge Fly very correctly said in above case, which is applicable here:

"It was a direct attempt to lend the credit of one corporation chartered for specific purposes to another chartered for other purposes, which attempt was null and void"—citing authorities.

The appellant admits such to be the statutory law of this state, of course, but says it is but the enactment of the common law. *Bond v. Terrell Manufacturing Co.*, 82 Tex. 312, 313, 18 S. W. 691.

[2] It is well-settled law, when a litigant seeks to set up the defense of equitable estoppel, against the illegal and ultra vires acts of the corporation, it must appear at the time of making the contract that the corporation, in the operation of its franchise rights and powers, received the benefits in the line of its necessary business and operation.

[3] In this case appellee in undertaking to induce the building of a railroad through Dimmit county to run near his property some time in the future, making an agreement to extend its credit and pay money for something to be done thereafter. This, we hold, when prohibited by our statute, as it is, cannot be done legally.

[4-6] Corporations possess only such powers as are expressly granted, or such as are necessary to carry into effect the powers expressly granted. 10 Cyc. 1096. With respect to the doctrine of ultra vires, a well-grounded distinction exists between acts which are beyond the power conferred by statute upon the corporation in express terms and acts which are prohibited by the

express language of the statute itself. If the act is in express violation of a statute, and the corporation nevertheless violates the plain letter of the law, such party so dealing with the corporation must take knowledge of the law and the statutory powers and limitations placed upon the charter power, because every man is presumed to know the law. 10 Cyc. 1148.

[7] An act of a corporation is properly said to be ultra vires when it is beyond the powers conferred upon the corporation. *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416, 23 S. W. 123, 34 Am. St. Rep. 815. In suits between the corporation and strangers dealing with it, the question is whether the act is one which the corporation is not authorized to perform under any circumstances, or one it may perform for some purposes or under certain conditions. In the first case, it is strictly ultra vires, because from the law of its existence it has no power to perform. 7 *Ruling Case Law*, § 678, and cases cited.

This is not like those cases in which there is no direct statute forbidding the act, where benefits were received in the course of the business of the corporation, but its officers exceeded the charter powers or the by-laws of the corporation. The execution of this note was from the very beginning prohibited by a very plain statute, the corporation had no power to execute it, and it was and is void, and the trial court committed no error in so holding.

We have carefully read and considered all the assignments and the briefs of counsel, and have examined the authorities cited by both parties, and find no error in the ruling of the court, and the assignments are all overruled.

The judgment is affirmed.

### JONES v. TEXAS ELECTRIC RY. (No. 8129.)

(Court of Civil Appeals of Texas. Dallas. Feb. 15, 1919. Rehearing Denied April 12, 1919.)

#### 1. APPEAL AND ERROR ⇨978(3)—NEW TRIAL ⇨44(1) — MISCONDUCT OF JURY — DISCRETION OF COURT—REVIEW.

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 2021, allowance of a new trial on account of misconduct of the jury is within the discretion of the trial court, which will not be reviewed except for abuse, notwithstanding the misconduct of the jury be proved.

#### 2. NEW TRIAL ⇨44(3)—MISCONDUCT OF JURY — DISCRETION OF TRIAL COURT.

In a railroad employe's action for personal injuries, it was not an abuse of discretion for the court to refuse a new trial to plaintiff because statements were made in the jury room

before a verdict was arrived at that plaintiff's witness had been guilty of stealing cotton, but escaped conviction because the cotton was not worth \$50, and that plaintiff, several years before the trial, had been convicted of ravishing a girl less than 15 years old.

#### 3. APPEAL AND ERROR ⇨722(1) — ASSIGNMENTS OF ERROR—SUFFICIENCY.

In view of *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1612, providing that the assignments on motion for new trial shall constitute the assignments of error, an assignment of error is sufficient where it is a substantial, although not a literal, copy of the assignment in plaintiff's motion for new trial.

#### 4. WITNESSES ⇨845(2)—INJURIES TO SERVANT — EVIDENCE — IMPRACHMENT OF WITNESSES.

In a railroad employe's action for personal injuries, it was error to permit plaintiff's witness to be asked whether he had been prosecuted for stealing cotton.

#### 5. APPEAL AND ERROR ⇨231(3)—REVIEW—RESERVATION OF OBJECTIONS.

A bill of exceptions taken to the admission of testimony must show the ground of objection urged against admission, and, unless such objection is so shown, the ruling of the court will not be reviewed.

#### 6. APPEAL AND ERROR ⇨281(3) — RESERVATION OF OBJECTIONS — ADMISSION OF EVIDENCE.

Where testimony admitted is wholly irrelevant and immaterial to any issue in the case and inadmissible upon any theory, the court's action in admitting it will be reviewed notwithstanding absence of objection on a specific ground.

#### 7. APPEAL AND ERROR ⇨1048(5)—REVIEW—CURE OF ERROR.

In a railroad employe's action for personal injuries, where plaintiff's witness was asked if he had been prosecuted for stealing cotton, that he answered he had, but had been acquitted, did not cure the error.

#### 8. APPEAL AND ERROR ⇨801—ASSIGNMENTS OF ERROR — ASSIGNMENTS NOT IN MOTION FOR NEW TRIAL.

An assignment of error not found in the motion for a new trial cannot be considered.

#### 9. NEGLIGENCE ⇨136(9) — QUESTIONS FOR JURY—SUFFICIENCY OF EVIDENCE.

To authorize the court to take from the jury the question of actionable negligence, the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it.

Error from District Court, Hill County; Horton B. Porter, Judge.

Action by P. J. Jones against the Texas Electric Railway. Judgment for defendant, a new trial was denied, and plaintiff brings error. Reversed and remanded.

Templeton, Beall, Williams & Callaway, of Dallas, and J. J. Averitte and Wear & Frazier, all of Hillsboro, for appellant.

J. Webb Stollenwerck, of Hillsboro, for appellee.

**TALBOT, J.** The plaintiff in error, hereinafter referred to as plaintiff, sued the defendant in error, hereinafter designated as defendant, to recover damages on account of personal injuries alleged to have been received as the result of the negligence of the defendant. The plaintiff alleged, in substance, that he was in the employ of the defendant as a section hand, with E. G. Gibson as foreman; that it was necessary in the discharge of his duties to go from one point of the section, upon which he was at work, to another; that defendant operated upon its railway tracks a car propelled by gasoline to carry the section hands to and from their work; that on the 16th day of May, 1917, while plaintiff was discharging his duties, the said Gibson, while acting within the scope of his authority, ordered plaintiff to push said car so it would ignite the gasoline and cause the car to run, and while plaintiff was doing as instructed, or as it was his duty to do, and while walking or trotting along by the side of said car on the rough ends of the cross-ties, and after said car had begun moving from the explosion of the gasoline, the foreman, Gibson, ordered plaintiff to jump aboard said car, or that plaintiff did try to jump aboard said car as it was his duty to do, but before plaintiff could get aboard of said car the said Gibson (section foreman) on account of the negligent manner he had of operating and controlling said car caused said car to give a sudden jerk forward and backward, and without ordinary care toward this plaintiff accelerated the speed of said car while the plaintiff was trying to board said car, and while said foreman knew he was trying to board it, or could have known it by the use of ordinary diligence; that the said car had no handholds on same, as was essential to its proper construction for the safety of those using it; that in the absence of handholds plaintiff took hold of a smooth plank of said car, and while engaged in pushing the car, and while holding to said plank, all of which the foreman knew or could have known by the use of ordinary diligence, the said foreman caused the car to jerk so violently that it caused him to lose his hold and to lose his balance and to stumble and fall, or to be thrown, in front of the car across the track; that as a result of being thus thrown across the track the car passed over his right leg, foot, and ankle so bruising, crushing and lacerating them that the injury thereto will be permanent. Plaintiff further alleged, in substance, that the foreman operating the car discovered plaintiff's perilous position after he had fallen, or was thrown across the track, and failed to exercise the degree of care required of him by

law to stop the car and avoid injuring him, but, on the contrary, did not stop, or attempt to stop, the car until it had run over his leg, foot, and ankle. The defendant answered by a general denial, pleas of contributory negligence and assumed risk. The case was tried before a jury, and the trial resulted in a verdict and judgment in favor of the defendant. The plaintiff filed a motion for a new trial, which was overruled, and he prosecuted this writ of error.

The first assignment of error is as follows:

"Because the verdict of the jury is not supported by the evidence in this case, and was rendered against plaintiff in error for the reason that the jury considered testimony, when they were in the jury room and before they arrived at a verdict, that was material and not a part of the testimony that was introduced in the case, but was extraneous matter that the jurors volunteered before they arrived at a verdict, and after the court had read his charge to the jury, and after argument had been made by counsel."

Plaintiff contends that the statements made in the jury room, and to which the assignment of error relates, are to the effect that Bob Rowland, a witness introduced by the plaintiff, was guilty of stealing cotton, and that the only reason he was not convicted upon trial therefor was because the cotton was not worth \$50, and that plaintiff several years prior to the trial of this case was convicted of ravishing a girl under 15 years of age. This matter was presented to the trial court in plaintiff's motion for a new trial, and full investigation of it made. All of the jurors who served in the trial of the case were examined, and the effect of each one's testimony is that while some such statements as those charged by plaintiff were made in the jury room, they were not considered by him, and did not influence him in arriving at a verdict. Each juror testified that he was unable to say whether the statements referred to were made before or after the verdict rendered was agreed upon. Some of them stated positively on direct examination that they were made after the jury had arrived at the conclusion that the evidence failed to show that plaintiff's injuries were the result of negligence on the part of the defendant and that their verdict should be for defendant, but, upon cross-examination each said, in effect, that he could not be certain that it was after the verdict had been reached and not before. On the other hand, some of the jurors said that in their judgment or according to their best recollection the statements were made before the verdict was agreed upon, but that they could not be positive as to that.

[1] It cannot be denied that if the statements in question were made before the jury arrived at their verdict they were highly calculated to injure the rights of the plaintiff, and a new trial should have been awarded him. Indeed, it would be difficult to conceive



of anything that could have been said in the jury room before a verdict was reached that would have been more damaging or prejudicial to the rights of the plaintiff. But under article 2021 Vernon's Sayles' Civil Statutes and the decisions of our Supreme Court construing that article, it is too well established for argument that, even though the alleged misconduct of the jury be proven, or the testimony received, or the communication made be material, the granting of a motion for a new trial on account thereof is a matter within the discretion of the trial court, and that in case such motion is overruled, an appellate court is not authorized to disturb the court's ruling, unless it clearly appears that there has been an abuse of such discretion.

[2] A review at this time of the cases in which the rule stated has been announced would serve no useful purpose, and for that reason a discussion of them will be pretermitted. It is sufficient to say they are binding upon this court whether we do or do not, in view of the facts in some of them, agree that the proper conclusion was reached. No matter what our action might have been upon the plaintiff's motion for a new trial in this case, based upon the objectionable statements and communications made after the jury retired to consider their verdict we are not prepared to say that it is manifest or clear from the evidence that the trial court abused its discretion in the matter.

[3] The second assignment of error in the brief complains of the admission of testimony. A consideration of this assignment of error is objected to on the ground that it is not a copy of the assignment contained in plaintiff's motion for a new trial. The objection is not, we believe, well taken, and will be overruled. The assignment in the brief is not a literal copy of the one it purports to be, but we think it is a substantial copy thereof. It is sufficient to direct the attention of the court to the error complained of. Article 1612, Vernon's Sayles' Civil Statutes. The bill of exception reserved to the ruling complained of shows the following: Plaintiff introduced the witness Bob Rowland, and on cross-examination by the defendant's counsel he was asked this question: "You have been convicted in this court, haven't you, for stealing?" Plaintiff objected to the question "because he is not guilty of anything until he is convicted." The court sustained the objection, and the defendant excepted on the ground that the answer, which it expected the witness to make to the question, was admissible for the purpose of affecting his credibility. Thereupon the court announced that he would allow the question for that purpose, to which ruling the plaintiff excepted. Without an answer to that question, however, the defendant's counsel propounded to the witness the following question: "You have been prosecuted in this court for stealing cotton?" To which the witness replied: "I have been

tried in this court for stealing cotton, but came clear." Immediately following this answer of the witness the bill of exceptions reads thus:

"To which question of the court in admitting said testimony that the witness had been charged in this court with stealing cotton plaintiff then and there excepted, and here now in open court tenders this his bill of exception, in writing, and prays that the same may be examined, signed, and approved by the court and ordered filed as a part of the record in this case."

[4] The assignment of error should be sustained. It is well settled by decisions of this state that it is error to permit a witness to be asked, and to require him to answer, whether or not he has been indicted or prosecuted for a crime. *Boon v. Weathered's Adm'r*, 23 Tex. 675; *Railway Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151; *Freedman v. Bonner*, 40 S. W. 47; *Railway Co. v. Norris*, 41 S. W. 706; *Kruger v. Spachek*, 22 Tex. Civ. App. 307, 54 S. W. 295; *Crawleigh v. Railway Co.*, 28 Tex. Civ. App. 260, 67 S. W. 140. In the case of *Carroll v. State*, 82 Tex. Cr. R. 431, 24 S. W. 100, 40 Am. St. Rep. 788, the Court of Criminal Appeals of this state held that, for the purpose of impeaching a witness, he can be required to testify that he is under indictment for embezzlement; and a like decision was rendered by the Court of Civil Appeals for the Second District, in the case of *Texas & Pacific Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 843. This court, in the case of *Hills v. Dons*, 87 S. W. 638, refused to follow the last-named cases, for the reason, as announced in the opinion, that our Supreme Court had refused to subscribe to the doctrine therein announced. The general rule upon the subject is that the credit of a witness can be impeached by general evidence only, and not by evidence as to particular facts. *Boon v. Weathered's Adm'r*, supra, and authorities therein cited. The reason given for the rule, which is sound, is "that a man may be supposed ready at all times to defend his general reputation but not to answer accusations which relate to particular facts," and for the additional reason "that a court cannot turn aside from the main inquiry to try collateral issues."

[5] The authorities cited in support of the general rule announced includes cases in which the witness was asked whether or not he had been indicted for embezzlement, or perjury, or theft, or burglary, and in each it was held that the witness could not be impeached in that way. The rule is so thoroughly established by decisions of this state that further pursuit of the subject in this opinion would be a waste of time. But the defendant insists, in effect, that since the bill of exceptions taken to the action of the court in permitting the question "You have been prosecuted in this court for stealing cotton?" fails to show that any objection whatever was interposed to the question, upon the ground

that the same was improper and the answer inadmissible for the purpose of impeaching the witness, this court should hold that such objection was waived and that a reversal of the case cannot be predicated upon the admission of the testimony; and, further, that since the witness answered that he had been acquitted of the charge no injury is shown. The bill of exceptions does not show that any special objection was made to the question, and it is unquestionably the general rule in this state that a bill of exceptions taken to the admission of testimony must show the ground of objection urged against its admission, and that unless such objection is so shown the ruling of the court will not be reviewed.

[6] But we understand there is an exception to this general rule, which is that where the testimony admitted is wholly irrelevant and immaterial to any issue in the case and inadmissible upon any theory the court's action will be reviewed. The bill of exceptions is very imperfect, but it does point out the testimony introduced, and that the plaintiff objected to its admission. There is no theory whatever upon which the testimony was admissible. It was inadmissible for any purpose, and a general objection to its admissibility without specifying any particular ground of objection is sufficient, we think, to require a review of the court's action in allowing it. Indeed, the mere asking the question was calculated to injuriously affect the rights of the plaintiff. In *Railway Co. v. Norris*, supra, it was held that the trial court erred in allowing the plaintiff therein, in cross-examining a witness, to prove that the witness had been acquitted of the charge of carrying a pistol on the ground that he did not know it was wrong to do so. In *Waller v. Leonard*, 89 Tex. 507, 35 S. W. 1045, it is held, in effect, that a general objection to the question propounded is good if the question is not calculated to elicit competent and material testimony. In the present instance the question was not only not calculated to elicit competent and material testimony, but could elicit only incompetent and immaterial testimony.

[7] Should the contentions of the defendant that, as the witness answered that he had been acquitted of the charge of stealing cotton, no injury resulted to plaintiff by the admission of the testimony be upheld? We think not. Bob Rowland, to whom the objectionable question was put, was an employé on the car in question with the plaintiff at the time the accident occurred, and was an important witness for him. The purpose of the question was to impeach the credibility of the witness, and, notwithstanding his answer thereto was, "I have been tried in this court

for stealing cotton but came clear," the inference, aside from the presumption that might otherwise obtain, is warranted from the record before us that the persons who tried his case, or some of them, did not believe him innocent, and probably discarded his testimony. It is practically undisputed, as shown in our discussion of the first assignment of error, that the fact that the witness had been prosecuted for stealing cotton was discussed in the jury room, and the statement made by one of the jurors that the reason the witness was not convicted of the charge of stealing cotton was because the cotton was not worth \$50. This implied and conveyed to the jurors who heard the statement the idea that the witness was guilty of theft, although he escaped punishment, and indicates that the testimony required of him and to the admission of which plaintiff objected, had the effect it was intended to have, and was therefore decidedly harmful to the plaintiff.

[8] The third assignment of error is not found in the motion for a new trial, and cannot be considered. Where the appellant or plaintiff in error files a motion for a new trial in the court below, the errors assigned in such motion constitute his assignments of error in this court, and he is confined to the grounds of error set up in the motion, except when the error complained of is "apparent on the face of the record." *Zmek v. Dryer*, 174 S. W. 659.

[9] The defendant has filed a cross-assignment of error in which he asserts that the trial court erred in refusing to give a special charge requested by him, directing the jury to return a verdict in his favor. It is said that the court erred in refusing to give this charge because the evidence failed to show that the defendant was guilty of any negligence which proximately resulted in the accident and plaintiff's injury. This assignment must be overruled. We would not be warranted to hold that the evidence conclusively established that defendant was not guilty of actionable negligence. "To authorize the court to take the question from the jury the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it." In our judgment the evidence in this case relating to the question of negligence on the part of the defendant was not of such a character. We, of course, express no opinion as to the weight of the evidence, but simply hold that it was sufficient to take the case to the jury for their determination of the question of negligence.

For the error indicated, the judgment of the district court is reversed, and the cause remanded.

Reversed and remanded.

**CONNER v. SCHNELL & WEAVER.**  
(No. 1509.)

(Court of Civil Appeals of Texas. Amarillo.  
March 26, 1919.)

**SALES ⇐279—WARRANTY.**

A guaranty that an automobile will give good service implies that it is to be handled and driven as automobiles ordinarily are, and given the care and supplied with oil, gasoline, etc., such as are proper to the use and running of such character of machinery.

Appeal from District Court, Wichita County; Edgar Scurry, Judge.

Suit by O. R. Conner against Schnell & Weaver. Judgment for defendants, and the plaintiff appeals. Affirmed.

Carrigan, Britain & Morgan and Bert King, all of Wichita Falls, for appellant.

Weeks, Weeks & Francis, of Wichita Falls, for appellee.

**BOYCE, J.** This suit was brought by appellant to recover the price paid for an automobile bought of appellees on allegations of a breach of warranty made on the sale of said automobile, to the effect that it was a good automobile and would give good service. The defendants pleaded that the automobile was as represented, and guaranteed that if it failed to give the service such failure was the result of lack of proper care and attention in the driving thereof. The jury found that the automobile was sold under representation and guaranty that it "was a first-class automobile and would give excellent service and do good work," and that the automobile did not give good service, but they further found that the automobile was a good "serviceable car for the purposes for which plaintiff purchased same," and that its failure to give service in the hands of the plaintiff was not due to any defect in construction or material, but was the "fault of the plaintiff, owing to the manner in which he handled and operated the same." The jury also found that plaintiff ran the automobile without oil, and thereby injured said car "in its running and service."

Appellant contends that under such findings he was entitled to a judgment. Certainly the guaranty that the automobile would give good service would imply that it was to be handled and driven as automobiles ordinarily are and given the care and supplied with oil, gasoline, etc., such as are proper to the use and running of such character of machinery. The other assignments present the same question in different form. The jury found against the plaintiff on the only issue of fact in the case, that is, whether the trouble plaintiff had with the automobile was due to defects in it or to the fault of the plain-

tiff. This issue was made by the pleadings and the evidence, and we see no reason to disturb the finding of the jury or the judgment rendered thereon.

Affirmed.

**CHOICE et al. v. CITY OF DALLAS.**  
(No. 1487.)

(Court of Civil Appeals of Texas. Amarillo.  
March 5, 1919. Rehearing Denied  
April 9, 1919.)

**1. MUNICIPAL CORPORATIONS ⇐57—INCIDENTAL POWERS—DOUBT.**

A municipal corporation possesses powers necessarily or fairly implied in or incident to powers expressly granted and powers essential to accomplishment of declared purposes of corporation, not simply convenient, but indispensable, and any reasonable doubt as to existence of power is resolved by courts against corporation.

**2. MUNICIPAL CORPORATIONS ⇐603—CHARTER POWERS — REWARD FOR ARRESTS — "MEANS OF PROTECTION AGAINST FIRE."**

Charter of city of Dallas, by article 2, § 1, subd. 2, authorizing city to make ordinances necessary to protect life and property, and by section 4, subd. 1, empowering it to provide means for protection against fires, etc., impliedly authorized an ordinance passed to obtain a lower insurance rate, offering a reward for arrest for and conviction of arson as a "means of protection against fire" (citing Words and Phrases, First Series, vol. 5, p. 4454; Second Series, vol. 3, p. 353).

**3. REWARDS ⇐8—ARREST AND CONVICTION—INFORMATION.**

Under an ordinance offering a reward for "arrest and conviction" for arson, the offer is complied with when one acting thereunder secures and furnishes information necessary to and which results in arrest and conviction by the properly constituted authorities.

**4. REWARDS ⇐7—KNOWLEDGE OF OFFER.**

The recovery of rewards offered by individuals is governed by the law of contract, and, before recovery can be had, it must appear that party claiming reward knew and acted upon the offer when services for rendition of which the reward is claimed were rendered.

**5. REWARDS ⇐7—ORDINANCE—KNOWLEDGE OF OFFER.**

A general reward offered by an ordinance for the arrest and conviction for arson is somewhat in the nature of a bounty, and it is not necessary for one claiming the reward to have knowledge of the existence of the offer of reward at the time of his action to secure an arrest and conviction.

**6. MUNICIPAL CORPORATIONS ⇐120—"ORDINANCE"—OPERATION AS "LAW."**

An ordinance is not a "law" in one sense of the word, but is a local law emanating from legislative authority and operative within its sphere as effectively as general law of the sov-

eighty (citing Words and Phrases, vol. 6, p. 5024; Second Series, vol. 3, p. 77).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Law; Ordinance.]

**7. ESTOPPEL** **§62(4)—MUNICIPAL CORPORATIONS—ORDINANCE—OFFERING REWARD.**

A city, even if having no power to pass an ordinance offering a reward for an arrest and conviction for arson, would not be estopped from asserting its invalidity because ordinance had enabled it to secure a reduction in the rate of insurance applicable to the city and had induced plaintiff to act in pursuance of ordinance.

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Action by Mrs. M. P. Choice against the City of Dallas and A. E. Firmin and wife, with cross-bill by defendant Firmin and wife. General and special exceptions urged by defendant City to plaintiff's petition and to the cross-bill sustained, and plaintiff and Firmin and wife appeal. Reversed and remanded.

Martin L. Cooley, of Tulsa, Okl., Goggans & Smedley and Allen & Allen, all of Dallas, and A. E. Firmin, of Eastland, for appellants.

A. S. Hardwicke, Edward P. Dougherty, and Edward M. Browder, all of Dallas, for appellee.

**BOYCE, J.** This suit was brought by appellant Mrs. M. B. Choice against the City of Dallas to recover a reward offered by the city "for the arrest and conviction of any one guilty of arson within the corporate limits of the city of Dallas." A. E. Firmin and wife, Mrs. Nellie Firman, were made defendants on allegations that they were claiming the reward. These parties appeared, and by cross-bill sought to recover the reward. The court sustained general and special exceptions urged by the city to the plaintiff's petition and the cross-bill of Mrs. Firmin, and this appeal complains of this action.

Plaintiff alleged in her petition that on January 27, 1917, her residence in the city of Dallas was destroyed by fire set by one Mary Wright, who was by such act guilty of arson; that the plaintiff secured and furnished information and testimony that led to the arrest and conviction of the said Mary Wright of said crime; that at such time there was in force in the city of Dallas an ordinance, duly and legally passed at a time long prior to the occurrence of the fire, as follows:

**"Arson Reward."**

"Whereas, under provisions of law, the state fire insurance commission has provided that, where any city or town maintains a standing

reward of a sum equal to \$1.00 for each one hundred of population for the arrest and conviction of any one guilty of arson, in that event the insurance key rate of such city or town is entitled to credit of 2%; and

"Whereas, the crime of arson results in loss of property, causes an increase in insurance premiums, and frequently results in the loss of life, and is one of the most serious crimes against society; and

"Whereas, the city of Dallas has now a population of 130,000; and

"Whereas, the people of Dallas, through their city government, are preparing to apply to the state insurance commission for a substantial reduction in our insurance key rate:

"Now, therefore, be it resolved by the board of commissioners that the city of Dallas hereby offers a standing reward in the sum of \$1,300.00 for the arrest and conviction of any one guilty of arson within the corporate limits of the city of Dallas, said reward, however, not to apply to the fire marshal, nor any other officer, city, county or state, who makes such arrest in the discharge of his official duties.

"Be it further resolved that the city fire marshal be, and that he is hereby directed to have prepared and to post placards in all public buildings in the city, showing that such reward has been offered as above described."

It is further alleged that notices of such reward were posted in accordance with the terms of such ordinance, and that by the passage thereof the city did secure the reduction in the key rate of insurance for said city, as referred to in the ordinance; that the plaintiff, with knowledge of, and acting under, said ordinance, secured and furnished such information as caused the arrest and conviction of said Mary Wright. Mrs. Firmin, joined by her husband, alleged in her cross-petition that she, and not the plaintiff, discovered the facts and furnished the information which caused the arrest and conviction of the said Mary Wright, and that she was entitled to the reward. This cross-petition contained no allegations that the cross-petitioner had any knowledge of the offer of reward or acted thereunder. The demurrers to these pleadings of the plaintiff and cross-petitioner were sustained on three grounds: (1) That the ordinance offering said reward was void as not being within the powers conferred upon the city by its charter; (2) that it did not appear that either of said claimants actually arrested the said Mary Wright; (3) that it did not appear from the cross-petition of Mrs. Firmin that she had knowledge of the offer of reward and was induced to act by reason thereof. We will consider these in the order stated.

[1,2] The charter of the city of Dallas, which was by its terms made a public act, contains the following provisions that may have some bearing on the decision of the first question suggested. It was provided by

the terms of subdivision 2 of section 1, entitled "General Powers," under article 2, entitled "Powers of the City," that the city of Dallas should have power to enact and enforce ordinances necessary to protect the health, life, and property of the city and its inhabitants, and "that the specification of particular powers herein authorized shall never be construed as a limitation upon the general powers herein granted." Section 4, entitled "Fires," of said article 2, provided that the city should have power "to provide means for the protection against and the extinguishment of fires and shall provide for the regulation, maintenance and support of the fire department," etc. The words just quoted were contained in the first subdivision of said section 4, and are followed by many specific provisions, both in said subdivision and in other subdivisions, there being eight of such subdivisions by which authority was granted to make provisions for equipment for extinguishing fires, and to establish rules and regulations for preventing fires, and lessening the danger thereof. The final clause of this article occurring in subdivision 8 thereof reads:

"And generally the board of commissioners shall have power to establish such regulations for the prevention and extinguishment of fires as it may deem expedient."

There is no express reference anywhere in the charter to the subject of rewards for the conviction of incendiaries. So that, in order to support the ordinance in question, it is necessary to hold that it is authorized by one or both of the general provisions referred to. The rule for determining whether a municipal corporation is acting within its power in any particular transaction, as announced in *Dillon on Municipal Corporations*, § 237, has been so often approved by the decisions of our courts that it is only necessary to state it without further comment:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied."

This statement is quoted in the following decisions of this state: *Williams v. Davidson*, 43 Tex. pp. 33, 34; *City of Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. 149; *Tharp v. Blake*, 171 S. W. 549; *City of Brenham v. Holle & Seelhorst*, 153 S. W. 345.

The power exercised in the enactment of

the ordinance we are considering is not granted by express words. Is it fairly or necessarily implied in or incident to the general powers expressly granted to which we have referred? We think it fairly appears from the recitation in the ordinance itself and the action of the insurance authorities in reducing the insurance rates in cities where a standing reward is offered for the arrest and conviction of incendiaries that it is recognized that the offer and publicity thereof, of such a reward, tends to lessen fires in a city. It is a commonly accepted fact that laws against crime are preventative as well as punitive, and that the prevalence of a particular class of crime decreases as the laws against it are more surely and rigidly enforced, and we may assume that it was this principle, and perhaps demonstration from experience, that led those having the power of fixing insurance rates, to reduce them in the circumstances stated. We think, therefore, that the enactment of such an ordinance may properly be said to be one "means of protection against fire." *Weaver v. Scurry County*, 28 S. W. 836; *T. & P. Ry. Co. v. Beezley*, 46 Tex. Civ. App. 108, 101 S. W. 1052; *Words and Phrases*, Second Series, vol. 8, p. 353; First Series, vol. 5, p. 4454. It may be suggested that the general power to provide means is limited by the express specifications following the grant of the general power. We do not think, however, that the rule of construction, "Expressio unius est exclusio alterius," is to be applied here. The connection of the general provision with what follows by the conjunctive "and" rather indicates that the particularizations that follow are not to be regarded merely as an enumeration of what was meant by the general grant, and the concluding clause of the article further emphasizes this conclusion. The same purpose to repudiate the application of the rule of construction referred to is also evidenced by the clause in subdivision 2 of section 1 of said article 2 above quoted.

The authorities are in conflict as to whether a city, under the general welfare clause, has power to offer such a reward. *Dillon on Municipal Corporations* (5th Ed.) § 299, and note; 19 R. C. L. p. 794; 34 Cyc. p. 1734; 24 Am. & Eng. Enc. of Law, 945. The following cases support the authority of the city in such matter: *People v. Holly*, 119 Mich. 637, 78 N. W. 665, 44 L. R. A. 677, 75 Am. St. Rep. 435; *Cranshaw v. Roxbury*, 7 Gray (Mass.) 374; *Coddling v. Mansfield*, 7 Gray (Mass.) 272; *Brown v. Bradlee*, 156 Mass. 28, 30 N. E. 85, 15 L. R. A. 509, 32 Am. St. Rep. 430; *Shaub v. Lancaster City*, 156 Pa. 866, 26 Atl. 1067, 21 L. R. A. 691; *York v. Forscht*, 23 Pa. 391. The following cases deny such power: *Croft v. Danbury*, 65 Conn. 294, 32 Atl. 365; *Winchester*

v. Redmond, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822; Murphy v. Jacksonville, 18 Fla. 318, 43 Am. Rep. 323. The authorities hold with comparative unanimity that as a general rule a municipal corporation may not offer rewards for the arrest and conviction of persons violating the criminal laws of the state. This holding is based on the ground that the enforcement of the criminal laws of the state is no part of the function of the municipality and its courts. But it was strongly reasoned in the case of *People v. Holly*, supra, that an exception should exist in the case of rewards offered for the conviction of incendiaries because of the fact that the crime of arson constitutes a peculiar menace to the public property of the city as well as to the property, and even lives, of its inhabitants. This reasoning appears to us to be sound, and we would be inclined to hold that the city would have the authority, under the circumstances of this case, to offer the reward under the general welfare clause. Without placing our decision specifically on either one of the clauses of the charter referred to, we are of the opinion that under the facts of this case the offer of the reward was within the power granted the city.

[3] The offer of a reward for "arrest and conviction" cannot be taken literally, as the conviction at least requires the action of the courts of the state. So it has been generally held that the terms of such an offer are complied with when one acting thereunder secures and furnishes information necessary to and which results in arrest and conviction by the properly constituted authorities, and we think this is the rule that should be applied in this case. *Tobin v. McComb*, 156 S. W. 237; *Haskell v. Davidson*, 91 Me. 488, 40 Atl. 330, 42 L. R. A. 155, 64 Am. St. Rep. 254; *Kinn v. First Nat. Bank*, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012; *Elkins v. Board of Wyandotte County*, 86 Kan. 305, 120 Pac. 542, 46 L. R. A. (N. S.) 622; 34 Cyc. 1747.

[4-6] It is settled in this state that the recovery of rewards offered by individuals is governed by the principles of the law of contract, and that before recovery can be had it must appear that the party claiming the reward knew of and acted upon the offer when the services for the rendition of which the reward is claimed were rendered. *Broadnax v. Ledbetter*, 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. (N. S.) 1057. The court in that case, however, suggests this distinction, which appellant Mrs. Firmin seeks to apply in this case:

"While we have seen no such distinction suggested, it may well be supposed that a person might become legally entitled to a reward for

arresting a criminal, although he knew nothing of its having been offered, where it was offered in accordance with law by the government. A legal right might in such a case be given by law without the aid of contract."

A suggestion of such a distinction was also made in the cases of *Clinton County v. Davis*, 162 Ind. 60, 69 N. E. 680, 64 L. R. A. 780, 1 Ann. Cas. 282, and *Drummond v. United States* (U. S.) 35 Ct. Cl. 372. The only case we have found in which the distinction was actually applied is that of *Smith v. State*, 38 Nev. 477, 151 Pac. 512, L. R. A. 1916A, 1276. In that case the Governor of the state of Nevada, acting under the provisions of an act of the Legislature, offered a reward for the arrest and conviction of the murderers of certain ranchmen, and the plaintiffs, who claimed the reward, were not aware of the fact that it had been offered when they did the acts on account of which the reward was claimed. The case of *Broadnax v. Ledbetter*, supra, was referred to in the opinion, and the above paragraph from the decision was quoted with approval, and it was concluded by the court that in cases of this kind it was not contemplated by the Legislature that any contractual relation was necessary; "that the right to the reward follows by operation of law if a compliance with the provisions of the statute has been shown." It seems that a general reward offered by the government is regarded by these authorities somewhat in the nature of a bounty. While an ordinance is not a law, in one sense of the word it is a local law, emanating from legislative authority and operative within its limited sphere as effectively as a general law of the sovereignty. Words and Phrases, vol. 6, p. 5024; Second Series, vol. 3, p. 77. Following these authorities, we hold that it was not necessary for the cross-petitioner to allege knowledge of the existence of the reward at the time she took action to secure the arrest and conviction of Mary Wright.

[7] The appellants also urge that, even if the city had not the power to pass the ordinance, yet it would be estopped from asserting its invalidity by reason of the fact that it had been enabled by its passage to secure a reduction in the rate of insurance applicable to the city, and also induced plaintiff to act in pursuance thereof. We do not think the principle of estoppel can be applied to such facts. *Noel v. City of San Antonio*, 11 Tex. Civ. App. 590, 33 S. W. 263; *Bigelow, on Estoppel* (6th Ed.) p. 503 et seq.

We are of the opinion that the court erred in sustaining the exceptions to the petition and cross-petition, and the case will be reversed and remanded.

**KANSAS CITY, M. & O. RY. CO. OF TEX-  
AS v. O'CONNELL. (No. 1481.)**

(Court of Civil Appeals of Texas. Amarillo.  
Feb. 19, 1919. Rehearing Denied  
April 16, 1919.)

**1. EVIDENCE ¶543(4)—EXPERT TESTIMONY—  
COMPETENCY OF WITNESS—DAMAGE TO AU-  
TOMOBILE TRUCK.**

Dealer in particular make of automobile truck at certain place, who was familiar with their market value at such place upon day of damage to a truck of that particular make, and who had examined truck minutely after accident to ascertain extent of damage, was competent to testify.

**2. EVIDENCE ¶543(4) — EXPERT WITNESS—  
COMPETENCY—MARKET VALUE.**

A dealer in personal property at any given place is generally accepted as an expert witness upon its market value.

**3. EVIDENCE ¶66 — PRESUMPTION—KNOWL-  
EDGE—MARKET VALUE.**

Dealer, having authority to sell particular truck in certain city, will be presumed to be well informed as to the market value of the truck in such city, and in city in which he himself purchases the trucks.

**4. EVIDENCE ¶543(4), 572—EXPERT—DAM-  
AGE TO TRUCK—WEIGHT.**

In action for damage to automobile truck, that dealer, who had authority to sell such trucks at place in which accident took place, and who testified to being familiar with the market value of such trucks at such place, had actually sold only one truck of that kind at such place, did not affect the admissibility of his evidence, but merely its weight.

Error from District Court, Foard County;  
J. A. Nabers, Judge.

Action by M. O'Connell against the Kansas City, Mexico & Orient Railway Company of Texas. Judgment for plaintiff, and defendant brings error. Affirmed.

L. W. Allred, of Chillicothe, Brookreson & Howell, of Benjamin, and H. S. Garrett, of San Angelo, for plaintiff in error.

W. C. Tisdale, of Crowell, for defendant in error.

HALL, J. Defendant in error sued plaintiff in error to recover damages in the sum of \$1,060, alleged to have resulted to an International auto truck, from having been struck by a freight train operated on a side track at the town of Crowell. For the purposes of this opinion it is unnecessary to set out the pleadings, as the only assignments urged here go to the admissibility of certain evidence and the sufficiency of such evidence to support the judgment. Trial before a jury resulted in a judgment against plaintiff in error in the sum of \$500.

The first and second assignments are based upon the alleged error of the court in admitting the testimony of defendant in error as to the market value of the motor truck at Crowell, prior to and immediately after the accident.

The remaining assignments are based upon the admission of the testimony of R. W. Self, under which it is insisted that he was not qualified to testify as to the market value in Crowell of the injured truck. If we admit that the objections to the evidence of defendant in error are well taken, they do not apply to the testimony of the witness Self. He testified that he resided at Crowell, was in the Crowell Garage business, a member of the firm of Self & Son, which handled the International motor trucks at that place; that he was familiar with the market value of such trucks on the 19th day of May, 1917, the date of the alleged injury; that he sold defendant in error the truck in question. He further shows that he examined the truck minutely after the accident, for the purpose of ascertaining the extent of the damage. He testified that he based his opinion of the market value on what he had to pay in Dallas, plus the freight; that because he sold those cars in Crowell he knew the market value on the day of the accident. On cross-examination he stated that he based his opinion of the market value on what his firm paid for the truck, the gasoline required in running it to Crowell from Dallas, and the time of the man in bringing it; that such a car would ordinarily sell for \$1,078 in Crowell, and that he would have sold one for that price at that time. He stated that the truck in question was the only one his firm had sold; that in ascertaining the amount of the damages he took the catalogue and determined what each part to be replaced would cost; that the difference between the market value of the car immediately before and immediately after the accident was about \$650. The jury seems to have accepted his estimate rather than that of defendant in error.

[1-4] We think the objections to the competency of this evidence were not well taken. A dealer in personal property at any given place is generally accepted as an expert witness upon its market value. *Wells Fargo & Co. v. Long*, 190 S. W. 530; *Lawson on Expert and Opinion Evidence* (2d Ed.) 190-193; 11 R. C. L. p. 638, § 56; *Jones on Evidence*, vol. 2, §§ 386, 387. From the evidence on cross-examination touching the question of the qualifications of this witness to testify as to the market value of such a truck in Crowell, it appears that as a dealer he sold this particular truck, and it may be reasonably inferred that he was the representative of the manufacturer of such trucks at Crowell, as he had in his pos-

session a catalogue showing prices of its several parts. Being a dealer and having authority to sell such trucks on that market, it is a legitimate presumption that he was well informed as to market values, both in Crowell and in Dallas. Having testified upon direct examination that he knew the market value in Crowell on the day of the accident, he was prima facie qualified to state what that value was. *G., C. & S. F. Ry. Co. v. Stewart*, 141 S. W. 1020. The facts developed on cross-examination failing to show his disqualification, the evidence was admissible. That he had actually sold only one truck of that kind at Crowell would affect the weight, but not the admissibility, of his evidence. *Belknap v. Groover*, 56 S. W. 249. The judgment is affirmed.

#### OLD RIVER CO. v. BARBER. (No. 356.)

(Court of Civil Appeals of Texas. Beaumont. March 10, 1919. Rehearing Denied April 2, 1919.)

#### 1. APPEAL AND ERROR ⇐719(8) — ASSIGNMENT OF ERROR—NECESSITY—VERDICT—NEG-LIGENCE.

A verdict of negligence against one on whom no legal duty rested to use care may be attacked on appeal in absence of assignment of error.

#### 2. WATERS AND WATER COURSES ⇐116—SURFACE WATER.

In Texas the common-law rule obtains that, surface water being considered a common enemy, any owner of land has the right to protect himself against it and to do anything upon his own premises with that end in view, so long as what he does amounts to no more than a due exercise of dominion over his own premises.

#### 3. HUSBAND AND WIFE ⇐276(6)—COMMUNITY PROPERTY—CONVEYANCE BY SURVIVOR—RIGHTS OF HEIRS.

Where, after death of wife, husband granted right of way for canal purposes to rice irrigation company over community tract, the company leasing other parts of the community tract for rice raising, and the company constructed the canal and paid each year the rent for leased land to the husband as long as he lived, and he paid to each of the children of himself and his deceased wife their proportionate share of such rent, and the children, knowing of the conveyance and lease, made no objection thereto, they were as fully bound by the conveyance of the right of way as if they had properly signed and acknowledged it.

#### 4. WATERS AND WATER COURSES ⇐118—REPELLING SURFACE WATER—OWNER OF CANAL RIGHT OF WAY.

Company owning rice irrigation canal right of way was protected by the common-law immunity of a fee-simple owner from liability for damages in repelling surface water, and would

be liable for obstructing the natural flow of surface water only if it did something in the construction or operation of its canal that amounted to an undue exercise of dominion.

#### 5. WATERS AND WATER COURSES ⇐118—SURFACE WATERS—OBSTRUCTION—IRRIGATION CANAL.

Where grant to rice irrigation canal company of right of way for canal did not require the company to construct drains or openings in its canal, its operation of the canal without doing so did not render it liable for damages for surface water impeded and backed upon the premises of another by the canal embankment; nor would the company be liable because it failed to cut its canal to allow escape of such surface water after being requested to do so by such land owner.

Appeal from District Court, Chambers County; J. Llewellyn, Judge.

Suit by Ollie Barber against the Old River Company. From judgment for plaintiff, defendant appeals. Reversed and rendered.

Stevens & Stevens, of Houston, and A. W. Marshall, of Anahuac, for appellant.

E. B. Pickett, Jr., of Liberty, for appellee.

HIGHTOWER, C. J. The statement of the nature and result of this suit, as made by appellant, Old River Company, as far as it goes, is substantially correct, and will be adopted by us, with such additional statement as we deem necessary to a clear understanding of the issues in the case.

This suit was instituted in the district court of Chambers county by Ollie Barber, as plaintiff, against the Old River Company, a canal irrigation company, as defendant; the plaintiff alleging that the defendant, without the consent or permission of the plaintiff or his wife, who was the owner in fee simple of 119.4 acres of land described in the petition, constructed a canal upon plaintiff's said premises, and that said canal was negligently constructed and negligently maintained, and caused surface water to be backed upon plaintiff's premises as aforesaid, and prevented such water from escaping from plaintiff's premises, by reason of which various kinds of vegetables and some field crops growing upon said premises, as well as domestic fowls owned by plaintiff, were damaged and destroyed, to the extent in the aggregate of \$610, that plaintiff and his family suffered further damages in the sum of \$2,500 by reason of the fact that plaintiff and his family were compelled to move from their home on said premises, and remain away for a period of 15 days, for the reason that said premises were rendered practically uninhabitable, being made very muddy and unclean, and the surroundings caused to be very disagreeable and unpleasant, and that plaintiff and his said family were greatly dis-



turbed and distressed and suffered inconvenience and annoyance, to their further actual damage in the sum of \$2,500.

Appellee not only alleged that his wife owned the tract of land on which their said home was located, and that the canal complained of had been built thereon without the consent or permission of appellee or his wife, but also alleged that, if plaintiff's wife did not own said entire tract in fee simple, then she owned all of said 119.4 acres except an undivided one-half interest in and to that part of said tract which was included within or occupied by the canal which defendant had constructed on said tract, and was then operating, and that defendant, in exercising whatever right of possession it had to said land, did not, in the construction and operation of said canal, limit itself to the exercise of a due and proper dominion of its rights as a cotenant upon said land, but built and maintained said canal in total disregard of the rights of appellee, without reference to the damage which such maintenance and operation was causing appellee, and which could and should have been prevented had said defendant limited itself to exercising only a due and proper dominion of whatever right of possession it had in and to said tract of land; that in the construction and maintenance of said canal defendant was unreasonably disregarding of the rights of appellee, and negligent, in this, that said canal is about 125 by 150 feet wide, and the north bank thereof is 2½ or 3 feet high, and 7 or 8 feet wide at its base, and that such embankment obstructs the water as it would naturally flow from plaintiff's land, but the defendant in building said embankment negligently failed to provide proper drain boxes or openings therein to sufficiently protect plaintiff's said tract of land, and that such embankment is wholly without the sufficient drain boxes needed to accommodate the flow of surface water that naturally drains in that direction, but that, by the use of reasonable diligence, the defendant could and should have built in said embankment drain boxes sufficient to allow the water that accumulated on plaintiff's land to flow therefrom, as it would naturally do but for such embankment; that defendant was further negligent in operating said canal in this, that, when plaintiff's said home and farm premises became flooded, plaintiff promptly made known to defendant the disagreeable and damaging situation in which he and his family and property were placed by reason of said overflow, and further, that defendant then knew that plaintiff's crops were being materially damaged by said overflow, and of the extreme discomfort, inconvenience, and hardship which plaintiff and his family were then enduring, and that plaintiff at that time appealed to the defendant to permit him to make an opening in the north levy of said canal of sufficient size

and depth to relieve plaintiff's said premises of the overflow which had accumulated thereon, and from that overflow and the damage that was caused by same plaintiff would have been saved if defendant had allowed him to cut the opening he requested to cut in said canal, or that, if defendant had complied with his request and itself cut in said canal proper and sufficient openings for the escape of the water which had accumulated on plaintiff's said premises, the defendant could in that manner, by the use of proper and reasonable diligence, have saved and prevented plaintiff from any material damage, but that the defendant refused and declined to do so, and that the result was that plaintiff suffered serious and material damage, fully specified in his petition.

In addition to his prayer for damages, plaintiff also prayed to recover title and possession of so much of that portion of the tract of land described as is occupied by defendant's canal.

The defendant answered by a plea of not guilty and general denial, and, by way of plea of confession and avoidance, alleged that at the time of the injury complained of it owned the right of way over the premises described in plaintiff's petition, and that it had a right to construct said canal upon said premises, having an easement over said property which it acquired by purchase from the owners of same at and before the construction of said canal, and after the construction of same. Defendant further alleged that on March 29, 1902, for valuable consideration, which consideration was that it would lease a large tract of land and cultivate the same in rice and pay \$.250 per acre for rent, that it acquired from Joe Fisher, the then owner of the premises described in the plaintiff's petition, a right of way 150 feet in width over the same, and defendant alleged that it acquired said right of way described in plaintiff's petition from the said Joe Fisher, who owned a one-half undivided interest, and who was the survivor of the community estate of himself and his then deceased wife. Defendant further alleged that said Joe Fisher had the management, care, and control of the property described in plaintiff's petition, and he conveyed the same to defendant, in that the same consisted of the community estate of the said Joe Fisher and his said wife, deceased, and that it was necessary for him, in order to manage the same for the purpose of producing an income, to make the conveyance of said right of way to, in, and upon said premises to defendant for the reason that said lands were chiefly valuable for the production of rice, and that rice could not have been successfully grown upon said premises without adequate irrigation, and that hence, in order to properly irrigate said lands, it was necessary to grant a right of way to defendant, or some other

canal company, in order to distribute water upon said premises. It was further alleged that, in pursuance of said purpose, to develop said lands for rice, so as to produce an income from the same for the benefit of those entitled thereto, the said Joe Fisher, on March 20, 1905, in pursuance of said agreement, leased said lands, including the land claimed by the plaintiff, to the defendant for a period of ——— years at \$2.50 per acre, and that the defendant, by virtue of said lease, took possession of the premises thereby conveyed, and farmed the same in rice, and paid annually for the years 1905 to 1909, inclusive, to the said Joe Fisher, the sum of, to wit, \$1,600, and to the plaintiffs annually for each of said years the sum of \$193.72, with the exception of the year 1909, when \$105.18 was paid to plaintiff as rental for said lands. It was further alleged that the plaintiffs, in accepting said sums of money as rental for said land upon which said canal was so constructed, were estopped from contending that defendant had no right to construct, maintain, and operate said canal; that plaintiffs, at the time they accepted said rents, well knew that said canal had been constructed in the manner that it was constructed; that plaintiffs, by their acts, have acquiesced in a partition of the premises in controversy, in so far as the right of way upon which said canal is located is concerned, in that the plaintiffs agreed to the operation of said canal, to its construction and maintenance; that, if plaintiffs were ever tenants in common with defendant, they, by accepting the benefits of the operation of said canal for the irrigation of rice upon their lands, and in accepting rent from defendant for the cultivation of said lands, were estopped from asserting that defendant was not properly exercising its dominion over that portion of the premises occupied and covered and used by said canal.

The case was tried with a jury, and submitted upon special issues, and upon the verdict returned a judgment in the sum of \$848 was rendered in favor of the plaintiff against defendant Old River Company, from which judgment it has duly perfected an appeal.

There are several assignments of error in appellant's brief, some of which we shall specifically mention later on, but at this point we shall make a statement of the undisputed material facts, as we gather them from this record, and from which our legal conclusions will follow.

Joe Fisher and his wife, whose maiden name does not appear from the record, owned in community approximately 1,000 acres of land known as the William Hodge survey in Chambers county. Mrs. Fisher died some time in the year 1901, leaving surviving her her said husband, Joe Fisher, and a number of their children, eight or ten, one of whom was Nina Fisher, who in 1904 became the

wife of the appellee, Ollie Barber. It does not appear from the record that there was any administration had upon the estate left by Mrs. Fisher, or that any necessity existed therefor. After the death of Mrs. Fisher, and on March 29, 1902, the said Joe Fisher made and executed and delivered to appellant the following written instrument:

"The State of Texas, County of Chambers.

"Know all men by these presents that I, Joseph Fisher, of Chambers county, Texas, for and in consideration of one dollar (\$1.00) to me in hand paid by Old River Rice Irrigation Company, a corporation under and by virtue of the laws of the state of Texas, and other valuable considerations, hereinafter stated, do hereby grant, sell and convey, and by these presents do grant, bargain, sell and convey, unto the said Old River Rice Irrigation Company, the right of way for constructing canals and laterals over the hereinafter described tract of land, being situated in Chambers county, Texas, and described as follows: [Here follows a description of the land, of which the premises in controversy are a part.]

"The said canal shall not exceed 150 feet in width, and shall be constructed by said company in such place and in such manner as may seem proper and most advantageous to said company, hereby granting to said company the right of ingress and egress to and over said land for the purpose of constructing and repairing said canal and laterals, and the said company may take and use the necessary earth from said land for constructing and repairing said canal and laterals, and may erect such pumping machinery as may be necessary on said land.

"The said Joseph Fisher further agrees to lease to the said company the land heretofore described [meaning the whole survey], and this shall be deemed a full and sufficient lease from the said Fisher to said company to authorize the said company to improve and plant said lands in crops of rice or other crops, at the option of said company. The said company shall utilize all the land heretofore described suitable for the purpose of raising rice or such other crops as may be raised by said company that the said canal is capable of furnishing water for, and the same shall be utilized by the said company within three years from the date hereof, and that the said Joe Fisher hereby reserves the right to terminate this lease at any time after the expiration of two years from the time of harvesting the first crop by selling the said land, or by cultivating the same for the purpose of raising rice, but in such event the same shall in no wise injure or prejudice the rights of the lessee who may have a growing crop on said lands, and full time shall be given to the said lessee to harvest and take care of any crop he may have on said land, and in the case of the termination of said lease without sale the said Fisher agrees to cultivate the said land for the purpose of raising rice, and to take all water from the company's canal, and to pay a reasonable water rent therefor.

"The said company shall erect and keep in repair all necessary fences and buildings for the protection of all crops raised by them on said land so leased, and shall have the right to remove all improvements from said land at the expiration of said lease. The said company

shall pay to the said Joseph Fisher the sum of \$2.50 per acre per annum for all land upon which the said company or their lessees shall produce crops.

"The said company shall build and complete the canal as fast as practicable to meet the demands of the farmers engaged in raising rice, and generally to meet the rice interests in the vicinity where said canal shall be built.

"Should the company fail to put the said canal into actual operation on or before the 1st of April, A. D. 1904, then and in that event the lease hereby given may be terminated and become null and void, at the option of the lessor.

"The construction of said canal and materials across the aforesaid lands shall be considered a full compensation for the right of way over the same, and upon completion thereof the title of said right of way is fully vested in said company and their assigns forever.

"The rent that may become due for the land leased as aforesaid shall commence when the first crop is planted, and shall become due when the same shall be harvested and marketed.

"All oil and mineral rights are reserved to the aforesaid land to said Fisher.

"Witness our hand this 29th day of March, A. D. 1902. [Signed] J. Fisher, T. W. Shearer, President, Old River Rice Irrigation Company."

On March 20, 1905, Joe Fisher made and executed and delivered to appellant the following instrument in writing:

"The State of Texas, County of Chambers.

"This agreement, made the 20th day of March, A. D. 1905, between Joseph Fisher, of the first part, and the Old River Rice Irrigation Company, a corporation chartered and existing under and by virtue of the laws of Texas, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the yearly rents and covenants hereinafter mentioned and reserved on the part and behalf of the second party, its successors and assigns, to be kept and performed, hath demised, let, and leased, and by these presents doth demise, let, and lease, unto the said party of the second part, its successors and assigns, all that certain tract of land in Chambers county, Texas, a part of the Chambers county school and the Wm. H. Hodges surveys, bounded and described as follows, to wit: All of the Wm. H. Hodges survey owned by Joseph Fisher east of said company's land and also all that part of said Hodges survey west of the east prong of said canal and south of the north prong, and east of the Shearer lateral and north of the Chambers county school land; also all the Chambers county school land belonging to said Fisher south of the land above described which is inclosed within said Fisher's pasture fence. The amount of said land is to be determined by a survey hereafter to be made.

"To have and to hold the same unto the said party of the second part, its successors and assigns, from the 1st day of January, 1905, for and during the term of three years thence next ensuing and fully to be completed and ended, the said party of the second part yielding and paying for the same unto the party of the first part, his heirs and assigns, the yearly rent or sum of two dollars and fifty cents per acre for each and every acre of land cultivated in rice by second party. The same to be paid on

or before the 1st day of January of each year after a crop of rice is made and harvested, and it is further stipulated by and between the parties hereto that at the expiration of said time the said party of the second part, its successors and assigns, shall and will quietly and peaceably surrender and yield up the said demised premises unto the said party of the first part, his heirs and assigns. It is further agreed by and between the parties hereto that the said second party shall at any time during the terms of this lease have the right to move off any or all of the improvements, machinery, or other fixtures placed by said party on said land, and shall have 60 days after the expiration of said lease to move off all improvements, machinery, and fixtures of every description from said land that may be on said land at the expiration of said lease.

"In witness whereof the said parties have hereunto set their hands the day and year aforesaid.

"[Signed]

Joe Fisher.

"Old River Rice Irr. Company,  
T. W. Shearer, Pres."

Appellant, acting under the authority given it under the first instrument, as above set out, constructed and completed its canal across that portion of the Hodge survey which is now claimed by Mrs. Barber, the wife of appellee, and ever since the construction and completion of said canal appellant has operated the same in accordance with the terms of its written contract, and each year paid to Joe Fisher, as long as he lived, the rental that was due by appellant for such portions of said estate as was cultivated in rice by appellant. The community estate of Joe Fisher and his deceased wife was not partitioned or divided as between him and said children until 1910, but in that year there was a legal decree of partition, by which 119.4 acres fell to Mrs. Barber, wife of the appellee, which tract constitutes the premises in controversy in this suit. Appellee, however, two years before such partition in 1908, moved upon that portion of the undivided estate which now constitutes said 119.4-acre tract, and commenced to improve a home there, and built a dwelling house, barns, outhouses, and planted an orchard, and commenced and continued to farm such premises until the year 1914. At the time appellee moved, with his wife, upon the premises in controversy, appellant's canal was in full operation, and had been for several years, with the full knowledge and acquiescence, and, we might add, with the full consent, of appellee and his wife, which continued until the date of the damage of which appellee complains in this suit. During all the years that appellant was cultivating the lands owned by Joe Fisher and children of his deceased wife, as tenants in common, it paid, according to its contract, to Joe Fisher, as long as he lived, the rental value thereof, and Joe Fisher paid to each child, including appellee's wife, its proportionate share thereof.

It appears from the record, practically without dispute, that the children of Joe Fisher and his deceased wife, including the wife of appellee and appellee himself, while they did not join in the execution of either of the written instruments executed by Joe Fisher to appellant hereinabove copied, at the same time they were aware that their father, Joe Fisher, had authorized appellant to construct its canal over said lands, and had leased to appellant said lands to be cultivated in rice for the rentals above mentioned, and none of said children interposed any objection to the action of their said father in granting said right of way to appellant, or in leasing said lands to it, and, in fact, none of said children, including the appellee, had any objection to the action of their said father in granting said right of way to appellant, or in leasing to it said lands for cultivation, as was done. There is no contention that appellant failed to live up to its agreement in any respect, either in the construction and operation of said canal, or in respect to the cultivation and use of said lands, or in the payment of rental therefor. In other words, all of said children of Joe Fisher and wife, not only knew of what their father, Joe Fisher, had done with reference to authorizing appellant to construct its canal over the common estate, and not only knew of the contract of lease of said lands made by him to appellant, but they had no objection thereto, and this record shows that all of them fully acquiesced in everything that Joe Fisher did, both as to granting the right of way for the canal and as to leasing the lands to appellant for cultivation in rice. When the partition of the common estate was had between Joe Fisher and his said children in 1910, it appears from the record that appellant was in no manner a party to that proceeding, and, so far as we are able to tell, no recognition was taken of appellant or its canal in that proceeding.

After the partition proceeding was had and the 119.4 acres above mentioned fell to appellee's wife, appellant did not cultivate any portion of that tract any further, and, so far as the record shows, appellant had no further dealings or connection in any way with appellee or his wife.

Appellant's canal crosses appellee's 119.4 acres of land near the south end thereof, as the same was afterwards laid out, and that portion of the tract actually occupied by the canal is about 7 acres, but the larger portion of appellee's premises lies north of the canal. The natural drainage on appellee's land is from north to south, or practically so, and surface water naturally finds its way from appellee's premises southward in the direction of appellant's canal, and escapes in that direction. On the 28th day of May, 1914, there was a heavy rainfall in that vicinity, and the north bank of appel-

lant's canal prevented the escape of water which fell during this rain and caused the same to back up on appellee's premises and flood the same, and such premises remained practically flooded during a period of approximately 15 days. The extent of the overflow of his premises was such that he was compelled to move his family away from home, and keep them away a period of approximately 15 days. Much of the garden vegetables and field crop was destroyed by such flood, and to the extent and value as found and itemized by the jury in this case, and in deference to the verdict of the jury, we find that the evidence was sufficient to warrant the amount found in appellee's favor because of inconvenience, annoyance, discomfiture, etc., to appellee and his family. In other words, we find that on account of the overflow of appellee's premises, which was in consequence of surface water being prevented from escaping by reason of the presence of appellant's canal, appellee was damaged in the amount as found by the jury in this case.

As stated above, the case was submitted to the jury upon special issues, and in answer to these issues the jury found: That appellant, in the construction and operation of its canal, failed to provide proper drain boxes or other openings in the embankment thereof to drain from appellee's land the surface water which accumulated thereon; that appellant was guilty of negligence in failing to provide such drain boxes or other openings; that appellee requested appellant to cut a sufficient opening in the embankment of the canal to allow surface water which had accumulated on appellee's premises to escape; that appellant was guilty of negligence in failing to cut such opening in said embankment, after being requested by appellee so to do.

Appellant's second assignment of error challenges the action of the trial court in refusing to peremptorily instruct the jury in its favor, the assignment being:

"The undisputed evidence having shown that the defendants, in the rightful exercise of dominion over its own property, constructed a canal over a right of way upon land owned by the defendant company, and maintained said canal, and that, if any water was obstructed, or caused to be backed upon the plaintiffs' property, that the same was surface water, and the defendant cannot be held liable under the law for any damage which may have arisen by reason of the backing of such surface water, therefore the court erred in overruling defendant's motion to instruct a verdict in its behalf, and the court further erred in not instructing the jury to return a verdict for the defendant."

The proposition under this assignment is as follows:

"The land upon which the canal in this case was located having been conveyed to the defendant company by Joe Fisher, the survivor of the community estate of himself and his deceased

wife, out of a larger tract of land owned by said estate, and it having been shown that the children of the said Joe Fisher, deceased, and his deceased wife, who were the sole heirs to said estate, had acquiesced as tenants in common in the ownership and occupancy of said land conveyed by said canal, the said acquiescence of said heirs, including the wife of the plaintiff, amounted in law to a partition by estoppel; hence the undisputed evidence in this case shows that the defendant, in operating said canal, was in the rightful exercise of dominion over its own property.

We have hereinbefore stated what we conceive to be, from the record, the undisputed facts upon which the judgment in this case was awarded, and it only remains to determine whether upon such facts the judgment of the trial court can be sustained as a legal proposition.

It is true the court submitted to the jury whether or not appellant was guilty of negligence in the construction and operation of its canal, and also whether or not appellant was guilty of negligence in refusing to cut its canal embankment after being requested to do so by appellee at a time when appellant knew that if it refused to do so appellee would be damaged, and the jury found that appellant was guilty of negligence in both respects. It is also true, as contended by appellee, that there is no assignment of record made by appellant challenging such finding of negligence by the jury. But it does not follow, as contended by appellee, that in the absence of complaint on appellant's part of such finding by the jury, appellant would be bound thereby, and that the judgment as to damages must necessarily follow and be sustained.

[1] Negligence, as a law term, presupposes a breach of duty owed by a party sought to be charged with such negligence to the party claiming injury therefrom. If there was really no legal duty resting upon appellant to the appellee in this case, there was no negligence on the part of appellant towards appellee in contemplation of law, and appellant would not be bound by the verdict of the jury, even though there be no assignment by appellant here challenging that verdict.

The counter proposition made by appellee to that of appellant is as follows:

"A tenant in common may ordinarily make use of jointly owned property as he pleases, but that right he must not misuse or abuse to the injury of another cotenant, and a tenant in common who is guilty of negligence in his use of common property, is liable for the damage which proximately results to another cotenant from such negligence."

We shall not undertake to determine here whether the relation between appellant and appellee's wife was that of tenants in common in all respects, or to determine just what relation appellant and appellee and his wife sustain to each other under the facts in this

case, because we do not deem it necessary to determine just what that relation was.

If, however, we should be of the opinion that such relation was that of tenants in common in the legal acceptance of that term, we are not yet prepared to agree with appellee's counter proposition to the extent of holding that a tenant in common who may be guilty of any act of negligence in his use of common property, as distinguished from a willful wrong or trespass, would be liable for all damage which might proximately result to a cotenant from such mere negligence. No authority has been cited by appellee which supports the counter proposition thus broadly made. The only Texas case that he cites that could in the least be construed as authority for such proposition is that of *Gillum v. Railway Co.*, 5 Tex. Civ. App. 338, 23 S. W. 718. As we read that case, it does not go to the extent contended for by appellee in this connection, but it was decided in that case that a tenant in common has a right to sell marketable timber growing on the common property, so long as he does not commit waste, and, further, that the purchaser from such tenant in common takes a good title as against the other cotenants; their remedy being to compel the seller to account for the proceeds. So, if it should be held that appellant was a tenant in common, under the undisputed facts in this case, we doubt whether it would follow that it would be guilty of actionable negligence towards appellee because of the manner in which it constructed or maintained its canal or because of its refusal to cut the canal at the request of appellee.

There is no question in this case but what the damage suffered by appellee was caused by surface water in every sense of that term. In other words, there is no difficulty in this case in determining the character of water that caused the injury complained of.

[2] At common law surface water was considered a common enemy, and any owner of land had a right to protect himself against such water and to do anything upon his own premises with that end in view, so long as what he did amounted to no more than a due exercise of dominion over his own premises. This rule is not disputed by appellee; neither is it disputed by him that such rule obtains in this state. That such was the rule at common law and is the rule in this state, see *Barnett v. Matagorda Rice Co.*, 98 Tex. 355, 83 S. W. 801, 107 Am. St. Rep. 636; *Wilbourne v. Terry*, 161 S. W. 33; *Walenta v. Wolter*, 186 S. W. 873.

While admitting the common-law rule as to surface water and its application in this state, yet it is the contention of appellee, in substance, that such rule of protection against surface water could only be invoked by one whose ownership of land was abso-

lute. In other words, appellee contends that nothing short of a fee-simple title in land, under the common-law rule, affords the possessor thereof immunity where he causes damages to another by obstructing the natural flow of surface water.

[3, 4] We admit that we have not been cited by counsel for either side in this case to any authority bearing directly upon the very facts of this case; neither have we been able to find any such authority. But, under the undisputed facts in this case, as we have stated them, it is our opinion that appellee and his wife were and are as fully bound by what Joe Fisher did in granting to appellant the right of way for the canal in question as if they themselves had properly signed and acknowledged both the written instruments executed by Joe Fisher to appellant, as hereinbefore copied; and if we be correct in this conclusion, it unquestionably must follow that appellant was in the rightful exercise of dominion over the land constituting the right of way of said canal, and that, unless appellant did something in the construction or operation of said canal that amounted to an undue exercise of dominion, then we see no reason, in common sense or logic, why appellant could be liable to appellee in this case.

[5] True, appellee contends that, if appellant failed to construct sufficient drainage under its canal to permit the escape of surface water from his premises, and if such failure was negligence in the opinion of the jury, or if the failure on the part of appellant to cut said canal after being requested by appellee to do so amounted to negligence in the opinion of the jury, then it follows that appellant's exercise of dominion over its canal was not a due exercise of dominion by it, and that consequently appellant would not be protected by the common-law rule as to surface water, which only gave protection where the exer-

cise of dominion by the owner was a due exercise.

We have given this contention careful consideration, and we are unable to agree with it. We believe that, appellant in this case having in effect a grant by all the interested parties for the right of way of its canal, and the right to operate that canal for purposes of irrigation, so long as it exercised that right for that purpose, as was contemplated by the parties granting that right, and since it was not provided in such grant that appellant should construct drains or openings in its canal, appellant was under no legal duty to do so, and that its operation of its canal without doing so could not be held to be an undue exercise of its dominion over its right of way.

For all practical purposes, it occurs to me that appellant is just as much the owner of the land covered by its right of way granted by Joe Fisher and, as we say, his children, and that its right of dominion thereover is just as complete as if it was the owner thereof by fee-simple title, and that so long as it operates said canal for canal purposes only, as was intended by the parties, it cannot in law be held responsible to the parties making that grant merely because of surface water being impeded and backed upon the premises of another.

Appellee has cited many cases wherein railroads were involved because of the failure to construct culverts, drains, etc., as required by statute, but such authorities can have no application here, whether they emanate from this or other states.

It being our opinion that the undisputed facts in this case show no legal liability against appellant in favor of appellee, it follows that the judgment of the trial court should be reversed, and here rendered in favor of appellant; and it will be so ordered.

**FT. WORTH & R. G. RY. CO. v. WILHITE.**  
(No. 953.)

(Court of Civil Appeals of Texas. El Paso.  
March 27, 1919.)

**1. RAILROADS ⇨268—OPERATION OF ROAD BY  
RECEIVERS—PLEADING.**

In an action against a railroad for loss of animals killed by trains operated by receivers, facts necessary to fix liability upon railroad, receivers having been discharged, must be pleaded and proved.

**2. RAILROADS ⇨411(6)—ANIMALS—DUTY TO  
FENCE.**

Where Vernon's Sayles' Ann. Civ. St. 1914, art. 7235 et seq., relating to horses and cattle, has not been adopted in a county, a railroad operating an unfenced track therein, unless negligent, is not liable, under article 6603, for hogs killed or injured while running at large in violation of title 124, c. 5, adopted in such county.

**3. RAILROADS ⇨411(1)—FENCES.**

There is no law compelling railroads to fence a right of way.

Appeal from Comanche County Court; J. H. McMillan, Judge.

Action by S. T. Wilhite against the Ft. Worth & Rio Grande Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Jerome P. Kearby, of Comanche, for appellant.

Callaway & Callaway, of Comanche, for appellee.

**Statement of Case.**

**HIGGINS, J.** This suit was filed June 16, 1917, by Wilhite, against appellant, to recover the value of two hogs killed by a train and damages for injuries to another hog. The facts found by the trial court may be summarized as follows: During 1916 Wilhite lived on a rented farm six miles east of Hasse. Appellant's line of railway passed through the farm. In April and May, 1916, two hogs belonging to appellee were killed and one crippled by a train operated upon the line of railway aforesaid, and by reason thereof, appellee was damaged in the sum of \$85. The right of way had never been fenced at this point. Appellee's farm was inclosed by a hogproof fence, but there was no fence to prevent hogs from straying upon the right of way and tracks of appellant. Appellee had turned the hogs loose upon his farm, and, being unattended, they strayed upon appellant's right of way and tracks. At the time mentioned, and for many years previous thereto, there was in force and effect in Comanche county what is commonly known as the "Hog Law," whereby, under the pro-

visions of chapter 5, tit. 124, Revised Statutes, hog, sheep, and goats were prohibited from running at large. There was no negligence on the part of the parties operating the train that killed and crippled the hogs. Under the orders of the District Court of the United States in the Northern District of Texas, receivers were appointed for appellant, and all of its properties were operated by said court and its receivers from July 5, 1913, to November 3, 1917, and such receivers had charge of all of the properties of appellant during the time mentioned and managed, controlled, and operated this line of railroad. The court found that appellant was guilty of actionable negligence in failing to fence its right of way so as to exclude hogs, and that by reason thereof it was liable for the damages sustained by appellee and rendered judgment accordingly.

**Opinion.**

[1] 1. There are no facts pleaded or found by the trial court which would authorize a judgment against appellant for damages on account of animals killed or injured by trains operated by the receivers of its properties, appointed by the federal court. The record discloses that the two hogs were killed and the third injured by a train operated by such receivers. There is no occasion to discuss this question, as it is well settled that the facts necessary to fix liability upon appellant must be pleaded and proven. *Railway Co. v. McFadden*, 89 Tex. 138, 33 S. W. 853; *Lumber Co. v. Cunningham*, 154 S. W. 288; *Hovey v. Weaver*, 175 S. W. 1089; *Railway Co. v. Daniel*, 195 S. W. 625; s. c., 186 S. W. 383; *Railway Co. v. Ballou*, 174 S. W. 337.

[2] 2. Prior to the amendment of article 6603, R. S., by Acts 1905, p. 228, c. 117, it was held that railway companies, unless guilty of negligence, were not liable for stock killed or injured in counties and subdivisions thereof where the stock law was in force prohibiting animals from running at large. *Railway Co. v. Tolbert*, 90 S. W. 508; s. c., 100 Tex. 483, 101 S. W. 206; *Railway Co. v. Nussbaum & Scharff*, 48 Tex. Civ. App. 410, 94 S. W. 1101; *Railway Co. v. Kropp*, 91 S. W. 819; *Railway Co. v. Scofield*, 98 S. W. 436; *Railway Co. v. Atlas*, etc., 86 Tex. Civ. App. 368, 81 S. W. 792.

For the evident purpose of changing the rule announced in the cited cases, article 6603, R. S., was amended by the act of 1905. This amendment provided that—

"Such liability [i. e., for stock killed or injured] shall also exist in counties and subdivisions of counties which adopt the stock law prohibiting the running at large of horses, mules, jacks, jennets and cattle."

At the time of this amendment, and now, there are two laws relating to stock running at large. The first is the act prohibiting hogs, sheep, and goats from so doing. This is the act of 1876, with subsequent amendments. It appears in Vernon's Sayles' Revised Statutes as chapter 5 of title 124. The second is the act prohibiting horses, mules, jacks, jennets, and cattle from running at large in certain counties. This act was originally passed in 1899 (Gen. Laws 26th Leg. c. 128, p. 220), and with its subsequent amendments appears in Vernon's Sayles' Revised Statutes as chapter 6 of title 124. The history of the legislation relating to this last class of animals is traced in Vernon's 1918 Supplement. See note to article 7235.

It thus appears that, when article 6603, R. S., was amended by the act of 1905, there were two stock laws—one relating to hogs, sheep, and goats; the other to horses, mules, jacks, jennets, and cattle.

The amendment of 1905 imposes an absolute liability upon railroad companies whose road is unfenced in localities which have adopted the law relating to the animals last named. It does not appear that this law has been adopted in Comanche county. It thus follows, under the rule announced in the Tolbert Case, that appellant is not liable for animals killed or injured while running at large in violation of the law prohibiting hogs, sheep, and goats from so doing. Since the trial court found that there was no negligence on the part of the operators of the train which killed and injured appellee's hogs, there is no liability. Under the cited authorities liability cannot be predicated, as was done by the trial court, upon the theory that appellant's failure to fence its right of way constituted actionable negligence.

[3] There is no law compelling railroads to fence their right of way. Under the law in force in Comanche county the animals became trespassers when they entered upon the right of way and tracks of appellant, and, in the absence of negligence on the part of the operators of the train, there is no liability.

Reversed and rendered.

#### AMSLER v. CAVITT. (No. 5973.)

(Court of Civil Appeals of Texas. Austin. Feb. 26, 1919. Rehearing Denied April 9, 1919.)

#### 1. CORPORATIONS §121(1) — TRANSFER OF CORPORATE STOCK—BREACH OF CONTRACT—REMEDIES.

Generally the remedy for a breach of a contract to sell stock in a corporation is an action for damages.

#### 2. SPECIFIC PERFORMANCE §70 — CONTRACT TO CONVEY CORPORATE STOCK.

Where justice requires it, an action can be maintained for specific performance of a contract to sell stock in a corporation.

#### 3. SPECIFIC PERFORMANCE §70 — CONTRACT TO CONVEY CORPORATE STOCK—PROPERTY OF REMEDY.

In a suit for specific performance of a contract to convey corporate stock by the terms of which plaintiff, as part of the consideration, was to convey an interest in realty, allegations that the shares of stock were limited, that an equal amount of other shares could not be purchased on the same terms, or at all, and that plaintiff was familiar with the affairs of the corporation, and was desirous of obtaining such shares, showed a cause of action for specific performance.

Error from District Court, McLennan County; Geo. N. Denton, Judge.

Suit by S. A. Cavitt against S. Amsler, for specific performance. Decree for plaintiff, and defendant brings error. Affirmed.

W. L. Eason, of Waco, for plaintiff in error.

Rogers & Earle, of Waco, for defendant in error.

KEY, C. J. Defendant in error sued and obtained a judgment against plaintiff in error for specific performance of contract, by which plaintiff in error agreed to convey to defendant in error 50 shares of the capital stock of a corporation known as the McGregor Milling & Grain Company. By the terms of the contract, defendant in error was to pay to plaintiff in error \$1,000 cash, execute a promissory note for \$1,000, due at a specified time, and bearing a specified rate of interest, and was also to convey to him an undivided half interest in a certain piece of real estate owned jointly by plaintiff in error and defendant in error.

There is no statement of facts, nor assignments of error, and the case is presented to this court upon the proposition, submitted as fundamental error, that the petition upon which the case was tried was insufficient, and failed to state a cause of action entitling the plaintiff to a judgment for specific performance.

[1, 2] As a general rule, the remedy for a breach of contract to sell stock in a corporation is an action for damages; but there are exceptions to that rule, and, where the ends of justice require it, an action can be maintained for specific performance.

"If the stock contracted to be sold is easily obtained in the market, and there are no particular reasons why the vendee should have the particular stock contracted for, he is left to his action for damages. But where the value of the stock is not easily ascertained, or the stock is not to be obtained readily elsewhere, or



there is some particular reasonable cause for the vendee requiring the stock contracted to be delivered, a court of equity will decree a specific performance and compel the vendor to deliver the stock." 1 Cook on Corporations (6th Ed.) § 336.

[3] The plaintiff in the court below alleged in his petition that the shares of stock in the corporation were limited, and that he could not purchase an equal amount of other shares upon the terms and conditions of his contract with the defendant; that other shares of stock were not upon the market upon the terms of the plaintiff's contract with the defendant, and for those reasons he was unable to buy other shares of stock in lieu of those which the defendant agreed to sell him. He also alleged that he was interested and familiar with the affairs of that corporation, and for many reasons was desirous of obtaining the 50 shares of stock sued for.

The answer of the defendant contained a general demurrer to the plaintiff's petition, but the record fails to show that it was called to the attention of, or ruled upon by, the trial court. This being the condition of the record, we overrule plaintiff in error's contention, and hold that the petition supports the judgment. In fact, we are of opinion that, if the general demurrer had been insisted upon, it should have been overruled.

This case involves more than an action for specific performance of a contract relating to personal property. By the terms of the contract, the defendant in the court below obligated himself to purchase real estate from the plaintiff, and the decree of the court requires specific performance of that obligation; also, there were other allegations in the petition, which, perhaps, were sufficient to take it out of the general rule, and authorize the plaintiff to demand specific performance.

No error has been shown, and the judgment is affirmed.

VAN CLEAVE et al. v. WALKER et al.  
(No. 1506.)

(Court of Civil Appeals of Texas. Amarillo.  
March 26, 1919.)

1. MASTER AND SERVANT ⇐330(1)—INJURY TO THIRD PERSON — ACTION — BURDEN OF PROOF.

In action against automobile dealers for death of one killed by their demonstrator, the burden of proof was upon plaintiff to show the demonstrator was acting within the scope of his employment when the accident occurred.

2. MASTER AND SERVANT ⇐302(6) — INJURY TO THIRD PERSON — DEMONSTRATOR OF AUTOMOBILE.

Although automobile dealers allowed their demonstrator to use demonstration car for his

own enjoyment, they would not be liable for injury done by him while so driving the car; he not being in the master's business in such driving any more than any one who might hire or borrow the car.

3. MASTER AND SERVANT ⇐302(6) — INJURY TO THIRD PERSON—RETURNING TO GARAGE.

Automobile dealers having allowed their demonstrator to take out demonstration car for his own enjoyment, they would not be liable for accident occurring to third person while demonstrator was returning the car to the garage; for the fact that it was demonstrator's duty to return the car after such use would not make his acts in doing so acts within his employers' service, but the return would be but an incident to the use.

Appeal from District Court, Wichita County; Edgar Scurry, Judge.

Action by D. C. Walker and another against A. J. Van Cleave, B. F. Walling, and another. From judgments for plaintiff, the named defendants appeal. Reversed and rendered as to named defendants, and affirmed as to the other defendant.

Martin & Oneal, of Wichita Falls, for appellants.

Martin, Bullington, Boone & Humphrey, of Wichita Falls, for appellees.

BOYCE, J. Appellees, D. C. Walker and wife, recovered damages in the court below against A. J. Van Cleave, B. F. Walling, and Alex Hirsch for the negligent killing of their minor son, the result of being run over by an automobile driven by the said Alex Hirsch. The automobile being driven by Alex Hirsch at the time belonged to the defendants Van Cleave and Walling, and the recovery against said two last named defendants was on the theory that the said Alex Hirsch was at the time of the accident in the employment and engaged in the business of the said defendants.

The defendants Van Cleave and Walling only appeal, and one of the principal questions on the appeal is as to whether the evidence is sufficient to show that the said Hirsch was at the time of the accident engaged in the business of the two appellants, so as to make them liable for his negligence. The evidence shows that the appellants Van Cleave and Walling were partners engaged in the sale of automobiles in the city of Wichita Falls, where they maintained a shop or salesroom. Alex Hirsch was employed by them as salesman and bookkeeper. Walling was the manager of the business; Van Cleave living in another town and being at the place of business only occasionally. During the absence of his employers, Hirsch had charge of the business. His duties were to keep the books and sell cars, and, as a part of this latter duty, to "demonstrate" them to

prospective purchasers. He also at times drove the car which they used as a demonstrator on the streets of the city for the purpose of showing off its appearance and performance. He also at times took the demonstration car out and drove it for his own pleasure, taking his wife riding on some of these occasions. The only witnesses as to his authority to so use the automobile for his own private pleasure were the three defendants, and, while they testify that he had no right to so use it and had been "jacked up" for doing so, the jury would have perhaps been warranted in finding that he used the automobile occasionally for his own pleasure with the tacit consent of his employers. On the evening of the accident the defendant Hirsch closed up the salesroom, defendant Walling having already left, at the close of business hours for the day, and took the automobile out, going to his home for the purpose, so he testifies, of taking his wife riding. His wife had been taken sick in the afternoon, and his aunt, with whom they were living, suggested that she ought to have some medicine, and, according to the testimony of the said Hirsch, he started to town without eating his supper, for the purpose of getting the medicine, intending to leave the automobile at the salesroom, where it was his duty to return it whenever it was used, and after getting the medicine to go back home on the street car. It was as he was on his way to town that the accident occurred. It was about dusk in the evening.

[1-3] The liability of the master in cases of this kind is to be determined by the application of the general principles of the law of master and servant. In such cases the burden is upon the plaintiff seeking to hold the master for an injury inflicted by the servant to "show that the servant did the wrong while acting within the scope of his employment," and the act (of driving the automobile in this instance) "must be done in furtherance of the master's business and for the accomplishment of the object for which the servant is employed." *I. & G. N. Ry. Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; *Hill v. Staats*, 189 S. W. 85. The evidence is insufficient, we think, to warrant the finding that Hirsch took the automobile out that evening for the purpose of demonstration on the streets, or to a prospective purchaser; it merely suggests a possibility that this may have been true and is not sufficiently tangible to form the basis of a verdict. *Joske v. Irvine*,

91 Tex. 574, 44 S. W. 1062, 1063, particularly as such suggestion is contradicted by the positive testimony as to his real purpose in such matter. *Starkey v. Wooten Grocery Co.*, 143 S. W. 693; *Grand Fraternity v. Melton*, 102 Tex. 399, 117 S. W. 788. If the evidence is sufficient to warrant the conclusion that the defendant Hirsch was allowed to use the automobile for his own enjoyment, and that he took it out on this evening for such purpose, with the consent of his employers, nevertheless there would not be any liability on their part for an injury done by him while driving the automobile under these circumstances. *Doran v. Tomsen*, 76 N. J. Law, 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677; *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1061-1063; *Reilly v. Connable*, 214 N. Y. 586, 108 N. E. 853, L. R. A. 1916A, 954, Ann. Cas. 1916A, 656; *Berry's Law of Automobiles*, §§ 138-140. The servant while using the automobile under such circumstances, is no more engaged in the business of the employer than one who might borrow or hire it. Liability, if any, in such case for injury inflicted by such person in using the automobile would depend on an entirely different principle, whether there was any negligence in intrusting to such person an instrument capable of becoming a dangerous agency, if not properly handled. No such question is presented by the pleading and evidence in this case. It is argued by appellee, and this is probably the theory on which the jury proceeded in reaching the verdict, that even if the defendant Hirsch did take the automobile out for his own purposes, yet it was his duty to take it back and put it in the salesroom after such use and his acts in so doing would be in the service of his employers. This is a too narrow view of the act. The return of the automobile was an incident to its use, and if the use was for the benefit of the employé, and not in the service of the master, the entire transaction is to be regarded as for his own benefit. *Hill v. Staats*, 189 S. W. 85.

We are of the opinion, therefore, that appellant's request for a peremptory instruction should have been given, and, as the case seems to have been fully developed, we will here reverse and render judgment in their favor, affirming it as to the defendant Hirsch.

This disposition of the case makes it unnecessary to consider the other assignments presented.

**ABBOTT v. WESTERN UNION TELEGRAPH CO. (No. 2416.)**

(Springfield Court of Appeals, Missouri, Feb. 25, 1919. Rehearing Denied April 7, 1919.)

**1. TRIAL ⇌ 386(3)—DECLARATIONS OF LAW—CONFORMITY TO EVIDENCE.**

A declaration asked in a suit against a telegraph company to recover a penalty under Rev. St. 1909, § 3330, that plaintiff could not recover if defendant agreed with the party to whom the message was erroneously delivered upon discovering such error, that such party should deliver it promptly to the addressee, and this was done was properly refused, where such party testified that "he thought" he delivered the message first, and saw defendant's agent afterwards.

**2. TELEGRAPHS AND TELEPHONES ⇌ 78(3) — ACTION FOR PENALTY — PLEADING AND PROOF.**

The sender of a telegram cannot, in a suit for the penalty prescribed by Rev. St. 1909, § 3330, for failure to transmit same and use due diligence in placing it in the hands of the addressee, base his claim upon the disclosing of the contents of the telegram to a party other than the addressee, the penalty for such an offense being provided by section 3334.

**3. STATUTES ⇌ 241(1) — PENAL STATUTES — "STRICTLY CONSTRUED."**

The rule that penal statute must be strictly construed means that the court must not bring cases within the provisions of such statute not clearly embraced by it, nor by narrow or forced construction of words exclude cases obviously within its provisions, the duty of the court being to follow the intention of the Legislature. [Citing Words and Phrases, Second Series, Strict Construction.]

**4. TELEGRAPHS AND TELEPHONES ⇌ 78(1)—DELIVERY OF MESSAGE—CARE EXERCISED—LIABILITY.**

W. C. M. and L. C. M. were well-known attorneys in a town of about 3,000. A telegraph agent of the town, on receiving a message addressed to W. C. M., changed the initials so as to make them read L. C. M. The message was filed at 8:20 a. m., and was delivered to L. C. M. at 8:50 a. m., who, upon discovering the mistake, delivered it to W. C. M. at 10:00 a. m., and in time for the latter to take the earliest train, as requested by the message. *Held*, that there was not such a lack of diligence as to make the telegraph company liable for the penalty prescribed by Rev. St. 1909, § 3330.

Sturgis, P. J., dissenting.

Appeal from Circuit Court, Laclede County; L. B. Woodside, Judge.

Action by H. O. Abbott against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed.

Albert T. Benedict, of New York City, and A. W. Curry, of Lebanon, for appellant.

I. W. Mayfield & Son, of Lebanon, for respondent.

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**BRADLEY, J. Plaintiff,** the sender of a telegram, sued to recover the penalty provided in section 3330, R. S. 1909. The cause was submitted to the court without the intervention of a jury, and the finding and judgment was for plaintiff, and defendant appealed.

The charge in the petition is that "the defendant wholly failed and neglected to transmit and deliver said message to the designated addressee thereof by the most direct means available, without material alterations, promptly, and with impartiality and in good faith, but said message has not yet been delivered to the addressee thereof by this defendant." The message was filed at Rolla, Mo., at 8:20 a. m., March 27, 1918, and is as follows:

"W. C. Mayfield, Lebanon, Missouri:

"Come to Rolla to-day on No. 4. Important business. [Signed] H. O. Abbott."

The message arrived at Lebanon in due time, and was by the messenger delivered to L. C. Mayfield, who receipted for it. W. C. Mayfield and L. C. Mayfield are lawyers, and have offices in Lebanon just across the street from each other. The telegram was properly transcribed, but after its transcription an L was written in pencil over the W, making L. C. Mayfield the addressee instead of W. C. Mayfield, the original addressee. L. C. Mayfield, to whom the telegram was delivered, was unaware of any "important business" that might concern him in Rolla, and he called Abbott, the sender, by telephone, and of course ascertained that the telegram was for W. C. Mayfield. L. C. Mayfield, on learning this fact, immediately took the telegram across the street and delivered it to W. C. Mayfield about 10:00 a. m. W. C. caught the designated train and went to Rolla in response to the telegram, and plaintiff was in no wise affected by the mistake.

On cross-examination L. C. Mayfield testified:

"Q. Mr. Mayfield, when you found that this message wasn't for you, you had a conversation with the messenger, didn't you? A. Yes, sir; I want to say I don't remember just how. I believe I went to see him, because it had bothered me about two hours and worried me some. \* \* \* Q. In the conversation you had with the messenger or agent you told him you would deliver it to Mr. Waldo Mayfield, didn't you? A. I think as soon as I found out, got word, from Mr. Abbott that it wasn't for me, I immediately went over and delivered it to Waldo, and I saw the agent or messenger after that. Q. How long? A. Well, I couldn't tell; it wasn't very long. Q. You told him that you

had delivered it to Mr. Waldo Mayfield? A. That is my recollection."

The statute (section 3330, R. S. 1909) on which this cause is founded reads:

"It shall be the duty of every telegraph or telephone company, incorporated or unincorporated, operating any telephone or telegraph line in this state, to provide sufficient facilities at all its offices for the dispatch of the business of the public, to receive dispatches from and for other telephone or telegraph lines and from or for any individual, and on payment or tender of their usual charges for transmitting and delivering dispatches as established by the rules and regulations of such telephone or telegraph lines, to transmit and deliver the same to designated address and to use due diligence to place said dispatch in the hands of the addressee, by the most direct means available, without material alterations, promptly, and with impartiality and good faith under a penalty of three hundred dollars for every neglect or refusal so to transmit and deliver, to be recovered with costs of suit by civil action by the person or persons or company sending or desiring to send such dispatch; two-thirds of the amount recovered to be retained by the plaintiff, and one-third to be paid into the county school fund of the county in which the suit was instituted, and the burden of proof shall be upon the company to show that the wire was engaged as the reason for the delay in transmitting such dispatch."

[1] The intent and purpose of the statute is to secure to the patrons of telegraph lines "fair, prompt and impartial service." *Robertson v. Telegraph Co.*, 186 Mo. App. loc. cit. 286, 172 S. W. 60.

Plaintiff bottoms his cause upon the proposition that defendant did not "use due diligence to place said dispatch in the hands of the addressee." The record shows that both of the Mayfields mentioned are practicing lawyers in Lebanon, and have been for a number of years, and are well known in that vicinity. Defendant asked two declarations, one in the nature of a demurrer:

"No. 1. The court declares the law to be that if the defendant agreed with L. O. Mayfield, on discovery of the fact that the message was addressed to W. C. Mayfield, that he, the said L. O. Mayfield, would deliver the same message to the addressee, then the said L. O. Mayfield became the agent of the defendant, and, if he delivered the message promptly, impartially, and in good faith, the plaintiff cannot recover.

"No. 2. The court declares the law to be that the message in question was filed at 8:20 a. m., March 27, 1918, and transmitted and delivered to the addressee at about 10 o'clock a. m. the same day, the court doth find that the said message was delivered promptly, impartially, and in good faith, and the plaintiff cannot recover."

These declarations were refused. The evidence would not justify No. 1, because L. O. Mayfield testified that "he thought" that he delivered the message first and saw the agent of the defendant afterwards. Declara-

tion No. 2 was a demurrer, and we think should have been given.

[2] Failure to use due diligence to deliver the message to the addressee naturally presupposes in most any likely case that there was some delay in delivery. Proof of unreasonable delay makes a prima facie case. *Kendall v. Telegraph Co.*, 56 Mo. App. 192; *Smith v. Telegraph Co.*, 57 Mo. App. 259. If there was no delay—and there was none in the case at bar—then plaintiff could not make a prima facie case based on delay. If he cannot base his cause on delay, then on what? Not on alteration, because he is not proceeding on that theory, even if such theory was tenable. He cannot complain in this cause that the contents of a private dispatch were disclosed to a person other than the addressee. The penalty for that offense is prescribed by section 3334.

[3] Section 3330 is penal, and must be strictly construed. *Moore v. Tel. Co.*, 164 Mo. App. loc. cit. 171, 148 S. W. 157; *Eddington v. Tel. Co.*, 115 Mo. App. 93, 91 S. W. 438. 4 Words and Phrases (2d Series) p. 719, quoting from *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, defines "strictly construed" as follows:

"The rule that a criminal provision must be strictly construed means only that the court must not bring cases within the provision of such a statute that are not clearly embraced by it, nor by narrow, technical, or forced construction of words exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the Legislature, and the duty of the court is to give effect to that intention as disclosed by the words used."

In *Moore v. Tel. Co.* supra, the court defines "strict construction" as follows:

"By the expression 'strict construction' is meant that the scope of the statute shall not be extended by implication beyond the literal meaning of the terms employed, and not that the language of the terms shall be unreasonably interpreted. Courts should neither enlarge nor narrow the true meaning of penal statutes by construction, but should give effect to the plain meaning of words, and, where they are doubtful, should adopt the sense in harmony with the context and the obvious policy and object of the enactment."

Again, in this same case and speaking of section 3330, the court said:

"The plain letter of the statute as amended discloses the legislative purpose of requiring a telegraph company to use reasonable diligence not only in the transmission of a paid message over its wires, but in the prompt delivery of such message into the hand of the addressee by the most direct means available. This does not mean that the company is an insurer of the delivery of the message, or that it must employ extraordinary care and diligence to find the addressee and personally hand him the message, but that it must act with reasonable care and

promptness, such care as the hypothetical ordinarily careful and prudent man would employ in the performance of a duty emphasized by a penal law."

The Supreme Court in *Priest v. Captain*, 236 Mo. loc. cit. 462, 139 S. W. 204, approves of a definition of strict construction as follows:

"Construction of a statute or other instrument according to its letter, which recognizes nothing that is not expressed, takes the language used in its exact and technical meaning, and admits no equitable considerations or implications."

[4] It is not necessary, in order for the sender to recover the full penalty, to prove actual damage or pecuniary loss, but it is necessary to prove something. The messenger will be indulged the presumption, until the contrary is shown, that he acted in good faith when he delivered the message to L. C. Mayfield. The only question is, Did he act as the ordinarily careful and prudent person would have acted under the same or similar circumstances? There is no question but that the agent was attempting to act with due diligence. The message was filed at 8:20 a. m., and was delivered to L. C. Mayfield at 8:50 a. m. The agent was merely mistaken in the Mayfield that the message was for. Suppose that the messenger, upon arrival back at the office of defendant, had ascertained that he delivered the message to the wrong Mayfield, and had gone to L. C. Mayfield, and obtained the message and delivered it to the proper addressee by 10:00 a. m., the time when L. C. Mayfield delivered it; could it be said with reason that under such circumstances the statute would have been breached? We do not think so. Or suppose that L. C. Mayfield had called up the defendant's agent in Lebanon instead of calling up the sender, and had explained that the message was not for him, and the agent had requested that he (L. C. Mayfield) deliver to the proper addressee, and L. C. Mayfield had done so; could there, under such circumstances, be any room to charge a breach of the statute? We think not. We think that to extend the statute to cover the facts of the case at bar would be doing violence to its letter and its spirit. The judgment is reversed.

FARRINGTON, J., concurs.

STURGIS, P. J. (dissenting). The plaintiff, as sender of a telegraph message, sues to recover the penalty provided by section 8330, R. S. 1909, for failure to transmit such message and to use due diligence to place such dispatch in the hands of the addressee promptly. The facts are not disputed, and defendant appeals from an adverse judgment, claiming that the undisputed facts do not warrant a judgment against it.

The facts are that plaintiff, living at Rolla, Mo., paid for and delivered to defendant's agent at that place this telegraph message:

"Rolla, Mo., March 27, 1918.

"W. O. Mayfield, Lebanon, Mo.:

"Come to Rolla to-day on No. Four. Important business.  
H. O. Abbott."

This message was filed at Rolla at 8:20 a. m., and was correctly transmitted and received by defendant's agent at Lebanon in a short time thereafter. The addressee, W. O. Mayfield, was a lawyer at Lebanon, had been practicing there nine years, was well known, his name had been in the telephone directory for the last seven years, and his law office was in the business part of town. There was also another well-known lawyer, L. C. Mayfield, in this same town, having his office across the street from the office of W. O. Mayfield, the two being rivals in business, however, rather than associates. The defendant's agent at Lebanon, on receiving this telegram directed to W. O. Mayfield, erased the first initial, "W.," and wrote the initial "L." instead, thus making the message one for L. C. Mayfield instead of W. O. Mayfield. A messenger then took the message to L. C. Mayfield, delivering it to him at his office at 8:50 a. m. W. O. Mayfield was then at his office across the street.

After L. C. Mayfield received this message telling him to come to Rolla on train No. 4, he did not understand the "important business" mentioned in the message, and naturally enough called up the sender, H. O. Abbott, by long-distance phone, to learn the particulars. He then learned that the telegram was to W. O. Mayfield, and was disappointed at being out the telephone expense, and perhaps at losing the "important business." However, he then, of his own motion, took the telegram and delivered it to W. O. Mayfield at about 10:00 o'clock a. m., explaining doubtless his having called Mr. Abbott by phone. It was yet time for W. O. Mayfield to catch the train for Rolla, and he says he was not delayed or damaged.

The defendant offered no evidence and made no explanation whatever as to why it changed the name of the addressee of the telegram and then delivered it to L. C. Mayfield instead of W. O. Mayfield.

The defendant's theory of the case is indicated by the following instruction, which the court refused:

"No. 1. The court declares the law to be that if the defendant agreed with L. C. Mayfield, on discovery of the fact that the message was addressed to W. O. Mayfield, that he, the said L. C. Mayfield, would deliver the said message to the addressee, then the said L. C. Mayfield became the agent of the defendant, and, if he delivered the message promptly, impartially, and in good faith, the plaintiff cannot recover."

The facts hypothesized in this instruction are far from the true facts of the case. Instead of defendant discovering that the message was addressed to W. C. Mayfield, it knew that from the time the message was received, for so it read when received. And instead of defendant agreeing with L. C. Mayfield that he would deliver the message to W. C. Mayfield for it, the defendant did not know that L. C. Mayfield would or had done so till some time after he delivered it of his own accord and in consequence of the telephone communication with the sender. The defendant took no action in the matter whatever after delivering the message to L. O. Mayfield, and the first it knew of the telegram being delivered to W. C. Mayfield was when L. C. Mayfield later told the defendant's agent, by way of criticism, of his having done so. There is not the slightest ground for saying that L. O. Mayfield was defendant's agent in delivering this telegram to the addressee, for it was done without its knowledge, and there was no intention on defendant's part of having him do so.

The only other instruction offered by defendant is to the effect that because the message in question was filed at 8:20 a. m. and transmitted and delivered to the addressee at 10:00 a. m. the same day, the court must find that same was delivered promptly, impartially, and in good faith, regardless of how this was brought about, and that plaintiff cannot recover. The effect of this instruction is to excuse all derelictions of the defendant, provided the telegram did in fact reach the addressee in due time—the question of liability is to be determined solely by the result.

Turning to the statute here involved (section 3330, R. S. 1909), we find that it makes it the duty of every telegraph company to receive messages, and, on payment of the charges, "to transmit and deliver the same to *designated address* and to *use due diligence* to place said dispatch in the hands of the *addressee*, by the most direct means available, without material alterations, *promptly*, and with impartiality and good faith under a penalty of three hundred dollars for every neglect or refusal so to transmit and deliver" (italics ours), to be recovered by civil action by the sender of the message. It will be noticed that the statute imposes the duty on the telegraph company to *use due diligence* to deliver the message to the *addressee* promptly, and seeks by the penalty imposed to enforce this *duty to the public*, and it is the company's failure to perform or neglect in performing this public duty that is penalized. It is rightly held that defendant's liability for this penalty is determined by its use of due diligence to accomplish the result rather than by the result accomplished. The duty imposed and the test of liability is the use of due dili-

gence, and the result accomplished is valuable only as it throws light on that question. The ultimate aim to be accomplished is, of course, the result, but in order to do this the statute penalizes the lack of due diligence.

In *Moore v. Telegraph Co.*, 164 Mo. App. 165, 172, 148 S. W. 157, the court said:

"The plain letter of the statute as amended discloses the legislative purpose of requiring a telegraph company to use reasonable diligence not only in the transmission of a paid message over its wires, but in the prompt delivery of such message into the hand of the addressee by the most direct means available. This does not mean that the company is an insurer of the delivery of the message, or that it must employ extraordinary care and diligence to find the addressee and personally hand him the message, but that it must act with reasonable care and promptness, such care as the hypothetical ordinarily careful and prudent man would employ in the performance of a duty emphasized by a penal law."

To the same effect is *Rubeottom v. Western Union Tel. Co.*, 194 Mo. App. 234, 186 S. W. 749.

It is also uniformly held that the question of the sender or addressee of the telegram being damaged by the defendant's dereliction of duty in this respect is in no wise material in a suit for this penalty. *Jones, Telegraph and Telephone Companies*, §§ 632, 644; *Moore v. Telegraph Co.*, 164 Mo. App. 165, 171, 148 S. W. 157; *Grant v. Telegraph Co.*, 154 Mo. App. 279, 284, 138 S. W. 678.

Nor is partiality or bad faith on defendant's part a necessary ingredient of its liability. *Burnett v. Western Union Tel. Co.*, 89 Mo. App. 599, 606; *Wood v. Western Union Tel. Co.*, 59 Mo. App. 236, 241; *McCloud v. Telegraph Co.*, 170 Mo. App. 624, 632, 157 S. W. 101.

As to the purpose of statutes such as this one, and what constitutes an offense thereunder, it is said in *Jones, Telegraph and Telephone Companies*, § 630:

"The object of these statutes is to fix a penalty upon telegraph and telephone companies for a breach of duty which they owe to the public generally, and not to assess a certain fixed amount of damages for nonperformance of a contract to properly transmit a dispatch."

And again in section 631:

"As said at first, the object of these statutes is to provide a remedy for the enforcement of duties and obligations which these companies owe to the public generally, and which are not recognized by the common-law remedies. On account of this, and for the further fact that it has become absolutely necessary that some remedy should be provided for in order that these companies may not become derelict in their duties toward the public, these statutes should not be construed in the strictest degree, and the purpose and intention of the Legislature is that they shall not be."

And in section 632:

"It [the penalty] is imposed particularly as a punishment on the company for a breach of its duty, and to be an object lesson to others, and at the same time, the injured person is peculiarly benefited for the wrong."

Summing up the whole matter, this same author in section 644 says:

"When the negligence has been sufficiently shown, the company will be liable for the penalty, although no loss has been sustained. The object of these statutes is to enforce the duties and obligations which these companies owe to the public generally, and, when it is shown that they have failed to properly and promptly discharge them, the penalty may be recovered."

A suit to recover the penalty imposed for violation of a public duty is in the nature of a criminal prosecution by indictment (*State v. Mackin*, 51 Mo. App. 129), and in order to fix liability it is only necessary to show that the act in question belongs to the class of acts forbidden by the statute. What a third party may have done to avert or mitigate the effect of the wrongful act is not a defense.

In the present case, leaving out what L. C. Mayfield did of his own volition, there can be no doubt of the flagrant violation by defendant of its public duty in handling this telegram. The telegram was plainly addressed, and when transmitted by defendant to Lebanon, and received by the agent there, the addressee was W. C. Mayfield. He was a well-known man in this town of some 3,000 people, with his office on the main street of the town, where he had been practicing law for nine years. His name and address were and had been for years in the telephone directory. He was at his office at this time, and there is not the slightest excuse for not delivering this message to him within a short time after its reception. Instead of so doing, the defendant changed the name of the addressee to that of L. C. Mayfield for no other reason, as here disclosed, than that he, too, was a well-known lawyer, with an office across the street from that of the addressee, W. C. Mayfield, and delivered the message to him. It certainly was the public duty of defendant, and so the statute says, to use due diligence to deliver the message unchanged to the addressee promptly, and, if the defendant is penalized by the statute for neglect and failure to perform this duty, then the offense is clear, if not flagrant. By delivering the message in question to L. C. Mayfield, the defendant also violated section 3334, R. S. 1909, for disclosing the contents of a private dispatch to a person other than to him to whom it was addressed. Certainly the trier of the facts could find that the act of changing the name of the addressee and delivering the message to another person without inquiry

was not the act of a reasonably careful agent. Changing the name of the addressee tended to prevent the discovery of the error.

It is clear that when defendant changed the name of the addressee and delivered this message to L. C. Mayfield it considered its duty in the premises fully performed, and did not intend and in fact never did do anything further toward delivering same to the true addressee. Its only defense, or excuse, rather, is that a third person to wit, L. C. Mayfield, to whom it had wrongfully delivered the message, did on his own initiative and suggestion, and in no way at the instance or request of the defendant, and after considerable delay and expense on his part, ascertain that defendant had been remiss in its duty, and himself did what defendant should have done in the first instance. Defendant cites no case, and we believe none will be found, holding that the voluntary and friendly performance by a third party of a public duty owed by a defendant to a plaintiff, in order to save such plaintiff from loss, will excuse such defendant, and avert the penalty incurred by its own wrong, when such voluntary performance is after defendant has failed to perform such duty, and does not intend to perform same, and which in no way influences the defendant in the nonperformance of its duty. If so, the statute falls of its purpose of punishing the defendant for breach of its public duty. As well might a railroad company claim exemption from the penalty imposed by statute for failure to ring the bell or sound the whistle on approaching a public road crossing, when same is sued for by an informer, by proving that some third party, as a friend to one about to be injured, gave a warning which proved efficient. The defendant is just as guilty as if L. C. Mayfield had gone to Rolla in response to this telegram, and there learned that W. C. Mayfield, and not he, was the lawyer wanted. The fact that the telegram was delivered to W. C. Mayfield an hour or more later than it should have been by using due diligence, but yet in time to avert actual loss, was not due to anything done by defendant, and is quite different than if defendant had corrected its own wrong by reclaiming the telegram, and by its own agent, or through L. C. Mayfield acting for it, delivered the same to the true addressee. I do not agree, however, that even then would the defendant be guiltless under the facts here.

I do not hold that a telegraph company may not under proper circumstances use some other agency, as the post office, or a third person, as a hotel clerk (*Moore v. Telegraph Co.*, 164 Mo. App. 165, 148 S. W. 157), in order to accomplish or facilitate the delivery of a telegraph message, when such means reasonably does so; but such is not this case. There was no need of using L.

C. Mayfield in delivering this message, and the defendant did not intend to do so, saying nothing of the delay caused thereby. The defendant deserves no more credit for the act of L. O. Mayfield in delivering this telegram to the addressee than if it had thrown the same in the street or waste basket intending to leave it there, and a third party had by chance picked it up and delivered it to the addressee.

Since defendant's negligence is clearly established, and that is the thing penalized, the judgment should be affirmed.

### MARKLAND v. BROTHERHOOD OF AMERICAN YEOMEN. (No. 13029.)

(Kansas City Court of Appeals. Missouri. Jan. 6, 1919.)

#### 1. TRIAL $\S$ 242—REQUESTED INSTRUCTIONS—MISLEADING INSTRUCTIONS.

A misleading instruction is properly refused.

#### 2. TRIAL $\S$ 280(1)—REQUESTED INSTRUCTIONS—INSTRUCTIONS COVERED.

Requested instructions, the substance of which is covered by other instructions given, are properly refused.

Appeal from Circuit Court, Howard County; A. H. Waller, Judge.

"Not to be officially published."

Action by William F. Markland, a minor, by W. L. Markland, guardian and curator, against the Brotherhood of American Yeomen. Judgment for plaintiff, and defendant appeals. Affirmed.

Sam C. Major, of Fayette, for appellant.  
Willard P. Cave, of Moberly, for respondent.

BLAND, J. This is a suit upon an insurance policy of \$3,000 payable to Sallie W. Markland and plaintiff. The policy provided:

"That if said member shall \* \* \* die feloniously \* \* \* by the hand of any beneficiary herein, then this certificate shall be null and void."

The insured died at the hand of his wife, Sallie W. Markland, one of the beneficiaries in the policy, on May 10, 1916; she having shot him while he was in the act of entering his home in the village of Armstrong, Mo. His wife immediately thereafter shot to death herself.

Plaintiff recovered a verdict and judgment, and defendant has appealed.

Defendant makes the point that there was no evidence from which the jury might find that Mrs. Markland was insane at the time she took the life of her husband. The

facts in this case are substantially the same as those in the case of William F. Markland v. Clover Leaf Casualty Co., 209 S. W. 602, decided at this sitting but not yet officially reported. The question of insanity was discussed at great length and fully decided in the other case. Therefore this point will be ruled against the defendant here.

[1, 2] There was no error in the refusal of defendant's instructions. They were misleading, and what was attempted to be submitted to the jury therein was fully covered by the other instructions given at defendant's request.

The judgment is affirmed.

All concur.

### CITIZENS' TRUST CO. v. CADDICK MILLING CO. et al. (No. 2316.)

(Springfield Court of Appeals. Missouri. Jan. 13, 1919. Rehearing Denied Feb. 25, 1919. Motion to Transfer to Supreme Court April 7, 1919.)

#### 1. BILLS AND NOTES $\S$ 195—ACQUISITION OF POSSESSION BY THIRD PARTY—RELATION TO PAPEE—INTENTION.

The relation of a third party to a note, who pays the full amount thereof and secures possession of it, is a question of intention, to be ascertained from the evidence surrounding the whole transaction.

#### 2. BILLS AND NOTES $\S$ 523—PAYMENT OR PURCHASE OF NOTE BY THIRD PARTY—EVIDENCE AS TO INTENTION.

In suit on a note against the makers and payee by the receiver of a bank, evidence that the payee after maturity sent the note to the bank for collection, that the note was paid from makers' funds, that it was found in a drawer separate from the assets, and was not numbered nor entered upon the register, was sufficient to show that the bank did not purchase the note.

#### 3. BILLS AND NOTES $\S$ 496(1)—FINDINGS OF COURT—PRESUMPTION.

In a suit on a note by the receiver of a bank, a third party, failure by plaintiff to show that the bank purchased the note out of funds belonging to it justified the trial court in finding that the note was not purchased by the bank, a presumption arising in view of the fact that the note was sent to the bank for collection, and that the bank, as collecting agent, remitted to the payee.

Appeal from Circuit Court, Butler County; J. P. Foard, Judge.

Action by the Citizens' Trust Company, as receiver of the Pemiscot County Bank, against the Caddick Milling Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.



C. G. Shepard, of Caruthersville, for appellant.

Ward & Reeves, of Caruthersville, for respondents.

FARRINGTON, J. On the 30th day of October, 1913, plaintiff, Citizens' Trust Company, a corporation, as liquidating agent of the Pemiscot County Bank, a corporation, filed its original petition in this cause seeking to recover of the defendant on a note in the sum of \$861.25, made by the Concord Mercantile Company, A. C. Tindle, R. F. Coppage, and W. H. Johnson to the Caddick Milling Company, a corporation, and by the Caddick Milling Company indorsed:

"Pay to the Pemiscot County Bank, Caruthersville, Missouri. Caddick Milling Company, by D. E. Caddick, Pres. & Treas."

Later the Citizens' Trust Company was by the Pemiscot County Circuit Court appointed receiver of the Pemiscot County Bank, whereupon an amended petition was filed and this suit prosecuted by the Citizens' Trust Company as receiver instead of as liquidating agent.

The petition alleges that on the 2d day of January, 1912, defendants, A. C. Tindle, W. H. Johnson, and R. F. Coppage, by their promissory note executed by the said Concord Mercantile Company and signed by the said A. C. Tindle, W. H. Johnson, and R. F. Coppage, promised and agreed in writing for value received to pay defendant Caddick Milling Company the sum of \$861.25 on or before December 1st, 1912, with interest thereon at the rate of 6 per cent. per annum according to the true terms, tenor, and effect of said note, a copy of which is hereto attached and marked Exhibit A; that prior to the maturity of said note said defendant Caddick Milling Company, for valuable consideration, sold transferred, and assigned said note to said Pemiscot County Bank, who became, and still is, the bona fide holder of said note for value.

The petition then alleges that the note was due and unpaid, and asked judgment for the full amount of the face of the note with interest at 6 per cent. The judgment went for defendant Coppage. No disposition is made therein of the other defendants, and no point is made here because it failed to dispose of all the parties.

The only answer set out in the abstract is that of Coppage. He filed a general denial, and specially denied that the Pemiscot County Bank ever purchased the note, and alleged that it was sent to the Pemiscot County Bank for collection only, and that as such collecting agent it received the money due on the note from the makers, and that the note was discharged. The trial court found that the Pemiscot County Bank never purchased the note or became the owner of it, and further found that the note had been

paid while in the hands of the Pemiscot County Bank by the makers thereof, and that it was never the intention of the Caddick Milling Company, the payee in the note nor the intention of the Pemiscot County Bank, to whom it was sent for collection, that the note was sent for any other purpose than that of collection, and was not sent for purchase.

The plaintiff introduced in evidence the order appointing the Citizens' Trust Company as receiver for the Pemiscot County Bank; then introduced the note which was dated January 2, 1912, for the sum of \$861.25, due on December 1, 1912, payable to the Caddick Milling Company, for said sum of money at the Pemiscot County Bank, Caruthersville, Mo., signed by the Concord Mercantile Company, by A. C. Tindle, and signed individually by R. F. Coppage and W. H. Johnson. The indorsement borne on the back of the note was as follows:

"Pay to the Pemiscot County Bank, Caruthersville, Mo. Caddick Milling Company, by D. E. Caddick, Pres. & Treas."

The plaintiff here rested.

[1] The facts in this case are very similar to the facts in the case of Citizens' Trust Co. v. Ward, 195 Mo. App. 223, 190 S. W. 364, and one of the questions for determination here was disposed of on the appeal in that case, wherein we held that, where a stranger pays to the payee of a note the full amount thereof, he will generally be presumed to become the purchaser of the note; but after all the intention of the parties to the transaction governs, and if from the evidence surrounding the whole transaction it appears that the money advanced was in payment of the note, and not intended as a purchase, the law will treat the obligation on the note as fully discharged.

[2] The evidence in this case offered on the part of the defense clearly and without contradiction by written evidence discloses that the allegation in the petition, to wit, that the note was purchased before maturity, was not the fact, as the letter written by the officer having charge of the Caddick Milling Company at Grand View, Ind., the payee in the note, was written on December 2, 1912, at Grand View, Ind., one day after the note fell due, in which letter he said:

"Pemiscot County Bank, Caruthersville, Mo.—Gentlemen: We inclose for collection note signed Concord Mercantile Company, by A. C. Tindle," giving a full description of the note; the last sentence in the letter being, "Please try and make collection of the same, report to us, and oblige."

It appears that no immediate report followed, and that the traveling salesman of the Caddick Milling Company, between the date that this letter bearing this note was sent to the Pemiscot County Bank and the time it was paid, visited Caruthersville and inter-

viewed the parties, because a letter written January 18, 1913, by the Caddick Milling Company to the Pemiscot County Bank is as follows:

"Gentlemen: Our Mr. Craig just returned home and reported that Mr. Tindle, Mr. Johnson, and Mr. Coppage all reported to him that their checks were put in your bank last Saturday in settlement of the note which was sent you for collection, but as we have not yet received any returns from this item, we are writing to ask why we have not received exchange in settlement of this note. Kindly let us hear from you promptly, and very much oblige."

The agent handling this collection for the Caddick Milling Company testified orally that there was never any intention or thought that the note was sent to the Pemiscot County Bank for sale or assignment, but was only sent for collection, and when they received the money, which was forwarded after the letter of January 18, 1913, nothing further was ever heard of the note, and the officers of the Caddick Milling Company had no thought but what the note had been collected from the makers, and that the Pemiscot County Bank, as its collecting agent, had remitted the funds thus collected.

Mr. Tindle, who was one of the makers of this note, and a partner in the Concord Mercantile Company, was also the cashier of the Pemiscot County Bank, and while his evidence is of a questionable character, and is to be given such credit only as that to which a defaulting cashier and one who was convicted of such crime is entitled to, testified positively that the Pemiscot County Bank did not purchase this note, and that the note was paid out of the funds belonging to the Concord Mercantile Company.

The evidence of the defendant further shows that this note was found in a drawer in the bank, not at a place where the notes and assets of the bank were kept; that is to say, it was not in the note pouch where the assets of the bank were found when the bank was closed; neither did it bear a number indicating that it was one of the notes which was alive and owned by the Pemiscot County Bank; nor was there any entry of any such note made on the register which contained, or was supposed to contain, a list of the notes which were owned and were assets of the Pemiscot County Bank. This is evidence from which can be determined the intention of not only the Caddick Milling Company, which positively shows that there was no intention to sell, and is evidence from which can be reasonably inferred that the Pemiscot County Bank did not, and never intended to, purchase this note.

[3] The finding of the court on this is conclusive on this court, because there is substantial testimony to uphold his finding. The judgment, however, goes farther, and finds that the note was paid by the makers thereof to the Pemiscot County Bank, and

on this branch of the case the attempt to prove this fact is of a very questionable character, and we doubt its sufficiency to give rise to a finding that the payment was made by the owners, and that such finding should not have been made but were it for the fact that plaintiff's cause of action when the full facts were brought out rested on proof which it must make that it became the purchaser of this note, and that it was purchased out of funds belonging to the Pemiscot County Bank; and if the evidence attempting to prove the payment by the makers heretofore spoken of was not sufficient in law or in fact to base such a finding upon, it can be answered that in the face of the fact that this note was sent to the Pemiscot County Bank for collection and a remittance was made to the sender by such bank as a collecting agent, a presumption would arise that it had collected the money from the makers, and that it had not violated the express terms under which the note was sent to it; and before it could recover at all as a purchaser, there must be this proof that the money furnished by it was not furnished by some one from whom it had collected it, but was furnished out of its own assets.

The plaintiff's case fails utterly in this respect, and such failure to show that it did not pay it out of funds from which it would naturally be presumed to pay it, that is, the funds collected from the makers, justifies the trial court in making the finding that he did, that the note was not owned or purchased by the Pemiscot County Bank, and that, it having been paid, in the absence of any proof to the contrary, it could be presumed that it was paid in the natural way and through the natural channels for which the note was sent; that is, it was paid by the makers to the Pemiscot County Bank, the collecting agent, and remitted by such agent to its principal, the Caddick Milling Company.

The judgment on the record before us is clearly for the right party, and is affirmed.

BRADLEY, J., concurs.

STURGIS, P. J. (concurring). This case was tried by the court sitting as a jury, and the instructions given and refused are valuable only as indicating the theory on which the court decided the case. Correct instructions were given for both parties on the question of the note having been paid by the makers to the Pemiscot County Bank, holding said note for collection. The court then made a specific finding that said note was so paid by the makers. This finding is decisive of the whole case, and a careful reading of the evidence convinces me that the court's finding is amply sustained. Whether the court erred in his views of the law on other questions is not material.

BRADLEY, J., concurs.

(188 Ark. 86)

**PARK v. DEPRIEST. (No. 158.)**

(Supreme Court of Arkansas. March 24, 1919.)

**1. LANDLORD AND TENANT ⇐19—INTERFERENCE WITH RENTER—CONSTRUCTION OF CONTRACT.**

Defendant was not liable to plaintiff upon employment of plaintiff's renter, under Kirby's Dig. § 5080, amended by Acts 1905, p. 726, making one who interferes with, entices away, knowingly employs, or induces, a laborer or renter to leave employer or leased premises before expiration of contract, without consent of employer or landlord, liable for advances and damages, where renter had breached his contract with plaintiff without interference or enticement by defendant, before he was employed by defendant.

**2. LANDLORD AND TENANT ⇐19—EMPLOYMENT OF ANOTHER'S RENTER—ACTION FOR DAMAGES—INSTRUCTIONS.**

In action to recover for employment by defendant of plaintiff's renter in violation of Kirby's Dig. § 5080, as amended by Acts 1905, p. 726, instruction held not to mislead jury by making it think that defendant was not liable, if there had been a mere falling out between plaintiff and renter, or unless defendant in some way participated in bringing about the breach or enticed renter to leave plaintiff before expiration of his contract.

Appeal from Circuit Court, Lonoke County; Thos. C. Trimble, Judge.

Action by J. I. Park against R. I. Depriest. Judgment of dismissal, and plaintiff appeals. Affirmed.

Following is instruction No. 2 referred to in the opinion:

"You are instructed that if the defendant knew at the time that the said Hill had a contract with said Park, and owed said Park for supplies and advances and knowingly employed said Hill, then your verdict will be for the plaintiff; provided at the time he was in the employ of the plaintiff and was carrying out his contract and was persuaded and induced to abandon it."

W. P. Beard, of Lonoke, for appellant.

Trimble & Williams, of Lonoke, for appellee.

HUMPHREYS, J. Appellant instituted suit against appellee in the Lonoke circuit court to recover \$339.38 for employing his renter, A. B. Hill, in violation of Act 298, Acts 1905 of the General Assembly, amending section 5080 of Kirby's Digest. It was alleged in the complaint that A. B. Hill contracted with appellant to cultivate 40 acres of land on shares, in the year 1918; that, in compliance with the contract, appellant advanced Hill said amount in money and supplies; that, before the expiration of the contract, appellee did knowingly interfere with,

entice away, knowingly employ, and induce Hill to leave appellant, with knowledge of the existing debt for advances.

Appellee filed answer, denying all the material allegations in the complaint.

The cause was submitted to a jury upon the pleadings, evidence, and instructions of the court, which resulted in a judgment dismissing appellant's complaint. Proper steps were taken, and an appeal has been duly prosecuted to this court from the verdict and judgment.

Appellant established by his wife, Mrs. J. I. Park, who kept his books, the correctness of his account for medicines, doctor bills, moneys, and supplies furnished his tenant, A. B. Hill. She testified that, after allowing all credits to Hill for work, he owed her husband a balance of \$349.63 for advances when he left. In support of his claim, appellant himself testified, in substance, as follows: That A. B. Hill entered into a contract with him to cultivate 40 acres of land on shares in 1918. That, when not working in the crop, Hill was to work for him at the rate of \$2 per day, and allow his girls to work for him at the rate of \$1 per day, with the understanding that they might have the use of two cows. That the crop was planted and cultivated until June 13th, at which time they had a misunderstanding concerning the girls' work. That Hill became angry, cursed, threatened to whip him and to quit. That, when Hill left, he tried to call him back and talk to him, but Hill refused to come back or permit him to talk to him. That, a short time thereafter, appellee called him up over the phone and said:

"'Mr. Hill is up here wanting to hire to me and move on my place.' I said, 'Bob, he owes me between three and four hundred dollars that I furnished him to make his crop, and, if I was you, I would let that alone.'"

That he also told him he wanted Hill to finish his crop. That Hill moved the next day. That he then had Hill arrested and fined for cursing him.

In defense, appellee offered the testimony of himself and others, which was, in substance, to the effect that appellant and his tenant, A. B. Hill, quarreled over the price to be paid the girls for work; that, during the quarrel, Hill cursed, abused, and threatened to whip appellant; that appellant requested Hill to leave as soon as possible; that Hill left for the purpose of procuring another house and returned and moved away the next day; that appellee refused to furnish a team or in any wise assist Hill in moving, and refused at that time to employ him, but did permit him to move into a little house on his place for the reason that he had no other place to go; that, when Hill was arrested the next day, through the procurement of appellant, appellee went on his

bond, and, when fined for using abusive language, gave Hill work in order that he might earn the money with which to pay his fine; that, at the time appellee employed Hill, he knew he owed appellant for advances and that he had not completed the share crop contract.

The statute furnishing the basis of this suit is as follows:

"If any person shall interfere with, entice away, knowingly employ, or induce a laborer or renter who has contracted with another person for a specified time to leave his employer or the leased premises, before the expiration of his contract without the consent of the employer or landlord, he shall, upon conviction before any justice of the peace or circuit court, be fined not less than twenty-five nor more than one hundred dollars, and in addition shall be liable to such employer or landlord for all advances made by him to said renter or laborer by virtue of his contract, whether verbal or written, with said renter or laborer, and for all damages which he may have sustained by reason thereof."

[1, 2] Instructions were requested by appellant, presenting the theory that appellee would be responsible under said act for advances made by appellant to his tenant, Hill, if appellee employed him knowing that the rental contract had not been completed. The instructions given by the court, over the objection of appellant, were based upon the theory that appellee would not be responsible under said statute for advances if either appellee or appellant, or both, breached the rental contract without interference by appellee, and if Hill had moved from the premises of appellant without enticement or inducement by appellee before he employed him. Appellant insists that the court sent the case to the jury on the wrong theory. The contention of appellant is inconsistent with the interpretation heretofore placed upon the statute by the court. It was said by this court in the case of *Tucker v. State*, 86 Ark. 436, 111 S. W. 275:

"The words 'knowingly employ' are used in the statute in connection with other words which imply that the employment must be done as an interference with the laborer's performance of his prior contract with another or as an enticement of the laborer away from his employer or an inducement of the laborer to leave the services of his employer."

The correct interpretation of the statute was carried in the instructions given by the

court, and the instructions requested by appellant carrying a contrary interpretation were properly refused. It is said, however, that oral instruction No. 2, given by the court on his own motion, exempted appellee from liability if the jury found that there had been a mere falling out between appellant and his tenant, Hill, or unless appellee in some way participated in bringing about the breach or enticed or induced Hill to leave appellant before the expiration of the rental contract. The instruction is not accurately worded; but, when read as a whole, we do not think it conveys the meaning suggested by appellant. No specific objection was made to the instruction for the reasons now urged by appellant. No reversible error was committed by the court in giving oral instruction No. 2.

Again, it is said by appellant that it was contrary to the statute for appellee to employ appellant's tenant, Hill, until the contract of rental was terminated by mutual consent. Appellant requested, and the court refused, an instruction to that effect. The instruction was as follows:

"You are instructed that one party to a contract cannot of his own accord terminate that contract without the consent of the other contracting party."

It is insisted that the court erred in refusing the instruction. We think there is nothing in the statute preventing a tenant from breaching a rental contract with his landlord, and vice versa, and then seeking employment elsewhere, provided, of course, the subsequent employer or landlord did not interfere with the original employment or entice or induce the tenant to leave his first employer or landlord before the expiration of the rental contract. Such right was recognized by this court in the case of *Tucker v. State*, supra. In the course of the opinion in that case, the court said:

"It [referring to the statute] is not intended as a punishment for merely giving employment to a laborer during the unexpired term of his broken contract with another person."

The court did not err in refusing the instruction.

No error appearing in the record, the judgment is affirmed.

(138 Ark. 47)

**ATKINSON v. THOMAS. (No. 181.)**

(Supreme Court of Arkansas. March 8, 1919.)

**1. SPECIFIC PERFORMANCE §121(4) — CONTRACT IN NAME OF WIFE — REAL PARTY IN INTEREST—EVIDENCE.**

In a suit for specific performance of a contract by which defendant gave plaintiff an option to purchase land, evidence held sufficient to show that the contract, though made in plaintiff's name, was in fact made with her husband, who was the real party in interest.

**2. VENDOR AND PURCHASER §18(4) — REAL ESTATE CONTRACT—USE OF WIFE'S NAME—AUTHORITY TO RESCIND.**

Where one enters into an option contract to purchase land, using his wife's name, it is not necessary for him to secure authority from his wife, to rescind or annul the contract, since she is not a party in interest to the contract.

**3. HUSBAND AND WIFE §232(3) — RESCISSION OF CONTRACT—EVIDENCE.**

In a suit for specific performance of an option contract to purchase land from defendant for \$4,000, evidence held sufficient to show that \$200 was paid plaintiff's husband, the real party in interest, for the purpose of rescinding such contract, at time of selling his business to his brothers.

**4. FRAUDS, STATUTE OF §140—RESCISSION OF CONTRACT.**

Oral rescission of an option contract to purchase land is not in contravention of the statute of frauds, where the prospective purchaser did not enter into possession of the land.

Appeal from Lincoln Chancery Court; Jno. M. Elliott, Chancellor.

Suit by Mrs. Virgie Thomas against R. G. Atkinson. From a decree for plaintiff, defendant appeals. Reversed and remanded, with directions.

On the 8th day of February, 1917, Mrs. Virgie Thomas brought this suit in equity against R. G. Atkinson for the specific performance of a certain real estate contract. The contract which is the basis of the suit is as follows:

"Yorktown, Ark., April 1st, 1916.

"This agreement made and entered into this day and date by and between R. G. Atkinson, party of the first part, and Mrs. Virgie Thomas, party of the second part, witnesseth:

"That whereas the first party has purchased from H. L. Hunter certain lands located at or very near Yorktown, Lincoln county, Ark. Said lands fully described in deed from H. L. Hunter to R. G. Atkinson, dated March 31st, 1916, and recorded in Book 13, page 181, first party paying therefor the sum of four thousand, two hundred dollars cash, the said land having been leased by \* \* \* before this sale, they paying the annual rental of \$500 per year. Now the said sum of \$500.00 for rent is to be paid to first party hereto for the years 1916 and 1917, the said parties continuing to hold under said lease until it expires.

"On or before December 1st, 1917, the second party hereto is to have the option or privilege of purchasing said land for cash, and is to pay to the first party the sum of four thousand dollars cash. Upon the payment of said sum over and above the annual rent as stated above to first party or his assigns, then the first party is to make warranty deed to the second party, or her assigns, to the said lands; then this agreement is to become null and void;

"All improvements, if any are made during the life of this contract upon said lands, are to be free from any cost or charge to the first party hereto.

"Witness our hands and seals, day and date above written.

R. G. Atkinson.

"Mrs. Virgie Thomas."

The plaintiff alleged in her complaint that on or about the 2d day of January, 1917, she tendered the defendant, Atkinson, \$4,000 and demanded of him a deed conveying to her the lands described in her complaint, and that the defendant refused to carry out the terms of his contract.

The material facts are as follows: R. L. Thomas, H. W. Thomas, T. A. Thomas, and J. L. Thomas, who are brothers, carried on a plantation supply business at Tarry and Yorktown, towns about five miles apart. The business became in an insolvent condition, and a corporation composed of their principal creditors, called Lincoln Supply Company, was organized for the purpose of taking over and carrying on the business at each place. The Thomas brothers continued to manage the business. At the end of the year 1915, the business was not satisfactory to the creditors, and R. G. Atkinson purchased all the stock of the Lincoln Supply Company except two shares. He allowed the Thomas brothers to continue to manage the business. T. A. Thomas and J. L. Thomas conducted the business at Yorktown, and R. L. Thomas and H. W. Thomas conducted it at Tarry. In the fall of 1916, there arose dissension among the Thomas brothers about the conduct of the business. R. G. Atkinson had known them all their lives and tried to adjust their differences. The agreement, when the Lincoln Supply Company was formed, was that the Thomas brothers should succeed to the assets as soon as the debts were paid. J. L. Thomas had some judgments against him, and on that account conducted the business in the name of his wife, Virgie Thomas, and his deposits in the bank were carried in her name. J. L. Thomas had no interest in the business at Tarry. Atkinson first suggested to him that he buy out the Yorktown business. During this time J. L. Thomas and T. A. Thomas were conducting the business at Yorktown. About the beginning of the year 1917, J. L. Thomas sold his interest in the business to his brothers for the sum of \$8,000. In closing up the trade a check was given

him for \$8,200, the \$200 being given J. L. Thomas for an interest in a tract of land.

It is the contention of the defendant that this was given him for his interest in the land in controversy, and that he, and not his wife, is the real party to the contract now sought to be specifically enforced.

On the other hand, it is the contention of the plaintiff that this \$200 was in payment of another tract of land, and that she is the real party in interest to the contract involved in this suit.

T. A. Thomas first thought of buying the land involved in this suit. It was situated just back of their store at Yorktown and would be very useful to them in conducting their business there. It was the intention of T. A. Thomas and J. L. Thomas at that time to purchase the interest of their brothers in the Yorktown business at the end of the year 1916. Atkinson agreed to furnish \$4,000 of the amount necessary to purchase the land from Hunter, and T. A. and J. L. Thomas were to furnish the additional \$200, which was to be paid immediately. Thus far the facts are practically undisputed.

According to the testimony of J. L. Thomas, when it came time to close the trade with Hunter for the land in controversy, his brother T. A. Thomas told him that he could not furnish any part of the \$200 and would relinquish his rights to be a party to the contract. His wife, Virgie Thomas, then concluded to become a party to the contract, and she furnished the \$200 out of her own money. J. L. Thomas sold his interest in the business to his brothers for \$8,000, the money being furnished by R. G. Atkinson. Subsequently an additional \$200 was included for his interest in a tract of land, but which was not the tract of land in controversy. J. L. Thomas admitted that during all this time he had conducted his business in the name of his wife, but denied that her signature to the contract in question was placed there as a cloak for him and that he was the real party in interest in the contract for the sale of the lands involved in this suit.

Mrs. Virgie Thomas, also, testified that she was the real party in interest in the contract and signed her name as such. She denied that her husband had any interest whatever in the contract. She said that she made the \$200 from her cows and chickens and keeping a few boarders. She denied that she gave her husband the right to sell her interest in the contract at the time he sold out his interest in the business.

On the other hand, according to the testimony of R. G. Atkinson, Mrs. Virgie Thomas was not a party to the contract, but her husband signed her name thereto in pursuance of his usual custom; that he conducted his business in his wife's name; and that she knew nothing about the business and had no interest whatever therein. When J. L.

Thomas sold out his interest in the business, he was paid \$200 additional to cancel his interest in the contract involved in this suit. R. L. and T. A. Thomas both corroborated the testimony of Atkinson in every respect. In addition, T. A. Thomas said that he first thought of buying the land from Hunter because it was near their store and would be useful to them in conducting the business of selling plantation supplies; that their business furnished the \$200 which was paid by J. L. Thomas at the time the contract was entered into; that he thought J. L. Thomas had taken the contract for them, until some time after its execution, when he asked his brother to see it; that J. L. Thomas first put him off and finally showed him the contract, and, being reminded that the contract was not according to their agreement, J. L. Thomas said that he would change it. Both R. L. and T. A. Thomas testified in positive terms that the \$200 paid J. L. Thomas was for his interest in the land in controversy, and that Mrs. Virgie Thomas was never considered a party to the contract, but that her name was only signed thereto in pursuance of the custom of J. L. Thomas in transacting all his business in his wife's name; that Mrs. Virgie Thomas had no means of her own at any time.

Frank Knox, an employé in the business, testified that he had known Mrs. Virgie Thomas for 10 or 15 years, and that she had no means or estate of her own; that J. L. Thomas conducted all his business in her name and deposited his money in the bank in her name.

The cashier of the bank upon which the check was drawn testified that he first drew the check for \$8,000, and that then it was suggested that a certain real estate deal had been left out which would increase the check \$200; that the first check was destroyed, and a second one written by him which included the \$200; that the \$200 was paid in settlement of some real estate deal with which the parties interested seemed familiar.

It was also shown by the manager of an oil mill with whom the parties conducted business, and had numerous transactions, that Mrs. Virgie Thomas never had any interest in the business; that he had numerous transactions with her husband about the business, and he always claimed it to be his own; that he never heard of Mrs. Virgie Thomas being interested in any manner whatever in the business. Other facts will be referred to in the opinion.

The chancellor found the issues in favor of the plaintiff and caused a decree for specific performance to be entered of record. The defendant has appealed.

Taylor, Jones & Taylor, of Pine Bluff, for appellant.

Crawford & Hooker, of Pine Bluff, for appellee.

HART, J. (after stating the facts as above). The record shows that the lands in controversy were purchased from H. L. Hunter for the sum of \$4,200, of which R. G. Atkinson paid \$4,000, and the remaining \$200 was paid either by J. L. Thomas for himself and brother or by Mrs. Virgie Thomas. Atkinson took possession of the lands and has held them ever since. It is the contention of the plaintiff that she signed the contract on her own account; that her husband, J. L. Thomas, had no interest in the lands; that she never authorized him to dispose of her interest therein when he sold to his brothers all his interest in the business conducted by them; and that he did not do so.

On the other hand, it is the contention of the defendant, Atkinson, that he made the contract with J. L. Thomas for the benefit of himself and brothers, and that J. L. Thomas signed his wife's name thereto because he was transacting all his business in her name. In determining whether the contract in question was the independent contract of Mrs. Virgie Thomas, or whether her name was signed thereto for the benefit of her husband, and, in consequence, it was his contract, we must not only consider the testimony directly bearing on this phase of the case, but also all the testimony relating to the conduct of the parties antecedent to and following the signing of the contract which would tend to show the real character of the transaction and who was the real party in interest.

On the one hand, J. L. Thomas testified that his wife, Mrs. Virgie Thomas, executed the contract for herself, and that he had no interest in it. His wife corroborated his testimony and testified that she furnished the \$200 that went to pay for the land over and above the \$4,000 furnished by the defendant, Atkinson. She testified that she earned the \$200 by the sale of butter, milk, and chickens, and kept a few boarders. She made this general statement, but did not enter into any particulars about how much she made, or to what extent she was conducting a separate business. She does not show that she had any bank account of her own, and the testimony of her husband shows that he kept his own bank account in her name and that it was subject to his check.

On the other hand, it is admitted that the defendant, Atkinson, paid \$4,000 of the purchase price of the lands to Hunter, and that he did this as an accommodation to J. L. and T. A. Thomas. The intention at the time was that they should have an option to purchase the land under the terms mentioned in the contract which is the basis of this suit, and Atkinson only furnished the money as an accommodation to them. Atkinson testified in positive terms that he made the contract with J. L. Thomas and that his wife's name was signed thereto because J. L. Thomas carried

on all his business in her name; that Thomas so explained the transaction to him at the time. T. A. Thomas was the one who first thought of purchasing the lands and said that they were to be purchased for the benefit of their business, which was that of furnishing supplies to plantations. He said that it was thoroughly understood that the lands were to be purchased for his brother J. L. Thomas and himself, and that J. L. Thomas so admitted to him after the contract had been made and explained that it was made in his wife's name because he transacted all his business in her name. He further testified that the \$200 was taken out of their business and applied towards the purchase price of the land.

The undisputed evidence shows that J. L. Thomas transacted all his business in his wife's name. J. L. Thomas himself admitted this to be true. It is not claimed that Mrs. Virgie Thomas ever entered into any other business transaction of her own. All the witnesses say they have known her for quite a number of years and that she had no independent estate or business of her own. She herself does not claim any, except what she might have made off of her cows and chickens, and does not even pretend to state how much this was. So it may be said that the undisputed evidence shows that J. L. Thomas had conducted all his business in his wife's name for a period of several years before the execution of the contract in question, and that during all this time his wife never engaged in any business transaction whatever, nor did she ever interest herself in her husband's business affairs. These circumstances shed light upon the transaction in question and tend to show its true character.

[1] In addition, the record shows that Atkinson furnished the money for the purchase of the land in question as an accommodation to J. L. and T. A. Thomas. He did not expect at the time that there would be any considerable rise in the value of land and expected them to pay him his money back and take a conveyance of the land to themselves. He knew that they had means with which to purchase the land and that Mrs. Thomas did not have any means whatever. These facts, in addition to those already related, tend strongly to show that the contract was made with J. L. Thomas and that the use of the name of Mrs. Virgie Thomas in signing the contract was merely a cloak, or at least was the use by J. L. Thomas of the trade-name by which for years he had carried on his business and it is immaterial whether he or she actually affixed her signature to the contract.

When all the facts and circumstances preceding and following the execution of the contract are read in the light of the evidence relating to the execution of the contract, we are of the opinion that the clear preponder-

ance of the evidence shows that the contract was made by J. L. Thomas, and not by Mrs. Virgle Thomas.

[2, 3] It is next contended that a clear preponderance of the evidence shows that the option contract was annulled or rescinded by the act of the parties and that the \$200 was restored to J. L. Thomas. We agree with counsel in this contention. It is true Mrs. Virgle Thomas testified that she did not give J. L. Thomas any authority to rescind the contract; but, if we are correct in holding that she was not a party in interest to the contract, it would not be necessary for him to have permission from her. J. L. Thomas admits getting \$200 over and above the \$8,000 which was to be paid for his share in the business and that the \$200 was paid him on account of a real estate transaction; but he says that it was on account of another real estate transaction which he describes. The record shows, however, that this tract of land had been sold prior to the time he sold out his interest in the business and that the proceeds had gone into the business. The cashier of the bank who drew the check in favor of J. L. Thomas for the \$8,000 states that the \$200 was paid him for his interest in a land contract. T. A. Thomas and Atkinson both testified that the contract was the one involved in controversy in this case. This land was situated near to the store and would be considered a considerable asset in the business. Atkinson was furnishing the money with which to buy out the interest of J. L. Thomas. He knew that Mrs. Thomas did not have any independent means of her own and that the object of buying the lands in controversy was to use it in connection with the business. The parties did not at that time anticipate any considerable rise in the price of real estate. It is conceded that Mrs. Thomas would have had to borrow the money with which to pay for it when she exercised an option to purchase it.

When all these facts and circumstances are read and considered in the light of each other, we are of the opinion that a clear preponderance of the evidence shows that the \$200 was paid J. L. Thomas for the purpose of annulling and rescinding the contract which is the basis of this suit.

[4] Again, it is sought to uphold the decree upon the plea of the statute of frauds. It is claimed that the admission of oral evidence to show a rescission of the contract would be in contravention of the statute of frauds. J. L. Thomas did not go into possession of the lands. He was paid back the \$200 which he had paid out under the contract, and, as we have already seen, a preponderance of the evidence shows that this was for the purpose of rescinding the contract. It is firmly established that a parol discharge of a written contract within the

statute of frauds is available in equity to repeal a claim upon that contract. *Browne on Statute of Frauds* (5th Ed.) § 483; *Wood on Statute of Frauds*, § 408; *Phelps v. Seely*, 22 Grt. (Va.) 573; *Marsh v. Bellew*, 45 Wis. 36; *Jones v. Booth*, 38 Ohio St. 405; *Miller v. Pierce*, 104 N. C. 889, 10 S. E. 554; and *Arrington v. Porter*, 47 Ala. 714.

It follows that the decree must be reversed, and the cause will be remanded, with directions to the chancellor to dismiss the complaint for want of equity.

(138 Ark. 81)

ST. LOUIS S. F. RY. CO. v. WINSLOW.  
(No. 156.)

(Supreme Court of Arkansas. March 24, 1919.)

1. ACCORD AND SATISFACTION  $\S$  17—EXECUTORY AGREEMENT — PERSONAL INJURY SETTLEMENT.

An executory agreement to settle for personal injuries for a specified amount provided the physician of the injured person will give a certificate approving thereof does not defeat cause of action for injuries where the physician refused to give certificate and no payment was made; such agreement not constituting an accord and satisfaction, inasmuch as there was no satisfaction.

2. DAMAGES  $\S$  132(2)—PERSONAL INJURIES—EXCESSIVE VERDICT.

Where 70-year old woman in good health was violently thrown from train injuring her back and hips and causing partial paralysis of a leg, was confined to her bed for four weeks, and at the time of the trial was suffering pain and frequent violent headaches as the result of the injury with likelihood that injuries would be permanent, a \$1,500 verdict was not excessive.

Appeal from Circuit Court, Craighead County; R. H. Dudley, Judge.

Action by Rebecca Winslow against the St. Louis San Francisco Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Evans, of St. Louis, Mo., W. J. Orr, of Springfield, Mo., and Basil Baker and E. L. Westbrooke, both of Jonesboro, for appellant.

J. F. Gautney and F. C. Mullinix, both of Jonesboro, for appellee.

SMITH, J. Appellee recovered judgment to compensate an injury sustained by her while traveling as a passenger on one of appellant's trains; and only two errors are assigned for the reversal of the judgment.

The first is that the court erroneously re-



fused to permit appellant's claim agent to testify:

"That at the instance of the appellee's agent, designated by her in his and the agent's presence, the agent went to see Charlie Winslow, her son and agent, and they agreed upon a settlement by the appellant paying to him, as appellee's agent, \$100, upon condition that Dr. Copeland, who was appellee's physician, should give a statement to justify the claim agent's action in paying the railroad company's money; that Dr. Copeland not only declined to make the statement, but advised Charlie Winslow not to accept the money, and further advised him to refrain from making a statement in connection with the alleged injury. No money was paid, and no agreement was made by Mrs. Winslow except through her son, Charlie Winslow, who was her agent, and no agreement was put in writing."

[1] It sufficiently answers this contention to say that Dr. Copeland refused to give a certificate; and, if there was an accord, there was no satisfaction thereof. Appellee could never have maintained a suit on the executory agreement sought to be proved; nor can appellant rely upon it to defeat the cause of action which it was proposed to settle. *St. Louis & San Francisco Ry. Co. v. Mitchell*, 115 Ark. 339, 171 S. W. 895, Ann Cas. 1916E, 317; *Lewis v. Arnn*, 127 Ark. 106, 191 S. W. 914.

[2] The second assignment of error is that the verdict, which was for \$1,500, is excessive. This assignment cannot be sustained in view of the testimony offered on appellee's behalf, to which we are required to give full faith and credit in testing its legal sufficiency to support the verdict. This testimony was to the effect that appellee, who is 70 years of age, was suddenly and violently thrown from a slowly moving train; that she fell and injured her back and hips either in the fall or while she was being dragged after the train was set in motion, and was confined to her bed about 4 weeks as a result of the injury, during all of which time she suffered considerable pain; that she continues to suffer pain and has frequent headaches as a result of the injury, and that these headaches are so violent as to cause the head to be drawn backwards; that there is a partial paralysis of her right leg as a result of these injuries; and that she frequently falls while attempting to walk. Dr. Copeland, the witness who refused to give the certificate upon which a settlement for \$100 would have been made, testified that it was not likely that appellee would ever recover from the result of her injuries, and that they were probably permanent. The evidence in appellee's behalf was that she was in good health and active for a woman of her age prior to her injury.

No prejudicial error appearing, the judgment of the court below is affirmed.

# CHRISMAN v. CHRISMAN.

(Supreme Court of Tennessee. March 28, 1919.)

## 1. WILLS §571—DISPOSITION OF PROCEEDS OF LIFE POLICY.

The proceeds of life policy payable to testator's estate did not pass under his will giving all his estate, both real and personal, to his wife to have and hold in her own right, but inured to the benefit of widow and only child of testator by former marriage as provided by Shannon's Code, §§ 4030, 4231.

## 2. WILLS §571—DISPOSITION OF PROCEEDS OF LIFE POLICY.

To effectuate the clear intentment of Shannon's Code, §§ 4030, 4231, and create the exemption in favor of widow and children, the proceeds of insurance must take a different course from that of disposition by will, for so long as the same are incorporated in the assets of a deceased husband they remain liable to his debts and subject to the claims of creditors under section 3985.

## 3. WILLS §571—DISPOSITION OF PROCEEDS OF LIFE POLICY—INTENT.

Testator is presumed to have known the effect of Shannon's Code, §§ 4030, 4231, relative to disposition of his life insurance, and, in the absence of his express intent to the contrary, the statutory provisions are effective, though it was wholly within his power to prevent application of the sections.

## Certiorari to Court of Civil Appeals.

Suit by William B. Chrisman, by next friend, against Annie P. Chrisman, individually and as executrix of E. E. Chrisman. The Chancellor dismissed the claims of the complainant in all respects, except as to the proceeds of deceased's life insurance, decreeing that complainant was entitled to receive one-half of the same. From this decree both complainant and defendant perfected appeals to the Court of Civil Appeals, which court affirmed the decree of the Chancellor. The case is before the Supreme Court upon petition for certiorari by defendant. Decree of Chancellor affirmed.

Baskerville & McGlothlin, of Gallatin, for complainant.

Wm. A. Guild, of Nashville, for defendant.

BACHMAN; J. E. E. Chrisman died in Sumner county, Tenn., March 9, 1907, leaving as his survivors Mrs. Annie P. Chrisman, his widow, the defendant herein, and one child, William B. Chrisman, a son by a former marriage, who instituted this suit in the chancery court of Sumner county on July 17, 1910.

The will of Mr. Chrisman is as follows:

"Gallatin, Tennessee, May 4, 1903.

"I, Ernest E. Chrisman, hereby make and publish my last will and testament, revoking

and annulling any and all others heretofore made by me.

"To my wife, Annie Chrisman, I give and bequeath all of my estate, both real and personal, to have and to hold in her own name and right.

"I hereby appoint my wife, Annie Chrisman, as guardian of the person of my son, Will Chrisman, such guardianship to be absolute and without the advice or interference of any other person. It is my desire that my friend, William A. Guild, be her legal counsel and adviser in such matters as his services may be needed.

"I hereby direct that if I should be the owner of the Semi-Weekly News at my death that it be sold at the earliest possible date.

"In giving all the property of which I am possessed to my wife, Annie Chrisman, I do so because of her love and affection for me, and believing she will use it as I would in caring for those I love.

"[Signed] Ernest E. Chrisman."

The bill of complainant contended that the will constituted a trust in favor of the complainant and that he was entitled to a one-half interest in the estate, alleging that its net value was some \$10,000; and further that the life insurance of his father was in terms payable to the deceased's estate, and that such insurance did not pass under the will, but under the statute hereinafter set out, the amount of the insurance being \$2,464.87.

A demurrer to the bill was sustained by the chancellor, and upon appeal to the Supreme Court the same was reversed, and the case came on to be heard. In the answer filed by the defendant any trust was specifically denied. It was also denied that the complainant was entitled to receive any part of the proceeds of the life insurance of the deceased. It set out that when Mr. and Mrs. Chrisman were married the complainant was then a child of about four years; that he lived with the defendant and his father, and after the father's death remained with the defendant until the year 1909, when he left without her consent and contrary to her wishes. The answer further alleged that the estate of the deceased, including insurance, amounted to some \$6,000, and that the defendant had paid debts of the deceased amounting to \$10,000.

Upon the hearing the chancellor dismissed the claims of the complainant in all respects except as to the proceeds of the policy of insurance, decreeing that the complainant was entitled to receive one-half of the same, amounting to \$1,232.33, with interest from the date of the filing of the bill; the amount totaling \$1,818.72. From this decree both complainant and defendant perfected appeals to the Court of Civil Appeals, which court affirmed the decree of the chancellor.

[1] The case is before us upon petition for certiorari by the defendant widow, and the assignment of error here presents the one question: Did the proceeds of the policy of

insurance of the life of the deceased pass under the terms of his will, or does it inure to the benefit of his widow and child, as provided in our statute?

Sections 4030 and 4231 of Shannon's Code are as follows:

"Sec. 4030. A life insurance effected by a husband on his own life shall inure to the benefit of the widow and next of kin, to be distributed as personal property, free from the claims of his creditors."

"Sec. 4231. Any life insurance effected by a husband on his own life shall, in case of his death, inure to the benefit of his widow and children; and the money thence arising shall be divided between them according to the law of distributions, without being in any manner subject to the debts of the husband, whether by attachment, execution, or otherwise."

These sections of the Code, being section 3 of chapter 216 of the Acts of 1845-46, have been construed by this court in numerous cases wherein creditors have sought to have satisfaction of their claims out of the proceeds of life insurance, and it has been consistently held that the act in no wise limited the authority of the husband to control policies of insurance upon his life where the same are payable to his estate—such insurance is the property of the husband and subject to his disposition either during his lifetime or by will. *Rison v. Wilkerson*, 35 Tenn. (3 Sneed.) 569; *Williams v. Carson et al.*, 68 Tenn. (9 Baxt.) 516; *Nashville Trust Co. v. First National Bank*, 123 Tenn. 617, 134 S. W. 311.

It is likewise decided by our cases that, notwithstanding the absolute control and authority of the husband over policies of insurance on his life made payable to his estate, the proceeds of the same do not pass by will in the absence of the use of apt words used therein clearly indicative of such intention, but goes to those entitled, by virtue of the provisions of the statute referred to. *Cooper v. Wright*, 110 Tenn. 214, 75 S. W. 1049; *Rowlett v. Rowlett*, 116 Tenn. 467, 95 S. W. 821.

But it is contended on behalf of the defendant Mrs. Chrisman that the principle above announced is not applicable to the case under consideration for the reason that here no claims of creditors are involved, the contest being one between the widow and child of the deceased husband, and that the statute does not control and was not intended to apply in such cases. To determine this we must look to the purpose of the act and its effect when applied. Its purpose, as expressed in the case of *Harvey, Adm'r, v. Harrison*, 89 Tenn. 476, 14 S. W. 1085, is as follows:

"The primary purpose of the act was to exempt life insurance from the claims of creditors, and this is expressed in emphatic and conclusive language. The secondary purpose was to provide for the disposition of this fund. The

words inserted for this subordinate intent, dissimilar from the primary object of the act, will not restrict the scope of the act in its main intent. The purpose of the enactment is clear, and this must guide in its application. It was to enable a husband or father to provide a fund after his death for his family."

Again, in *Rose v. Wortham*, 95 Tenn. 511, 82 S. W. 459, 30 L. R. A. 609, it is said:

"It was intended by the statute to provide a fund for the widow and children and next of kin, which, upon the assured's death, should go to them free from the claims of creditors, and, like other exemption laws, they have been liberally construed to carry out the general purpose."

The effect of the act in carrying out its obvious purpose is to remove and set apart, from the assets of the estate of the husband at the time of his death for the benefit of his widow and children, the proceeds of his life insurance, and to prevent such funds from passing into the hands of his executor or administrator. *Williams v. Carson et al.* and *Rison v. Wilkerson*, supra.

As stated in *Pritchard on Wills*, § 628, the effect of the statute is as follows:

"Its operation is to prefer the widow and children, or next of kin, to creditors, and to prevent the fund passing into the hands of the executor or administrator as assets for the payment of debts, and to require him to distribute it under the statute."

[2] To effectuate the clear intendment of the act and create the exemption in favor of the widow and children, the proceeds of insurance must necessarily take a different course from that of disposition by will; for, so long as the same are incorporated in the assets of a deceased husband, they remain liable to his debts and subject to the

claims of creditors, as provided in section 3985, Shannon's Code, as follows:

"Every debtor's property, except such as may be specially exempt by law, is assets for the satisfaction of all his just debts."

This court has heretofore decided that a policy of insurance coming within the provisions of our statute herein considered is not to be considered as assets, but is exempt property out of which the year's support for a widow and her family cannot be set apart; the insurance fund, by the statute, is separated and divorced from the assets of the husband. *Agee v. Saunders*, 127 Tenn. 683, 157 S. W. 64, 46 L. R. A. (N. S.) 788.

The case of *Weil v. Trafford*, 3 Tenn. Ch. 108, is urged upon us as opposed to our decision herein. This case was before the court in the case of *Cooper v. Wright*, supra, and was not approved. It is in conflict with the decision in *Agee v. Saunders*, supra, which, in our opinion, announces the correct effect of the statute and one to which we adhere.

[3] In diverting the course of such funds, the statute provides that the same shall be divided between the widow and children according to the law of distributions, and, while it is wholly within the power of the husband to prevent the application of the statute, such an intention will not be presumed, but must appear from unmistakable terms—such is the substance of our holdings where claims of creditors are involved, and we can see no reason for the application of a different principle in this case. The testator is presumed to have known the effect of statutory provisions, relative to the disposition of his insurance, and, in the absence of his expressed intent to the contrary, the statute is effective.

The decree of the chancellor is affirmed.

(183 Ky. 718)

**BRYANT v. HAMBLIN et al.****SUTTON et al. v. BRYANT et al.**

Court of Appeals of Kentucky. March 28, 1919.)

**1. PUBLIC LANDS — 151(8) — PATENTS — VALIDITY.**

Where vacant lands were purchased from county treasurer in 1846, under Acts 1884-85, c. 875, and Acts 1836-37, c. 370, for notes and bonds, in view of Acts 1849-50, c. 370, legalizing the receipt of bonds, and Acts 1850-51, c. 388, giving citizens of Whitley county until March 1, 1852, to return plats, certificates of surveys and treasurer's receipts, and to register all land purchased, pay price, and take out grants, failure to so do prior to such date renders the grant void as to subsequent purchasers.

**2. QUIETING TITLE — 10(2), 44(1) — RECOVERY — STRENGTH OF PLAINTIFF'S TITLE — PATENT BOUNDARIES — EXCLUSIONS — EVIDENCE.**

A party must recover on the strength of his own title, and it is not sufficient, as against one claiming under a valid grant, that the property in contest is embraced within the exterior boundary of the patent, but it must be shown that it was not within the exclusions.

**3. BOUNDARIES — 37(1) — EVIDENCE — SUFFICIENCY.**

In an action to enjoin trespass on land, evidence to support defendant's claim of ownership held insufficient to show location of boundaries.

**4. ADVERSE POSSESSION — 13 — ELEMENTS.**

To establish title by adverse holding, the possession must have been continuous, actual, open, notorious, and peaceable for at least 15 years; the exterior boundary lines of the land claimed must be well defined, that is, either actually inclosed or so marked that the land is susceptible of identification by its description; and the possession must have been of such character and extent as to exclude the idea that the right of possession was in any one else.

**5. ADVERSE POSSESSION — 35(3) — ACCIDENTAL INCLOSURE — TIME OF LIMITATION TO QUIET TITLE — EVIDENCE.**

Evidence held to show that a small tract was inclosed by claimant's ancestor accidentally and unintentionally, without claim of right or possession.

**6. APPEAL AND ERROR — 655(1) — RECORD — DIRECTION TO CLERK TO COPY RECORD — NOTICE — MOTION TO STRIKE.**

Where a schedule directed the clerk to copy the entire record, so far as it affected any of the parties to the appeal, unless there is an omission of some part of the record affecting some of the parties, a motion to strike should be overruled, where there were no portions copied not pertinent to the appeal, particularly where the objecting party had previous notice of the schedule.

**7. APPEAL AND ERROR — 655(1) — SCHEDULE — RECORD.**

Where a schedule has been filed as prescribed by Civ. Code Prac. § 787, calling for a

complete record, and the parties have consented to try the appeal on the transcript, in view of rule 14 (154 S. W. ix), that the court will conclusively presume, after submission, that the record is complete, motion to strike a part of the record must be overruled.

Appeals from Circuit Court, Whitley County.

Action by Roberta S. Bryant against Pleas Hamblin and others to enjoin trespassing upon certain lands. By an amended petition Richard F. Hickman and others were made defendants, for claiming an interest in said land, and an injunction asked against each of them. From a judgment entered therein, the plaintiff prosecutes an appeal against Pleas Hamblin, Richard F. Hickman, the Sutton heirs, and the Sumner heirs, and the defendants Richard F. Hickman and the Sutton heirs prosecute an appeal against the plaintiff, Roberta S. Bryant, and the defendant Pleas Hamblin. Judgment, in so far as it affects the Sutton heirs and Richard F. Hickman, affirmed; as to the Sumner heirs, reversed; as to the Hamblin heirs and Pleas Hamblin, so far as it adjudges that Pleas Hamblin is the owner of a certain described tract, reversed, and remanded to the lower court for further proceedings consistent with the opinion.

H. C. Gillis, of Williamsburg, for appellants Sutton and others.

Stephens & Steely, of Williamsburg, for appellant Bryant.

J. B. Snyder, B. B. Snyder, and Rose & Pope, all of Williamsburg, for appellees.

QUIN, J. The appellant Roberta S. Bryant, plaintiff below, is the owner of approximately 1,000 acres of land under what is familiarly known as the "Hudson and Wait patent," No. 24,081, dated October 18, 1855, under a survey of September 4, 1854. All land previously appropriated within the exterior boundary of said patent is expressly excluded therefrom. Plaintiff is asserting title to only so much of the land as was vacant and unappropriated on the day of the survey; the acts complained of in her petition having been committed on the tract not embraced within the exclusion. She alleges that the defendants Pleas Hamblin and others had entered upon her lands, on the waters of Buzzard, Crow, and Cantrill creeks, and had begun cutting the timber and committing other trespasses thereon, and she asked that they be enjoined and restrained from committing other trespasses upon her property.

By an amended petition Richard F. Hickman, the heirs of J. F. Sutton, the heirs of Nehemiah Sumner, and others were made defendants; it being alleged they were claiming an interest in the land described in the petition, and were threatening to commit

trespasses upon said land. An injunction was asked against each of them.

From a judgment in 10 paragraphs, entered by the court below, the plaintiff, Roberta S. Bryant, has prosecuted an appeal against Pleas Hamblin, Richard F. Hickman, the Sutton heirs, and the Sumner heirs; while Richard F. Hickman and the Sutton heirs are prosecuting an appeal against Roberta S. Bryant and Pleas Hamblin.

The several defendants, not only claim all, or a major portion, of the land described in the petition, but claim the land as against one another, and to certain portions of the land involved in this lawsuit there are three or more claimants. Some of the defendants filed no pleadings, and no proof was taken in their behalf; others filed pleadings, took proof, and from the judgment, in so far as it denied their claim, they have appealed. The present appeal, therefore, resolves itself into a contest as to ownership of the land involved, as between Roberta S. Bryant, Pleas Hamblin, Richard F. Hickman, the Sutton heirs, and the Sumner heirs; the case having been briefed on behalf of each and all of the above named.

Pleas Hamblin is the son of Jackson Hamblin, and represents the heirs of his father. Title is claimed by the various parties under surveys and by adverse possession. We will discuss the case under several subheads, taking up in order the claims of each of the parties to the appeal.

#### Sumner Heirs.

In paragraph 6 of the judgment it is adjudged that the heirs of Nehemiah Sumner are entitled to the three tracts set out in their answer, not covered by the claims of David Privitt or the possession and title of Pleas Hamblin. The court then specifically describes the property so adjudged to the Sumner heirs, together with the several tracts excluded therefrom.

It is agreed between the parties that appellant Roberta S. Bryant is the owner by title of record to the Hudson & Wait 10,000-acre patent No. 24,081. The tracts adjudged the Sumner heirs are included within the exterior boundaries of the Hudson-Wait patent. The land claimed by the Sumner heirs is alleged to be embraced within the exclusion of the foregoing patent.

[1] By an act of the Legislature of 1835 (Session Acts 1834-35, p. 859) control of all vacant lands was vested in the several county courts; by the later act of 1837 (Session Acts 1836-37, p. 250) provision was made for the appointment of a county treasurer, to whom application for the purchase of this land should be made, warrant for the land purchased to be issued by the county clerk, upon presentation to him of receipt given by the treasurer. March 9, 1846, the following

order was entered in the Whitley county court:

"Received a bond of Middleton Meadors for twenty dollars (\$20) for 800 acres of vacant land in Whitley, and the clerk of the Whitley county court is authorized to issue a warrant for the same this 9th day of March 1846.

"[Signed] James K. Gallion, C. T.

"The Commonwealth of Ky. to the Surveyor of Whitley County—Greetings: You are hereby authorized and directed by yourself or deputy to survey in one or more surveys for Middleton Meadors 800 acres of vacant and unappropriated land in your county; he having produced to me the county treasurer's receipt for a bond for twenty dollars (\$20), the price thereof, as required by law, and this shall be your warrant for the same."

Copies of the two surveys referred to in the judgment are found in the record; the one being for Nehemiah Sumner, as assignee, the other for Sumner, Lamb, and Easthouse as assignee under warrant 272 to Middleton Meadors.

Construing the acts of 1835 and 1837 as authority for such, the Whitley county court sold much of the vacant land for notes and bonds. This manner of disposing of these lands led to the passage of the act of March 5, 1850 (Session Acts 1849-50, p. 399), legalizing the receipt of bonds in the sale of vacant land in Whitley county, said bonds or their proceeds to be appropriated for road purposes, the same as if the money had been paid therefor. Said act made it unlawful thereafter for the register of the land office to receive or register any plat or certificate of a survey made by the surveyor of Whitley county, upon county warrants, without a certificate from the county treasurer accompanying it, showing the land had been paid for in money or labor according to the order of said court.

By an act approved March 8, 1851 (Session Acts 1850-51, p. 305), the citizens of Whitley county were given until March 1, 1852, to return plats and certificates of said surveys to the register of the land office as provided in the act of 1850. In *Bryant v. Kentucky Lumber Co.*, 144 Ky. 755, 139 S. W. 1089, in speaking of these several acts, especially the last one, the court said:

"The plain purpose of this act was to require all these matters to be closed up by March 1, 1852; that is, the parties who had made these surveys were given a year to pay the price and take out their grants. The necessary meaning of the statute is that they were required to pay the price and register their surveys within the time specified, and that they could not do so thereafter. The Gillis survey was made on February 28, 1851, or eight days before the passage of this act. Gillis had under the act until March 1, 1852, to return the plat and certificate of survey to the register of the land office, with a certificate of the treasurer of the county that the warrants had been paid for. When he did not do this, he lost all his rights

under the warrant or survey. If it should be held that the statute is not mandatory, and that these surveys could be carried into grant by a compliance with the statute after the time fixed in it, then it would be meaningless, and the purpose of its enactment would be defeated. The rule is that, under statutes conferring privileges on private individuals for a certain period of time, the privilege cannot be exercised after the time allowed. 36 Cyc. 1160; Black on Interpretation of Laws, 359; 26 Am. & Eng. Ency. of Law, 691, and cases cited.

"It is insisted that the receipt of the treasurer is for a bond for \$1,000, and that we cannot say now what sort of a bond this was; but, when the receipt is read in the light of the legislative acts above referred to, there is no question what it means. It refers to one of the bonds which the Whitley county court by its orders allowed taken. The county treasurer was not authorized by the act of 1837 to take anything but money, and he does not receipt for money. He did not take the bond as money; he receipted for what he got, a bond. His receipt does not show that anything was paid, and there is nothing in the record to indicate that anything has ever been paid on this land from that time to this."

To the same effect is *Ford v. Bryant*, 158 Ky. 97, 164 S. W. 308, wherein, after quoting from the opinion in the above case, the court says:

"In view of the above authorities, we conclude that the expression 'plotting out of this survey all lands heretofore surveyed,' contained in the Hudson and Wait survey, applies only to valid surveys, and does not include surveys which were never perfected in the manner required by the statute."

The Bryant mentioned in the above two cases is the present appellant, and those appeals involved the same patent herein referred to.

By the order of the county court of March 9, 1846, it will be seen that the warrant was ordered issued on the execution of a bond for \$20, "the price thereof as required by law." There is nothing in the record showing a compliance on the part of the patentee, or those claiming under him, with the provision of the acts of 1850 and 1851. March 1, 1852, was the final date fixed in the later of these two acts for filing the plat or certificate, accompanied by the treasurer's receipt.

Passing on this question we said in *Stephens v. Terry*, 178 Ky. 129, 141, 198 S. W. 768, 773:

"A copy of the bond executed by Cox, Williams, and McLancy is not on file, but it can only be concluded that it was one executed in accordance with the order of the county court and described in the acts of the Legislature with reference to them, above quoted. The provisions of the act of March 8, 1851, do not mention mere entries or the disposition of warrants, which had been issued upon the execution of bonds, and where no entries were ever made; but, as it renders invalid a survey made by virtue of such a warrant, which had not been

filed with the register and the land paid for before the 1st day of March, 1852, it would seem that an entry made under such a warrant and not carried into grant before the 1st day of March, 1852, and the land paid for, would also be invalid, as well as such a warrant which was not entered, survey made, and returned to the register before that date. The purpose of the act was to make an end of the practice of issuing warrants, where the land authorized to be appropriated was not paid for. Furthermore, it is apparent that the holder of such a warrant could not make an entry by virtue of it, or a survey under it, after the 1st day of March, 1852. \* \* \* Cox, Williams, and McLancy had until March 1, 1852, to survey the entry made under the warrant, No. 464, pay for the lands, and file their survey with the register; but they did nothing of the kind. Doubtless they recognized that their warrant and entry were both invalid after March 1, 1852, as they took no other steps in regard to them."

[2] It is true, as urged by counsel for the Sumner heirs, that a party must recover upon the strength of his own title. Nor is it sufficient, as against one claiming under a valid grant, that the property in contest is embraced within the exterior boundary of the patent; it must be shown that it is not within the exclusion.

But, to use the language of the court in *Bryant v. Meadors*, 188 Ky. 651, 210 S. W. 177, the exclusions apply to "only subsisting legal entries and surveys that are excluded by such reference in a patent, and for which the statute invalidates subsequent entries, surveys, or patents." In this suit the court referred to the cases in which the Wait and Hudson patent has been upheld as a valid patent by this court. The question there involved was whether a survey made December 21, 1853, upon which a patent for 200 acres was issued to Jacob V. Harmon, through whom the appellees claimed, was a valid survey. The order of the Whitley county court in that suit was issued in consideration of a bond, as in the instant suit, and not for a cash consideration, as required by the acts of 1835 and 1837. After referring to the acts of 1850 and 1851, the court quotes, with approval, from *Bryant v. Kentucky Lumber Co.* and *Stephens v. Terry*, supra.

We do not think the claim of the Sumner heirs is based upon valid subsisting legal entry, patent, or survey as of the date of the Hudson and Wait survey and patent, and hence, as to them, the court erred in so far as it adjudged them to be owners of any of the land in contest.

Richard F. Hickman.

The claim of Hickman was dismissed by the lower court, because he did not show title in himself to any part of the land claimed by him. He was granted and has taken an appeal from that judgment, making *Roberta S. Bryant and Pleas Hamblin* appel-

tees, inasmuch as the land claimed by him was awarded to them.

The schedule in this case directs the clerk to copy the entire record so far as it affects Richard F. Hickman and others named, including all of the pleadings and orders with reference thereto. After a careful examination of the entire record, we have been unable to find any pleading filed or tendered by Hickman. We find depositions of said Hickman and other witnesses in his behalf, and since the appeal is briefed on his alleged claim we will treat the case as at issue as to Hickman.

[3] Counsel, with commendable forethought and to save expense and facilitate the preparation and trial of this complicated suit, by an agreed order entered March 6, 1915, controverted of record all the affirmative matter in all pleadings. Hickman was made a defendant in an amended petition, in which it was alleged that Hickman and other defendants were claiming an interest in the land described in the petition. Traversing this allegation would not aid his cause.

From the brief we find Hickman is claiming title by purchase from Mark Creekmore to 100 acres above Crow creek, being one-half of a 200-acre survey made by Nicholas White in 1844, and he also claims title by adverse possession. Hickman claims to have made a crop on the land in 1877, and later to have leased the land to Jackson Hamblin, father of Pleas Hamblin, 23 to 30 years ago. The senior Hamblin was dead at the time this deposition was taken, and all parts of the deposition relating to conversations with decedent were excepted to. He introduced three other witnesses to prove the lease. The reputation of one of these for truth and veracity is said to be bad; another, on cross-examination, testifies that he had in mind an entirely different tract of land. The third witness testifies to a conversation with the elder Hamblin as to the erection of a fence on what is claimed as the Hickman land, and he does not remember when this conversation took place. Hickman says it was supposed to be all the land between Cantrill creek and Crow creek, and, when asked to give the boundary set out in the original survey, he thus describes it:

"Beginning at the mouth of Cantrill creek, I believe is the best of my knowledge, marked on water birches and a pine; I believe running down with the meanders of the river 190 poles to a black oak or water oak at the first branch below Crow Creek; running up the hill northeast to a post oak on a ridge to a side of a path; thence north several degrees, don't remember exactly, to a black oak on a ridge, thence north again more degrees than the first, I don't remember how many degrees, so many degrees east, was more degrees east than any other, I remember, to a black oak on the top of a ridge; then the line turned again north. I don't remember exactly what the next corner was, or how far it was. \* \* \* There was two or

three other corners running up there, and made a smoothing iron shape, and the next corner where it made the next turn on a poplar near the hollow rock, 325 poles, crossing Crow creek to the George Sumner land, known as the Jim Sumner survey. It went on to the Sugar Tree fork on Crow creek, as well as I remember, to a bunch of sugar trees, and it was marked on the sugar trees. It went from there across the divide between Crow creek or the Sugar Tree fork and Cantrill creek. That is my understanding; it ran to Cantrill, and then down to Cantrill creek to the beginning."

No written evidence is produced showing his ownership of the land; no deed, patent, entry, survey, or tax receipt, either by original or copy. True, he testifies he had a copy of a survey, and the last time he saw it was eight or nine years before giving his deposition, when it was in the hands of two persons in Williamsburg. He does not introduce either of these, but states that both of them "say they have not got them." He further states that the survey was recorded in the surveyor's book; he saw it there in 1876; that later one of his attorneys told him that, after this survey was copied into a new book, the leaf containing the plat had been torn or cut out of the book. He has never personally examined the book to verify this alleged fact, nor does he introduce the surveyor or any other person to prove same, and yet, on this vague, doubtful, unfixed, and hazy description and evidence we are asked to adjudge title in him. This we cannot do. The chancellor did not err in dismissing his claim.

#### Sutton Heirs.

The Sutton heirs claim the one-half, or 100-acre, survey of Nicholas White, below Crow creek; they also claim under a Jack Harmon survey of about 1842, and also by adverse possession. J. F. Sutton, who was made a defendant in the original petition, filed an answer controverting the allegations thereof. The death of said Sutton is noted in the amended petition, and his widow, Emily Sutton, and two children, Stella Gillis and Henry Sutton, as his only heirs at law, are made defendants. They have appealed from the judgment dismissing their claim, making Roberta S. Bryant and Pleas Hamblin appellees.

Much we have said about the Hickman claim applies to this, at least that part where their rights are based on the Nicholas White survey. We will discuss their claims first under the surveys and then by adverse possession.

**I. The Surveys.**—The Nicholas White survey was never carried into patent. Neither the White nor the Harmon surveys are of record; counsel says the originals are lost and could not be produced.

There is no pleading by the Sutton heirs setting up any claim to any portion of the

land described in the petition, nor in the answer of Pleas Hamblin; no boundary is claimed by them. Thus we meet with practically the same indefiniteness and uncertainty as confronted us relative to the claim of Hickman, and the proof as to the Sutton title is almost as vague. Counsel concedes that the evidence as to the Harmon survey is meager; also that there is little evidence as to when that survey was made.

**II. Adverse Possession.**—We have read and reread the depositions taken on behalf of these parties, and, without entering into a detailed discussion of same, we deem it sufficient to say we cannot find testimony that would warrant us in reversing the judgment as to them. For example, James White, in speaking of the deal between Harmon and Sutton, says:

"Well, it was land there about Crow creek, below this Nicholas White land, is the way I understand it."

He did not know how many acres, nor the date of the survey, and never saw any survey.

G. W. Early found one corner tree about 40 poles from the river; says that Joe Sutton did not live on the surveys. Witness purchased a one-half interest of Harmon tract from Sutton. He claimed to have a copy of the Nicholas White survey, which was lost, and, when asked if it covered any of the land he now claimed an interest in, he responded:

"\* \* \* Nothing, only we started from where they told us had been a corner, and started up on that line, and run that far, and it came night, and we quit, and never got back any more."

Mark Creekmore never saw but two of the corners. It will be remembered that no pleading was filed by Hickman, and only a traverse by the Sutton heirs; hence neither by pleading has set up any definite boundary claimed by them.

It is in evidence that about the year 1880 Sutton built a fence inclosing the lands to which he claims title. Logs, brush, and rails entered into its makeup and cliffs were used wherever possible; one of the witnesses saying:

"We cliff-fence down there a whole lot."

S. R. Sutton says the fence was kept up for about four years, when it burned; that is, most of the rails were destroyed. It is doubtful if any part of the claimed boundary could be located, other than by occasional reference to the "long bottom," "sheep park," "bend in the river," "Buzzard," "Crow creek," etc.

The lines are not marked by courses or distances; a few marked trees are referred to, but practically no lines any one could follow.

[4] To support a title by adverse holding three facts must be established: (a) The possession must have been continuous, actual, open, notorious, and peaceable for at least 15 years; (b) the exterior boundary lines of the land claimed must be well defined, that is, either actually inclosed or so marked that the land is susceptible of identification by its description; and (c) the possession must have been of such a character and extent as to exclude the idea that the right of possession was in any one else.

The rambling, uncertain, and indefinite character of the evidence, coupled with the silence of the pleading as to the boundary claimed by the Sutton heirs, can lead to but one conclusion, viz. the lower court did not err in dismissing their claims.

#### Jackson Hamblin's Heirs.

In paragraph 7 of the judgment it is adjudged that Pleas Hamblin is the owner (1) of the surface of the land contained in the boundary described therein being between Cantrill branch and Crow branch; (2) another tract on Cantrill branch; (3) a track on Cumberland river; and (4) a tract on the south bank of the river.

By an agreement between Roberta S. Bryant and Pleas Hamblin the controversy as to them is reduced to the Sanford T. Barnett patent for 200 acres surveyed June 4, 1883. Barnett's being the junior patent, the claim, if any, of the Hamblin heirs must be based upon adverse possession.

[5] Reverting to the evidence we find:

Pleas Hamblin, in his deposition taken March 20, 1915, testifies (in narrative form) that he has claimed this land "18 or 19 years, according to his recollection." It has been inclosed for 18 years, or somewhere near about that. He and his father paid the taxes. In another place he says the fence referred to in the record as the "sheep park fence" was put up 17, 18, or 19 years ago. Two-thirds of the fence consists of cliffs; the wire fence is just across the gaps. At the time the fence was erected, he never heard his father say he claimed to own all the land inside the fence. He fenced it for herding purposes, following the cliffs, because it made less work to fence it. Only knows of three marked lines in the Barnett survey. When asked if either he or his father ever had any clearings, or made any improvements, upon the Barnett patent, since they had the fence around it, he says:

"Right along up in here some clearings run outside a little bit."

About two acres in all, or probably a little more than that. He states it had been cleared for about 17 years.

L. E. Bryant is a son of plaintiff, and his deposition was taken on interrogatories pro-



pounded by the Hamblin heirs, and he thus testifies as to the fence:

"Jack Hamblin was a long-standing acquaintance of mine. I saw him at most every court four times a year at Williamsburg. Early in our acquaintance he proposed to me to permit him to inclose about 1,000 to 1,500 acres of our wild land with a wire fence for a sheep ranch, and keep them out, fire and protect the timber, and hold possession of the land for us; at that time we had many adverse claims to our land, and this seemed a practical plan from a friend, and after consulting the family I consented. Mr. Hamblin and I talked the matter over from time to time, when he would report to me of the claims of others and the condition of our possession. He never held adversely to us."

Sanford T. Barnett and wife deeded, without warranty, their undivided interest in this land to the senior Hamblin, March 24, 1898, for a consideration of \$20.

Summing up the testimony on this branch of the case, it appears that about 23 years ago the senior Hamblin, while fencing the Hawkins McKee survey, so extended or erected the fence as to include about 2½ acres of the tract in controversy. About 17 years before his deposition was taken, he testifies, this small tract was cleared up, and at the time it was fenced Pleas never heard his father say he claimed it as his own land.

At most it would seem the inclosure and clearing of this 2½ acres was accidental and unintentional, and without claim of right or possession on the part of Jackson Hamblin at the time. The petition in the present suit was filed January 30, 1912; hence at this date the period of occupation was less than 14 years. The clearing was coincident with the execution of the deed from Barnett and his wife, which bears date of March 24, 1898. Pleas Hamblin, in his deposition taken March 20, 1915, says the clearing was made 17 years before, which would make it March, 1898.

Possession, to defeat title, must be actual, as well as adverse and continuous, and to a well-defined and marked boundary, for as much as 15 years before the institution of an action by the holder of the legal title. *Gatliff v. Carson-Muse Lumber Co.*, 159 Ky. 833, 169 S. W. 504; *White v. McNabb*, 140 Ky. 828, 131 S. W. 1021.

We think the court was in error in adjudging that Pleas Hamblin was the owner of the tract described in paragraph 7 of the judgment.

#### The Schedule and Record.

[8] A motion of Pleas Hamblin to strike from the transcript all parts not embraced in the schedule was passed to the submission on the merits. The schedule in this case directs the clerk to copy the entire record in so far as it affects the parties to the appeal, and contains this sentence:

"All of the pleadings and orders with reference thereto are directed to be copied, to wit."

And here follows an enumeration of 44 different items. The appellees' contention is that the record contains more than called for in the schedule, and that the record actually contains 83 different pleadings, depositions, etc. It is true that the record does contain a great many more separate orders or pleadings than are referred to in the schedule; but this apparent discrepancy is explained, in the main, by the fact that the schedule in one item called for the depositions of certain parties, whereas in the transcript there appears a number of depositions filed in behalf of said party. As an illustration, an item in the schedule calls for the depositions of the Sutton heirs; as a matter of fact there are six depositions for them in the record. This, we think, explains the apparent difference complained of by counsel. Another place the schedule calls for an order filing an amended petition; this appears in the transcript under two headings—first, the order itself; and, second, the amended petition—and we do not suppose that counsel would contend that in this instance the schedule did not call for the amended petition.

Counsel do not claim or contend that any parts of the record have been omitted, but their objection is there is too much record here; furthermore, that a discretion was given the clerk as to what parts of the record should be copied. The schedule having directed the clerk to copy the entire record so far as it affected any of the parties to the appeal, unless there is an omission of some portion of the record affecting some of the parties, the motion to strike should be overruled, because it does not appear upon an examination of the record there were any portions copied not pertinent to the appeal on behalf of any of the several parties. Section 737 of the Civil Code provides, in part as follows:

"The appellant, within ninety days after the granting of the appeal, shall file in the office of the clerk of the inferior court \* \* \* a schedule, showing, concisely, what parts of the record he wishes to have copied. His failure to file said \* \* \* schedule within the time prescribed shall be cause for the dismissal of his appeal."

A notice of the filing of this schedule was served on Pleas Hamblin. The notice states that the schedule directs the copying of the entire record, so far as it affected Pleas Hamblin and others to the appeal. We think this was ample notice to him as to what parts of the record would be included in the transcript. Provision is made in the section of the Code, *supra*, by which the appellees may file a schedule similar to the one the appellant is permitted to do. The clerk certifies that the record filed in this court—

"is a true and correct copy of so much of the record as is directed by the schedule."

Appellee complains the schedule does not direct the copying of the appellant's petition. The first order called for in the schedule is thus given: "O. B. 88 page 80"—which we assume was the petition, although not specifically mentioned; but we do not see how the directions to copy the entire record could be obeyed, or the record certified as complete, without the petition.

[7] Rule 14 of this court (154 S. W. ix) is as follows:

"The court will conclusively presume, after submission, that a record brought up to this court on schedule filed in the clerk's office of the inferior court, as prescribed by section 737 of the Code of Practice, is the complete record, and that all parties interested have consented to try the appeal on such record. Before submission the court will, in its discretion, allow a transcript of other parts of the record to be filed when deemed necessary in furtherance of justice."

See, also, *Clevinger v. Nunnery*, 140 Ky. 592, 131 S. W. 519, wherein the court says:

"Under the rule, where a schedule has been filed as prescribed by section 737 of the Code, it will be presumed that all that is material in the record is contained in the transcript, and that the parties have consented to try the appeal on the transcript; but the rule has no application

unless the schedule has been filed in the clerk's office as prescribed by section 737 of the Code."

We think, under the provision of the Code, the rule, and authority above cited, that appellees' motion to strike from the transcript should be overruled.

Wherefore, upon a consideration of the whole case, and for reasons hereinabove given, the judgment appealed from, in so far as it affects the Sutton heirs and Richard F. Hickman, is affirmed; as to the Sumner heirs, the judgment is reversed; and as to the Hamblin heirs and Pleas Hamblin, so much of paragraph 7 as adjudges that Pleas Hamblin is the owner of the tract of land described as "beginning at a maple and a black oak; thence N. 40° E. 38 poles to two chestnut oaks; thence N. 10° E. 32 poles to a post oak on a ridge; thence N. 62° E. 40 poles to a chestnut and black oak; thence N. 4° E. 18 poles to a black gum; thence N. 60° W. 20 poles to a black oak; thence N. 45° W. 36 poles to a poplar and white oak; thence N. 49° W. 10 poles to a black oak; thence N. 100 poles to a stake at the hollow rock; thence west 320 poles to the Cumberland river; thence up the river with the meanders thereof to the beginning"—be and the same is hereby reversed; and this case is remanded to the lower court for such further proceedings as may be necessary and consistent with this opinion.

(184 Ky. 1)

**CHESAPEAKE & O. RY. CO. v. COMMON-WEALTH.**

(Court of Appeals of Kentucky. April 18, 1919.)

**1. CRIMINAL LAW §604(1)—WRITTEN INSTRUCTIONS—MISDEMEANOR CASES.**

Provision of Cr. Code Prac. § 225, that instructions in criminal cases be written applies to misdemeanors, unless the requirement be waived.

**2. RAILROADS §226—DUTY TO MAINTAIN WATER-CLOSET — FACILITIES IN COMMON USE.**

A railway company was required to maintain, at a point, only water-closet facilities equal to best in common use in vicinity, and, there being no waterworks nor sewerage system there, it was under no duty to maintain, at its own expense, a private waterworks system to supply a water-closet.

**3. RAILROADS, §255(11)—PROSECUTION FOR FAILURE TO PROVIDE WATER-CLOSET—EVIDENCE.**

In prosecution for failing to maintain suitable water-closet at point where there was no waterworks nor a sewerage system, evidence of location of company's water tank and a creek, and as to topography of surroundings, to show a serviceable sewerage system was practicable, held inadmissible.

**4. RAILROADS §255(12)—MAINTENANCE AND REPAIR OF WATER-CLOSET — QUESTION FOR JURY.**

A railroad, proceeded against for failure to maintain suitable water-closet at point where there was no sewerage system, was not entitled to peremptory instruction, where, though there was no evidence closet was not suitable and convenient, there was substantial evidence it was not maintained in decent order and repair, taking latter question to jury.

Appeal from Circuit Court, Rowan County.

The Chesapeake & Ohio Railway Company was fined for failing to provide, at a point, a convenient and suitable water-closet, and to maintain it in decent order and repair, and it appeals. Reversed, and cause remanded for new trial.

James Elay and E. Hogge, both of Morehead, and Shelby, Northcutt & Shelby, of Lexington, for appellant.

Charles H. Morris, Atty. Gen., O. S. Hogan, Asst. Atty. Gen., and W. C. Hamilton, of Mt. Sterling, for the Commonwealth.

CLAY, C. The Chesapeake & Ohio Railway Company appeals from a judgment imposing a fine of \$250 for its failure to provide at Morehead a convenient and suitable water-closet and maintain it in decent order and repair.

[1] Our Code requires that instructions in criminal cases be written, and the provision

applies to misdemeanors unless the requirement be waived. Section 225, Criminal Code; Adams Express Co. v. Com., 163 Ky. 275, 173 S. W. 764. Here the company did not waive the requirement, but moved the court to instruct the jury in writing. The court overruled the motion and gave oral instructions. This error is sufficient to authorize a reversal.

[2, 3] The company was only required to maintain water-closet facilities equal to the best in common use in the vicinity, and, there being no waterworks nor sewerage system in Morehead, it was under no duty to maintain at its own expense a private waterworks system in order to provide a suitable and convenient water-closet. L. & N. R. R. Co. v. Com., 181 Ky. 268, 114 S. W. 1192; L. & N. R. R. Co. v. Com., 187 Ky. 802, 127 S. W. 152; L. & N. R. Co. v. Com., 180 Ky. 848, 203 S. W. 717. Hence it was error to admit evidence of the location of the company's water tank and Triplett creek and as to the general topography of the surrounding lands for the purpose of showing that a serviceable sewerage system was practicable.

[4] The company was not entitled to a peremptory instruction; for, while there was no evidence that the water-closet was not suitable and convenient, there was substantial evidence that it was not maintained in decent order and repair, thus making the latter question one for the jury.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

(183 Ky. 845)

**WARD v. PRESTON et ux.**

(Court of Appeals of Kentucky. April 17, 1919.)

**MORTGAGES §25(6), 86(3)—VALIDITY—SUFFICIENCY OF EVIDENCE—FRAUD—CONSIDERATION.**

In suit to enforce mortgage lien, evidence held insufficient to sustain defense that mortgage was without consideration and had been procured by fraud.

Appeal from Circuit Court, Johnson County.

Action by S. W. Ward against Sanford Preston and wife. Judgment canceling mortgage and dismissing the petition, and plaintiff appeals. Reversed and remanded, with directions.

Fogg & Kirk, of Paintsville, for appellant. J. K. Wells and J. W. Wheeler, both of Paintsville, for appellees.

CLAY, C. On July 31, 1912, Sanford Preston and his wife, Mary Ellen Preston, executed and delivered to S. W. Ward a mortgage on 75 acres of land located on Buffalo

creek in Johnson county, to secure the payment of a note for \$400, payable one year from date. About a month after the maturity of the note, this suit was brought by Ward against Preston and wife to enforce the mortgage lien. The defendants pleaded, in substance, that there was no consideration for the mortgage, and that its execution was procured by the fraud of plaintiff and his brother, Jeff Ward. On final hearing, the chancellor sustained the plea of fraud and entered judgment canceling the mortgage and dismissing the petition. Plaintiff prays an appeal.

According to the evidence for plaintiff, Jeff Ward, who was the son-in-law of Sanford Preston, approached plaintiff for the purpose of procuring a loan of \$400, to be used for the purpose of buying cattle. He and Jeff Ward then repaired to the home of Sanford Preston, who agreed to execute a mortgage to secure the loan. Upon the execution of the note and mortgage, Preston and Jeff Ward went to the home of plaintiff, who delivered to Preston and Jeff Ward a mare, nine head of young cattle, two cows and a calf, a sow and three pigs, and \$35 in money, aggregating \$400. Preston rode the mare away and drove the cattle home that day. The next morning he returned and got the hogs. The cattle and other stock were taken to Preston's home, where they remained for a few weeks, when they were sold to John Butcher, who paid the purchase price to Jeff Ward. Plaintiff never told the defendant that he did not have the \$400 with him, but would get it when he sold some sheep, but the consideration for the mortgage was the stock. Jeff Ward corroborates plaintiff and claims to have paid Preston his part of the proceeds of the stock. Other witnesses who were present claim to have seen Preston driving the stock away. Ashley Ward testified that Preston told him he had mortgaged his farm to plaintiff, and that he and his son-in-law, Jeff Ward, were going to get some money and trade in cattle. This witness also stated that he had sold Preston a bunch of cattle himself. Milton Music says that, when Preston came to drive away the hogs, he stated to him that he had mortgaged his farm and thought he would come out all right. Ed Vanhooze, a justice of the peace, testified that Preston had told him that he and his son-in-law, Jeff Ward, were partners trading in cattle.

According to Preston's testimony, he executed the mortgage for the purpose of getting \$400 to go in partnership in the cattle business with his son. Upon the execution of the mortgage, S. W. Ward jumped up and said he did not have the money. He further said that he had a drove of sheep over at John Trimble's, and as soon as he could take the sheep off he would bring the \$400 back to Preston. Thereupon Pres-

ton demanded the return of the mortgage, but plaintiff refused to give it back to him. Preston further claims that the cattle and other stock were bought by Jeff Ward, and that he went to S. W. Ward's home merely to assist Jeff in driving the cattle home. He also says that he never received any of the proceeds of the stock. Mrs. Preston testified to the same facts, but admitted on cross-examination that she and her husband were to have an interest in the profits of the stock. Will Preston testified that S. W. Ward and Jeff Ward came to his father's farm and said they had money to loan him, but that the money was not paid when the mortgage was executed. On the contrary, S. W. Ward told his father that he had a drove of sheep, and as soon as he sold them he would bring him the money. Linnie Preston, William Preston's wife, also testified to the same facts.

In rebuttal, S. W. Ward and Jeff Ward denied that upon the execution of the mortgage S. W. Ward said he did not have the money and would bring it to Preston as soon as he disposed of the drove of sheep, or that the mortgage was obtained by fraud.

With respect to what occurred when the mortgage was executed, it is apparent that the evidence is about equiponderant, but, viewing the case in the light of the subsequent developments, it seems to us that the evidence is wholly insufficient to sustain the claim of fraud or lack of consideration. Indeed, the charge that S. W. Ward conspired with Jeff Ward to procure the execution of the mortgage is based entirely on suspicion. As a matter of fact, S. W. Ward delivered to Preston, \$400 worth of live stock, and Preston himself helped to drive the stock to his home. Not only so, but Preston admitted to three disinterested witnesses that he had mortgaged his home for the purpose of getting the money to trade in cattle, and that he and his son-in-law were partners in that business. Furthermore, Mrs. Preston testified that she and her husband were to share the profits on the stock. It is therefore manifest that Preston's claim that the mortgage was executed for money, and that S. W. Ward failed to deliver it to him is clearly opposed to his own conduct and admissions. While it may be true that his son-in-law, Jeff Ward, disposed of the stock without paying Preston his portion of the proceeds, S. W. Ward, who parted with his stock upon the faith of the mortgage, cannot be held responsible for any default upon the part of Jeff Ward. We therefore conclude that the judgment canceling the mortgage and dismissing the petition was erroneous, and that the mortgage lien should have been enforced.

Judgment reversed, and cause remanded, with directions to enter judgment in conformity with this opinion.

**RANDOLPH v. LEWIS. (No. 36-2685.)**

(Commission of Appeals of Texas, Section B.  
April 9, 1919.)

**1. ADVERSE POSSESSION  $\Leftrightarrow$  80(3)—CLAIM UNDER DEED—SUFFICIENCY OF DEED.**

In trespass to try title, a plea of five-year statute of limitations was supported by a deed referring to adjoining surveys on three sides and a river on the other, although name of patentee and number of certificate were erroneous.

**2. ADVERSE POSSESSION  $\Leftrightarrow$  81—NOTICE OF ADVERSE POSSESSION—BOUNDARIES—LOCATION.**

An owner of land claimed adversely by another is charged as a matter of law with knowledge of location of land and its boundaries.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Trespass to try title by R. J. Randolph against C. W. Lewis. From a judgment of the Court of Civil Appeals (163 S. W. 647), affirming a judgment in favor of defendant, plaintiff brings error. Affirmed.

Randolph & Randolph, of Madisonville, and Hart & Patterson, of Austin, for plaintiff in error.

J. M. Brownlee, of Madisonville, and E. A. Berry, of Austin, for defendant in error.

SADLER, J. Plaintiff in error filed suit in the district court in trespass to try title to recover from defendant in error 369 acres of land in Madison county, Tex., patented to Samuel Bogart, assignee of John W. Holman, on February 14, 1852, by virtue of certificate 347, described by metes and bounds, and having the Navasota river as its western boundary. The defendant answered by plea of the five-year statute of limitation, claiming under a deed from D. J. Donohoe to the defendant, dated May 16, 1905, describing the land as follows:

"All of that certain tract or parcel of land in said county and state, and being 360 acres of land patented to John W. Holman, abstract No. 116, certificate 516, vol. 9, as shown by the land records of Madison county, Texas, and bounded on the south by the George L. Ramsdale and on the east by the A. J. Wynn, and on the north by another survey of the G. L. Ramsdale, and on the west by the Navasota river."

The defendant recovered in the district court on his plea of limitation, which judgment was affirmed by the Court of Civil Appeals. 163 S. W. 647.

**Opinion.**

[1] The sole question presented for our determination is: Will the deed relied upon by the defendant support his plea of limitation? This question is very carefully con-

sidered in the opinion of the Court of Civil Appeals, and the authorities upon which plaintiff relies for sustaining the proposition that the description of the land in the deed is so defective that it will not support the plea are very carefully reviewed in the opinion on rehearing. We are of opinion that the Court of Civil Appeals correctly decided the question.

The abstract records in the office of the tax assessor of Madison county show that certificate No. 347 was issued to Samuel Bogart and the patent to John W. Holman. The deed to Lewis is clearly erroneous in reciting the certificate to be No. 516, and it is apparent that the land was patented to Bogart as the assignee of Holman. The abstract books did not correctly show the facts. Were this all the description contained in the deed to Lewis, the contention of plaintiff might be correct. However, the further description is believed to be sufficient to raise the question of notice to plaintiff that the defendant was asserting title to the land under the deed from Donohoe.

Defendant was in possession of the identical tract of land to which plaintiff asserted title. Plaintiff was therefore charged with knowledge that defendant was in possession of property belonging to him. This fact was sufficient to call the attention of plaintiff to the holding of defendant. *Brownson v. Scanlan*, 59 Tex. 222; *Craig v. Cartwright*, 65 Tex. 413; *Wimberly v. Bailey*, 58 Tex. 222.

[2] Having notice of the adverse possession, and seeking to pursue that notice to ascertain by what tenure defendant held, the plaintiff consults the records of Madison county. It is true that, in undertaking to run the chain of title from himself to the sovereignty, he does not find a conveyance to the defendant; but is he, with the knowledge of defendant's possession, excused from a further investigation to ascertain whether defendant holds a deed to the property? A further examination of the record would have brought him in touch with the deed here under question. What would he have discovered from an inspection of that deed? He would have ascertained the following definite facts: (a) A deed from Donohoe to Lewis; (b) that it affected in some manner the John W. Holman survey in Madison county; (c) that it was a conveyance of a certain tract of land situated in Madison county, bounded on the west by the Navasota river, on the south by the George L. Ramsdale survey, on the east by the A. G. Wynn, and on the north by another George L. Ramsdale survey. The plaintiff is charged as a matter of law with knowledge of the location of the land owned by him and with its boundaries. *Brownson v. Scanlan*, 59 Tex. 222; *Craig v. Cartwright*, 65 Tex. 413.

Further investigation of the record would

have disclosed to him the fact that the boundary lines of the land claimed by the defendant and the boundary lines of the Wynn and two Ramsdale surveys were the same, and that the Navasota river was the western boundary. Plaintiff knew that his land was located within that particular territory included within the boundaries of those surrounding surveys, and had the Navasota river for the western boundary.

It is contended, however, that the deed to the defendant does not sufficiently describe the land, to put the plaintiff upon such notice as will support limitation, since it was necessary for the plaintiff to do something more than examine the records in order to ascertain the fact that the particular land described in defendant's deed was the land described in plaintiff's title; for instance, that it was necessary to ascertain by actual survey the location of the boundary lines of the surrounding surveys, and that would require an investigation allunde the record. That may be true but let us see about plaintiff's own deed. Is it possible that the plaintiff can from the record read the deed under which he holds, and then say exactly where his land is located on the Navasota river? In order to find the land claimed by the plaintiff and described in his deed, it is necessary to go upon the ground and find the objects defining the boundaries of his property. It is necessary, in order to determine the boundaries of the land held by defendant, to ascertain the lines and corners of the surrounding surveys mentioned as descriptive of the location and extent of the holding under Donohoe's deed.

The surveyor says that he cannot plat the land described in the deed to defendant without first platting the surrounding surveys. This is self-evident; but can he plat the land from the description in plaintiff's deed, so as to assist or point out its definite location with reference to the public domain from which taken, or surrounding lands, without platting the abutting surveys? It is true that he can, with proper instruments, draw an outline to a scale of a certain supposed tract of land; but does that assist in the location of the land on the ground? We assert not.

In all matters with reference to the description of land, that description is sufficient when the surveyor can take the data called for in the deed, and with that data, locate the land upon the ground. According to the record here the surveyor can locate the land claimed by defendant, by utilizing the things called for in the description contained in the deed.

The record shows that at the date of the deed to the defendant these adjoining surveys had been patented and that the field notes thereof were of record. Taking the data furnished by defendant's deed, the

plaintiff can go upon the ground and locate definitely the land covered by the claim of the defendant. And a fortiori, taking the deed of the defendant in connection with the possession of the defendant, of which plaintiff had notice, the plaintiff could have known from the deed that defendant was asserting, by the record, title to the property claimed by plaintiff.

The errors in defendant's deed, in giving the name of the patentee, and the number of the certificate, are not material, and may be treated as surplusage, when the other portion of the description is clearly sufficient to manifest the error and to locate the land. *Arambula v. Sullivan*, 80 Tex. 615, 16 S. W. 436; *MacManus v. Orkney*, 91 Tex. 33, 40 S. W. 715. In the case of *Club Land & Cattle Co. v. Wall*, 99 Tex. 591, 91 S. W. 778, 122 Am. St. Rep. 666, Justice Brown says:

"The defendant in error, Wall, claims that the deed from the assignee, Harrell, to Carver, is not sufficiently definite in its description of the land to sustain the statute of limitations, because it calls to be taken out of a tract of 280 acres deeded by Harrell and East to J. C. Scott out of the J. Ostane survey No. 83, and, because it is not shown that the deed to Scott was recorded, the description is defective. The facts of this case are quite different from those in *McDonough v. Jefferson County*, 79 Tex. 535 [15 S. W. 490], where the deed under which the statute of limitations was prescribed contained no description of the land whatever, but referred to another deed, which was not of record; therefore there was no such deed to the land on record as was required by the statute. The deeds introduced in this case were sufficiently definite to sustain the five-year limitation."

In that case the description of the land is as follows:

"*Second Tract*.—100 acres, being a part of the J. Ostane survey, No. 83, and described as follows: Beginning at southeast corner of the 280-acre tract, deeded by Harrell and East to J. S. Scott in the southwest corner of said survey; thence north 1340 varas to northeast corner of said 280-acre tract; thence east 420 varas; thence south 1340 varas; thence west on south line of said survey 420 varas to the beginning."

"*Third Tract*.—All the right, title and interest of said assigned estate, including the superior title held by the assigned estate of E. H. East to the following described tract of land situated in Archer county, Texas, and being a part of said Ostane survey containing 119 acres: Beginning at the southeast corner of said 100-acre tract, on the south line of said survey, thence north 1340 varas to northeast corner of said tract; thence 500 varas east; thence south 1340 varas to south line of said survey; thence 420 varas to the beginning."

"The last tract is in controversy in this case."

The deed from Harrell and East to J. S. Scott for the 280-acre tract was not recorded. It will be seen from the description of the above land in controversy that there was no

definite object to mark its location. In order to determine the location of the land it was necessary to ascertain, first, the location of the 280-acre tract. This could not be done from the record, and it could only be done by procuring the original deed to Scott, or by reason of the fact that Scott's land had already been surveyed and its corners established, and then the necessity existed of going upon the ground in order to find these corners. After doing this it then became necessary to survey our tract No. 2 above described before tract No. 3 could be located. Certainly tract No. 3 could not be located until surveyed. It is therefore clear that the deed conveying the third tract did not contain a description sufficient in itself, or sufficient by reason of the record, to locate the land in controversy. The deed only furnished information putting Wall on notice of facts which, when pursued to their legitimate conclusion, furnished him with knowledge of the location of the land claimed by the Cattle Company. We surmise that the possession of the Cattle Company was one of the things which assisted in locating the land covered by the field notes of tract No. 3. There was no definite object shown in this deed by which the land could be located, and we feel quite sure that a surveyor would have had great difficulty in platting the location of the second or third tract from the records.

Had the deed under investigation here, instead of calling for the adjoining surveys, called to begin on the Navasota river at the northeast corner of the G. L. Ramsdale survey, thence with its north line to a corner of the A. G. Wynn, thence with the west line of the Wynn to the southeast corner of another G. L. Ramsdale survey, thence with the south line of said Ramsdale to the Navasota river, thence with the meanders of said river back to the beginning; could it be contended that that description was not sufficient? The deed certainly would have put the plaintiff on notice that the Holman survey was supposed to be conveyed, and certainly the boundaries could have been ascertained. The fact that the A. G. Wynn elled the northeast corner of the Holman for a short distance before reaching the southeast corner of the upper Ramsdale will not affect the description.

We are of opinion that the description contained in the deed to the defendant was sufficient to put the plaintiff on notice that the Holman survey was intended to be conveyed and to give to the plaintiff sufficient facts from which he could definitely locate the land held in possession of the defendant.

We are therefore of the opinion that the judgment of the Court of Civil Appeals should be affirmed.

**PHILLIPS, C. J.** The effect of the reference to the adjoining surveys was to incorporate in the deed their description as a means of identifying the particular land, as fully as though their field notes had been set out in the deed. *Wiseman v. Watters*, 107 Tex. 99, 174 S. W. 815; *Devlin on Deeds*, § 1020. The patents to the surveys, showing their field notes, were of record in the Land Office, and constituted notice to the world. *Evitts v. Roth*, 61 Tex. 81. The reference to the surveys accordingly gave the plaintiff, as a matter of public record, constructive notice of their location. Since, with the river, they in fact entirely surround and enclose the plaintiff's land, he was therefore advised by the record that the deed conveyed his land.

The judgments of the District Court and Court of Civil Appeals will be affirmed.

**FIELDER et al. v. HOUSTON OIL CO. et al.**  
(No. 29-2661.)

(Commission of Appeals of Texas, Section B.  
March 5, 1919.)

**1. ADVERSE POSSESSION ~~§~~ 98—INCLOSURE—CLAIM LIMITED TO TRACT INCLOSED.**

Where a party's improvements were all on a certain survey, and there was no visible evidence of his claim to the land in controversy in another survey, except an encroachment by fencing a small portion thereof, there was no such possession of the land as gave notice of any claim except as to that inclosed.

**2. APPEAL AND ERROR ~~§~~ 1178(6)—REMANDING CASE FOR FURTHER EVIDENCE.**

As the burden is on one claiming land by adverse possession for the period of limitation by fencing to identify the particular land to which he was entitled under plea of limitation, he cannot complain that on appeal the cause was remanded to afford him an opportunity to supply the defect by evidence without grant of new trial.

**3. APPEAL AND ERROR ~~§~~ 714(1)—FACTS OUTSIDE OF RECORD—CONSIDERATION.**

Alleged facts outside of the record may not be considered upon appeal.

On rehearing. For former opinion, see 208 S. W. 158. Motion for rehearing overruled.

**MONTGOMERY, P. J.** It is insisted by Stephens in his motion for rehearing that we misstated the facts in saying that Teel acquired the five acres on which his improvements were situated in the Jordit survey in the year 1884.

[1] This statement was based on the testimony of Teel that he moved upon this land in the year 1884, and that he had resided on it every hour since. Teel further testified that all his improvements except the fencing was

situated on the five-acre tract out of the Jordit survey. It can really make no difference whether he owned the five-acre tract or not. If all his improvements were on the Jordit survey, and there was no visible evidence of his claim to the land in controversy except an encroachment by fencing a small portion thereof, whether it was two acres or twenty acres, there was no such possession of the land in controversy as gave notice of any claim of Teel outside the land actually inclosed by him.

[2] It is also insisted that we should have, as between the plaintiffs and Stephens, reversed and remanded the case for a new trial, and that we erred in limiting the investigation to a determination of the amount of the land in controversy actually inclosed by Stephens and directing that judgment be entered in his favor for the land so inclosed and for the plaintiffs for the remainder.

We might very well have advised that judgment be here rendered for the plaintiff for all the land in controversy, as the burden was on the defendant Stephens to identify the particular land to which he was entitled under his plea of limitation, but in the interest of justice we did not take that course, as we believed it better to permit Stephens to supply the defect in the evidence by showing the amount of the land in controversy between him and the plaintiff which was inclosed within his inclosure.

[3] Our attention is called to certain alleged facts outside the record, but we are not at liberty to consider anything except the record in this case.

With this explanation we advise that the motion of Stephens and of the Houston Oil Company for rehearing be overruled.

(85 Tex. Cr. R. 131)

### MARSHALL v. STATE. (No. 5323.)

(Court of Criminal Appeals of Texas. April 2, 1919.)

#### 1. CRIMINAL LAW §1091(4) — EXCEPTIONS, BILL OF—EXCLUSION OF EVIDENCE.

A bill of exception to the admission of evidence to require consideration must show what the action of the court was, the subject of it, and its relation to the case.

#### 2. CRIMINAL LAW §730(12), 1171(6)—HARMLESS ERROR—ARGUMENTS OF COUNSEL—MATTERS OF RECORD.

Argument of state's counsel as to relation between defendant, a negro, and boys who testified for him, not outside of the record, held not so prejudicial that they could not be withdrawn by special charges and not reversible error, where minimum penalty was imposed.

Appeal from Harris County Court, at Law; R. M. Love, Special Judge.

H. Marshall was assessed a fine for unlawfully carrying a pistol, and he appeals. Affirmed.

W. B. Ware, of Houston, for appellant.  
E. A. Berry, Asst. Atty. Gen., for the State.

MORROW, J. The appeal is from a judgment assessing a fine of \$100 against appellant for unlawfully carrying a pistol.

The state's theory is supported by several witnesses who gave direct testimony to the possession of the pistol by the appellant under circumstances which would render his act unlawful. He introduced several witnesses who gave negative testimony controverting his possession of the pistol at the time in question, and introduced two small boys, one eight years of age, who testified that they saw the transaction and that the instrument which the appellant had was not a pistol but was a monkey-wrench.

[1] There are several bills of exceptions complaining of the admission of testimony, and some complaint of the exclusion of evidence. We have examined these bills and they disclose no error. We desire to remark in connection with them, however, that it was stated in an early case, *Buchanan v. State*, 24 Tex. App. 200, 5 S. W. 848:

"A bill of exception taken to the exclusion of testimony must disclose the relevancy and materiality of the proposed testimony. Inferences will not be indulged to supply the omission of such essentials"—citing *Luttrell v. State*, 14 Tex. App. 147; *Sutton v. State*, 16 Tex. App. 490; *Counts v. State*, 19 Tex. App. 450.

This rule holds good with reference to the admission of evidence. The bill to require consideration must be so drawn that the court on its examination may be able to decide, not only what the action of the court was, but the subject of it and its relation to the case. *Vernon's Crim. Stats.* vol. 2, p. 542, note 29, and cases collated.

[2] There are some bills reserved to the argument of the state's counsel. One of these objects to the remark:

"And the defendant says he did not have a gun, because he had a ring-tail monkey-wrench."

Another:

"And this negro comes into court and brings these little boys, and has them to testify that way, to protect himself."

In another bill the remarks were:

"And that same little boy, God help him, riding around with the negro, he used that little boy to come here into court, he subpoenaed him into court to cover his own guilty acts—it is debauchery of childhood."

Another:

"Shame on you for bringing a little innocent boy into this court, and hiding behind him!"



Another:

"This little boy may be sleeping with this old negro because they are from the North and don't know any better."

None of these remarks appear to have been outside of the record, and, with the exception of the reference to the fact that the little boy was from the North and did not know any better, we discern no impropriety. Certainly none of them were such as to be so obviously injurious and prejudicial to the appellant as they might not have been withdrawn had a special charge in writing been requested of the court. Branch's Ann. Pen. Code, § 362, and cases cited. And taken in connection with the fact that the lowest penalty was assessed and there was ample evidence to show the guilt of the appellant, we are of the opinion that there is nothing shown in the record which authorizes the court to reverse the judgment.

It is therefore affirmed.

(85 Tex. Cr. R. 204)

Ex parte BERRY. (No. 5338.)

(Court of Criminal Appeals of Texas. March 19, 1919. On Motion for Rehearing, April 16, 1919.)

HABEAS CORPUS  $\S$  85(3) — APPLICATION — PRESUMPTION IN FAVOR OF REGULARITY OF COMMITMENT.

Where there is nothing but the application for habeas corpus, which shows that defendant was placed in jail following an adjudication that he was in contempt of the district court for refusing to answer questions before a grand jury, the Court of Appeals is unable to decide upon what the judgment was rendered, and must dismiss the application upon the presumption that the commitment was regular, and was based upon proper facts.

Original application by J. W. Berry for writ of habeas corpus, which was granted, and the cause set for hearing. Application dismissed, and relator remanded to custody of the sheriff.

Travis T. Thompson, of Clarksville, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

LATTIMORE, J. On February 8, 1916, this relator presented an application for a writ of habeas corpus to the presiding judge of this court, which was granted, and the cause set down for February 19, 1919, on which date same appears to have been duly submitted. The record is before us without any statement of facts or agreement of counsel or any other manner by which this court may be guided in determining its decision of this case. It has been often held by this

court that the contents of the application are but pleading, and that, if nothing further be presented, the application will be dismissed. See *Ex parte Thomas*, 65 Tex. Cr. R. 537, 145 S. W. 601; *Ex parte Clark*, 198 S. W. 954; *Ex parte Robertson*, 63 Tex. Cr. R. 280, 140 S. W. 98.

There being nothing before us except the application for this writ which alleges that applicant was placed in jail following an adjudication that he was in contempt of the district court of Red River county for refusing to answer certain questions before the grand jury of that county, we are unable to decide what the facts were upon which such judgment was rendered, and, the presumption being that proper facts were before the court and in favor of the regularity of the court's action, the application will be dismissed, and the relator will be remanded to the custody of the sheriff of Red River county.

On Motion for Rehearing.

At a former day of this term application for habeas corpus presented by relator was ordered dismissed, and relator remanded, because there were no facts on file from which the court could determine the correctness of the rulings of the trial court on the matters complained of. Appellant was sent to jail for refusing to answer certain questions before the grand jury. Relator now files a motion for rehearing in which he states that he is now filing a statement of facts. An examination of the record fails to disclose any such facts filed.

Motion for rehearing overruled.

CHRISTOPHER v. STATE. (No. 5360.)

(Court of Criminal Appeals of Texas. April 2, 1919.)

CRIMINAL LAW  $\S$  1090(8) — ABSENCE OF STATEMENT OF FACTS AND BILLS OF EXCEPTION—REVIEW.

Record being before court on appeal without a statement of facts or bills of exception, the only ground of motion for new trial, namely, want of sufficient evidence, cannot be considered, and judgment will be affirmed.

Appeal from District Court, Nacogdoches County; Lee D. Guinn, Judge.

Olint Christopher was convicted on a charge of rape, and he appeals. Affirmed.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was given five years in the penitentiary by the verdict of the jury on a charge of rape.

The record is before us without a state-

ment of facts or bills of exception. The only ground of the motion for new trial is the want of sufficient evidence. This cannot be considered for the reasons above stated.

The judgment will be affirmed.

(85 Tex. Cr. R. 144)

THOMPSON v. STATE. (No. 5293.)

(Court of Criminal Appeals of Texas. April 2, 1919.)

**1. HOMICIDE  $\S$  115 — JUSTIFICATION — SELF-DEFENSE — ABANDONMENT.**

If deceased had abandoned the conflict, accused was in no immediate danger, and was not justified in shooting deceased.

**2. HOMICIDE  $\S$  116(2) — SELF-DEFENSE — APPEARANCE OF DANGER — INTENT OF DECEASED.**

Upon the question of whether deceased had abandoned conflict at the time accused fired shot, the intentions of deceased should be judged by their appearance from the accused's standpoint at the time he fired.

**3. HOMICIDE  $\S$  276 — SELF-DEFENSE — ABANDONMENT — QUESTION FOR JURY.**

Where deceased, after having stabbed defendant, ran apparently toward a building, making it appear to defendant that he intended to get pistol and renew conflict, the deceased had not, as a matter of law, abandoned the conflict.

**4. CRIMINAL LAW  $\S$  762(5) — INSTRUCTIONS — CHARGE ON PROVOKING DIFFICULTY — EXPRESSION OF OPINION.**

In homicide prosecution, where it was claimed defendant had shot deceased after deceased had abandoned the conflict, charge on provoking difficulty held objectionable as suggesting that in the opinion of the court the defendant was wrong in the beginning, and that he invited contest with deceased in order to kill him, particularly where evidence as to who was aggressor in the beginning was conflicting.

**5. HOMICIDE  $\S$  307(2) — CHARGE ON PROVOKING DIFFICULTY — AGGRAVATED ASSAULT.**

In homicide prosecution, charge on provoking difficulty should inform jury that, if defendant provoked the difficulty with the intent to injure the deceased, but with no intent to kill him or do him serious bodily harm, and afterwards fired upon him for the protection of his own life against the threatened assault by deceased, conviction could not be for a higher grade of offense than aggravated assault.

**6. ASSAULT AND BATTERY  $\S$  54 — AGGRAVATED ASSAULT.**

Where defendant provoked the difficulty with the intent to injure the deceased, but with no intent to kill him or do him serious bodily harm, and afterwards fired upon him for the protection of his own life against a threatened assault by the deceased, conviction cannot be for a higher grade of offense than aggravated assault.

**7. HOMICIDE  $\S$  300(8) — SELF-DEFENSE — COMMUNICATED THREATS — CHARGE.**

In homicide prosecution involving self-defense issue, where there was evidence that deceased had made threats against defendant's life, court's refusal to give requested instruction on law of communicated threats was error.

Appeal from District Court, Howard County; Chas. Gibbs, Judge.

L. V. Thompson was convicted of assault with intent to murder, and he appeals. Reversed and remanded.

H. R. Debenport, of Big Springs, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

MORROW, J. Appellant, under indictment for murder, was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a period of two years.

The deceased was shot by appellant with a pistol, the bullet striking his leg, below the knee, fracturing the bone. The evidence presented the theory that the death of deceased did not directly result from the wound, but was caused by gross neglect. This was submitted to the jury and determined in appellant's favor. The state predicated the view that appellant in shooting at deceased acted upon malice from evidence that the deceased's wife and her sister were occupants of appellant's home, and that appellant desired the wife of deceased for his paramour, and upon this motive sought and embraced the opportunity to kill the deceased. The appellant had, according to his testimony, been carrying a pistol for some seven months prior to the homicide for the purpose of protecting himself from threats against his life made by other persons. The wife of deceased and her sister had been occupants of appellant's home, where he lived with his wife prior to the marriage of deceased, and subsequent to the marriage deceased and his wife resided with appellant for a time. Shortly before the homicide there had been a separation of deceased and his wife; she remaining at appellant's house. On the day of the homicide, which took place in the evening, the appellant claimed that the deceased's wife and her sister had been guilty of some misconduct, and that he had determined to exclude them from his premises. The evidence of the witnesses is in agreement to the point that immediately before the homicide deceased and his wife were talking together on the street; that appellant and one Miller approached them; that some words ensued; that the appellant struck the deceased with his hand; that the deceased had his open knife, and with it stabbed appellant, seriously wounding him; that after receiving the wound appellant

drew his pistol, the deceased fleeing, and in his flight was twice fired upon by the appellant, the second shot inflicting the wound; that when he was shot the deceased fell to the ground, and the appellant fell from the result of the wound he had received about the same time.

The *res gestæ* statement of the deceased was introduced by the state, and in substance it was that deceased and his wife had walked out on the railroad and started back; that she was staying at appellant's house; that while talking to her he heard some one coming, and, looking up, saw appellant and Miller approaching; that appellant spoke to him, saying: "I told you not to come around my house," to which the deceased replied that he was not at his house; that they began to wrangle; that appellant slapped him, and Miller told appellant to shoot deceased; that deceased stabbed appellant, and thereafter the appellant drew his pistol, when the deceased fled. An eyewitness for the state said that he passed the deceased and his wife while they were talking on the street, and met the appellant and Miller walking fast in the direction of where the deceased stood; that shortly thereafter he heard a voice say: "What in the hell do you fellows want?" and heard the reply, in substance, "You can't come around my house," and, turning, he observed the parties apparently in a fight; that deceased ran; appellant pursued and fire twice—the first when they were about 30 feet apart; the second when about 100 feet separated them.

Appellant claimed that he had no improper relations with the wife of the deceased or her sister; that their conduct was such that his wife on the day of the homicide had told the girls to leave; that he had determined that they should leave his house that night, and that when he saw the deceased and his wife he approached them for the purpose of seeing that they left his house that night; that in approaching them he had no intention of hurting them, no idea of having a fight or shooting; that it was his intention to run them off from his house because they had not been acting right; that when he reached a point within 5 or 6 feet of them deceased pushed his wife aside with his left hand and came towards appellant with his knife with the blade open; that the deceased had his head down like he was going to butt appellant and coming towards him, and when he came close enough appellant hit him twice with his fist, and the deceased stuck the knife in him; that the wound shocked him, and he fell backwards and felt pain; that he did not fall down, but caught himself, and got out his pistol, and while holding his entrails to prevent their protruding through the wound he pursued deceased, believing that he was going to a building near by to get a pistol

and renew the contest; that when deceased started toward him with the knife he did not draw his gun, but had hardly time to hit deceased with his hand; that he did not think the deceased was a coward, and did not figure that he was intending to kill him, and was not afraid of him, but that he believed that if he had not had his pistol deceased would have killed him with the knife. There was evidence introduced to the effect that the deceased had made threats against the life of appellant which had been communicated to him.

The court submitted the issues of murder, assault with intent to murder and self-defense, and in connection with the latter charged on the law of provoking the difficulty with intent to kill or inflict serious bodily injury. The court failed to charge on the law of communicated threats, and refused a special charge applicable thereto, to which action exception was duly reserved. It has been often ruled that, where the facts are such as to require an instruction to the jury on the law of self-defense growing out of apparent danger, and there have been introduced previous threats of the deceased against the accused which were communicated to him prior to the difficulty, it is incumbent upon the court to embody in his charge the law of communicated threats. *Alexander v. State*, 25 Tex. App. 266, 7 S. W. 867, 8 Am. St. Rep. 438; *Fieilding v. State*, 48 Tex. Cr. R. 334, 87 S. W. 1044.

[1] The state's counsel insists, however, that the facts did not call for a charge upon the law of self-defense, and predicates thereon a proposition that the omission of the charge on the law of threats was justified. The appellant fired both the shots at the deceased while he was retreating and the appellant was pursuing him, and after the deceased had stabbed appellant. One of the shots was fired when the deceased had gone about 10 steps, and the other when he had gone about 30 steps. If deceased had abandoned the conflict then appellant was in no immediate danger, and not justified in shooting deceased. *Lynch v. State*, 24 Tex. App. 350, 6 S. W. 190, 5 Am. St. Rep. 888; *Faubian v. State*, 203 S. W. 897.

[2, 3] The intentions of deceased, however, should be judged by their appearance from appellant's standpoint at the time he fired, and, thus viewed, we are not prepared to say as a matter of law that it was manifest to appellant that the deceased had abandoned the contest. The learned trial judge did not so view it, and in submitting the issue to the jury there are cases involving similar facts supporting him. Notably *Lawson v. State*, 50 S. W. 345; *Bordeaux v. State*, 58 Tex. Cr. R. 61, 124 S. W. 640; *Crow v. State*, 48 Tex. Cr. R. 421, 88 S. W. 814; *Airhart v. State*, 40 Tex. Cr. R. 472, 51 S. W. 214, 76 Am. St. Rep. 736.

[4] If the Assistant Attorney General's

view, however, that self-defense was not raised, were accepted as correct, it would follow, we think, that the charge on provoking the difficulty was unauthorized. That phase of the case arose only as a qualification of the law of self-defense. *Burnett v. State*, 51 Tex. Cr. R. 20, 100 S. W. 381; *Branch's Ann. Texas P. C. § 1955*. The charge on provoking the difficulty put the appellant at the disadvantage of suggesting to the jury that in the opinion of the court there was evidence that appellant was in the wrong in the beginning; that he invited the contest with the deceased in order to kill him. Particularly is this true when it is recalled that the evidence is quite conflicting as to who was the aggressor in the beginning of the conflict. *Rodriguez v. State*, 58 Tex. Cr. R. 397, 126 S. W. 264; *Tillery v. State*, 24 Tex. App. 251, 5 S. W. 842, 5 Am. St. Rep. 882.

[5, 6] If upon another trial the law of provoking the difficulty is submitted, it should embody, not only the theory of provocation with intent to kill or seriously injure, but the jury should be told in appropriate language that, if the appellant provoked the difficulty with the intent to injure the deceased, but with no intent to kill him or do him serious bodily harm, and afterwards fired upon him for the protection of his own life against a threatened assault by the deceased, his conviction could not be for a higher grade of offense than aggravated assault. *Young v. State*, 41 Tex. Cr. R. 442, 55 S. W. 331; *Branch's Ann. Texas P. C. § 2057*; *Green v. State*, 12 Tex. App. 449; *Sanders v. State*, 50 Tex. Cr. R. 430, 97 S. W. 1046; *Carter v. State*, 28 Tex. App. 355, 13 S. W. 147; *Solis v. State*, 76 Tex. Cr. R. 230, 174 S. W. 343.

[7] We think there was error in failing to charge upon the law of threats, and by reason thereof the judgment is reversed, and the cause remanded.

(85 Tex. Cr. R. 148)

#### WILSON v. STATE. (No. 5356.)

(Court of Criminal Appeals of Texas. April 2, 1919.)

#### 1. LARCENY. §55 — SUFFICIENCY OF EVIDENCE.

Evidence held to sustain conviction of theft of a barrel of whisky.

#### 2. CRIMINAL LAW §982—SUSPENDED SENTENCE.

The right of suspended sentence is a substantial one, and should not be taken from the defendant in any case where he reasonably brings himself within the terms of the law and presents his application.

#### 3. CRIMINAL LAW §982—SUSPENDED SENTENCE—TIME OF APPLICATION—"WHEN THE TRIAL BEGINS."

The expression "when the trial begins" within statute giving a defendant the right to file his application for a suspended sentence before such time means the announcement of ready for trial by both parties.

#### 4. CRIMINAL LAW §982—SUSPENDED SENTENCE—APPLICATION.

Where attorney for defendant did not announce himself ready for trial, and did not know that court entered on his docket an announcement of ready for both parties, but began preparation of an application, for a suspended sentence, the application should have been permitted, and the question submitted to the jury.

Appeal from District Court, El Paso County; W. D. Howe, Judge.

E. L. Wilson was convicted of theft, and he appeals. Reversed and remanded.

P. E. Gardner and Jackson & Isaacks, all of El Paso, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted of felony, theft of a certain keg or barrel of Scotch whisky, and his punishment fixed at two years in the penitentiary.

It appears from the record that some gentleman, whose identity is undisclosed, for a consideration, turned over to one Daniel some household goods which were to be packed by the latter and shipped to Matagorda, Tex., but the railroad company, moved by fear of the law, declined to receive for shipment one item of the aforesaid household property, to wit, a ten gallon keg of Scotch whisky, which, for several reasons, said Daniel placed for safe-keeping in a corral which he had around his warehouse. Just how long the keg remained there or how frequently it was seen while in that custody is also undisclosed. It appears that there was a colored individual by the name of Steele who had accepted some character of employment from Mr. Daniel, and that on the night of November 10, or rather in the early hours of the morning of November 11, 1918, this appellant and said Steele, who was also charged with stealing this same keg, appeared at the home of one Phillips about 3 or 4 o'clock a. m., while it was yet night, and said parties were accompanied by this same keg of Scotch whisky. In arousing Phillips appellant, who seems to be so black that he has been nicknamed "Blue," informed Phillips, who wished to know who was disturbing him, that it was Blue, and that he had some booze, and when permitted to enter Blue came in with a box containing a barrel, which later Phillips called a keg, which, when introduced in court in the presence of the jury, was identified by Phillips, and also substantially by Daniel,

as being the same keg, or one identical, with that in which the Scotch whisky was in Daniel's corral. Later in the day appellant came back and brought with him two jugs and a dozen bottles, all of which he proceeded to fill from the contents of the keg which Phillips said he knew by personal contact and experience was whisky, and Scotch whisky at that. After the departure of appellant carrying with him the dozen bottles and two jugs, all being full, Phillips seems to have been moved by some impulse, and says that he poured out the remaining contents of the keg. The testimony of Phillips was corroborated by his wife and one Clifford. Daniel had testified that the last time he saw the aforesaid keg of Scotch whisky in his corral was on the 10th of November.

[1] We think there is nothing in appellant's contention that the verdict is not supported by the evidence. Steele worked for Daniel. Daniel had the keg of Scotch whisky in his corral on November 10th. The night of that day said keg disappeared; that same night, at an unearthly hour, Steele and appellant appeared with a keg; same kind of keg, same content, whisky; same kind of whisky, Scotch. The conclusion is irresistible.

[2-4] We think the case must be reversed because the trial court refused to allow appellant to file his application for a suspended sentence and refused to submit that question to the jury. The record discloses that the attorneys for appellant had two cases before the district court set for the same day, and that he said to the court that he would be ready in either, and thereupon the prosecuting attorney announced ready in the other case, same being against one Thompson, which case was tried. When it was concluded, the court called appellant's case, and the attorney for the state announced ready for trial, but appellant's counsel announced he was not ready, because he had a case in the federal court for the following morning and desired the remainder of the day to get ready for trial in that case. The court then informed counsel that he could try appellant's case and finish it that afternoon and have the day following to look after his case in the federal court. Thereupon, as appears from the court's explanation to the bill of exceptions, appellant's counsel said, "Let me see if the defendant is here," and presently stated that he was so present. Thereupon the court, without so stating to

counsel, as far as the record discloses, entered on his docket an announcement of ready for both parties, and directed the clerk to prepare and deliver a list of the jurors to the attorneys. When the list was handed to the district attorney, he began an examination of the panel, but counsel for the appellant had begun to prepare an application for a suspended sentence for the signature of appellant thereto. Some colloquy occurred between the court and counsel for the appellant at this stage, the latter claiming that he had not announced ready for trial, and the court insisting that the words and action of counsel constituted an announcement, and thereupon the court refused to permit the application for a suspended sentence to be filed, which counsel nevertheless prepared. The court also refused to charge the jury relative to the suspended sentence or to give a special charge thereon requested by appellant. In this the court erred. The right of suspended sentence is a substantial one, and should not be taken from a defendant in any case where he reasonably brings himself within the terms of the law and presents his application. There had been no announcement of ready by appellant, nor had there been any statement by the court to appellant's counsel of the fact that the court was entering or had entered on his docket the fact of his making such announcement for appellant. The court's conclusion that the words and action of appellant's counsel amounted to an announcement of ready should not have been indulged when it at once became apparent that appellant not only desired to avail himself of his right to make such application, but was immediately engaged in its preparation. We are not in disagreement with the proposition that, for the purpose of determining when an application should be filed, the expression "when the trial begins," as used in this statute, means the announcement of ready for trial by both parties; but we are holding that, when it appears reasonably certain that it is not understood by appellant that he has announced, or that the court is making the announcement for him, then no technical strictness should be invoked to prevent a bona fide attempt to present such application. The application should have been permitted, and the question submitted to the jury.

For the error in this matter, the judgment of the trial court is reversed, and the cause remanded.

(85 Tex. Cr. R. 205)

**HUGGINS v. STATE. (No. 5195.)**

(Court of Criminal Appeals of Texas. Feb. 19, 1919. On Motion for Rehearing, April 16, 1919.)

**1. INTOXICATING LIQUORS §158—SALE TO SOLDIER.**

In a prosecution for selling whisky to a soldier contrary to Acts 35th Leg. (4th Called Sess.) c. 7, a requested instruction, directing an acquittal if the defendant bought the whisky for himself, was incorrect.

**2. CRIMINAL LAW §507(4)—EVIDENCE—ACCOMPLICE PROCURING SALE.**

Testimony of witnesses who procured the sale of intoxicating liquor to soldier contrary to Acts 35th Leg. (4th Called Sess.) c. 7, for the purpose of procuring evidence is subject to the general rule governing testimony of accomplices, the special rule in local option cases prescribed by Penal Code 1911, art. 602, being inapplicable.

**3. CRIMINAL LAW §1038(3), 1056(2)—APPEAL — NECESSITY OF EXCEPTION AND REQUEST FOR INSTRUCTION—TESTIMONY OF ACCOMPLICE—"FUNDAMENTAL ERROR."**

Witnesses who procured the sale of whisky to a soldier to secure evidence against defendant are not accomplices as a matter of law, and the necessity for corroboration of their testimony cannot be considered on appeal, in the absence of a requested charge or exception to the charge given; the error not being fundamental within Acts 33d Leg. c. 138 (Vernon's Ann. Code Cr. Proc. 1916, arts. 735, 737, 737a, 743).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fundamental Error.]

**4. CRIMINAL LAW §511(1)—PROSECUTION—SUFFICIENCY OF EVIDENCE—TESTIMONY OF ACCOMPLICE.**

In a prosecution for selling whisky to a soldier, evidence held sufficient to corroborate testimony of witnesses who procured the sale for the purpose of securing evidence, if those witnesses were accomplices.

On Motion for Rehearing.

**5. CRIMINAL LAW §511(2)—EVIDENCE—CORROBORATION OF ACCOMPLICE—SUFFICIENCY.**

Evidence sufficient to corroborate an accomplice need not be sufficient of itself to show guilt, but need only be material, and tend directly and immediately to connect accused with the offense.

Appeal from District Court, El Paso County; W. D. Howe, Judge.

Frank Huggins was convicted of selling or giving intoxicating liquor to a soldier, and he appeals. Affirmed.

Weeks & Owen, of El Paso, for appellant. El B. Hendricks, Asst. Atty. Gen., for the State.

MORROW, J. This conviction is for a violation of the statute which provides that

it shall be unlawful for any person, directly or indirectly, to purchase for, procure for, sell, give, or deliver to any person enlisted in the military forces of the United States, any spirituous liquors capable of producing intoxication. See Acts 35th Leg. (4th called Session) c. 7.

[1] Counsel for appellant upon the trial reserved no exceptions to the charge of the court, nor proper exceptions to special charges refused. The only special charge requested, the refusal of which is not properly reserved, was incorrect in that it directed an acquittal if the defendant bought the whisky for himself. He would, under the statute, have been guilty if he bought the whisky for himself and sold or delivered it to the soldier.

[2, 3] Other counsel appealing the case urge the insufficiency of the evidence, based upon the proposition that Pope, the soldier to whom the whisky was charged to have been delivered, and two officers co-operating with him, were accomplices, in that they brought about the commission of the crime, and that under the rule stated in *Bush v. State*, 68 Tex. Cr. R. 301, 151 S. W. 554, their testimony should be weighed by the rule applicable to accomplice testimony. In *Mansfield v. State*, 206 S. W. 195, we intimated in this character of prosecution the rule touching accomplice testimony would be the same as in prosecutions for violation of the local option prohibition law. The decision of that question was not necessary for a determination of the case, and inasmuch as article 602, P. O., provides a special rule in local option cases, it is doubtless correct, as held in *Bush v. State*, supra, that in a prosecution of the character here involved the general rule with reference to accomplice testimony would prevail. Applying that rule, however, and assuming that there was evidence upon which the jury might have concluded that Pope, Porter, and Pomeroy were accomplices, it was incumbent upon the appellant to have requested the submission of that issue to the jury, or to at least have excepted to the failure of the court to do so in his charge. An omission of this character is not fundamental error, nor one that can be raised in motion for a new trial, or on appeal, in the absence of an exception to the charge as provided by the act of the Thirty-Third Legislature, chapter 138 (Vernon's Ann. Code Cr. Proc. 1916, arts. 735, 737, 737a, 743).

[4] Moreover there was evidence other than that to which the complaint is addressed tending to connect the appellant with the commission of the offense. The witness Gat-en testified to a part of the transaction, corroborating the witness Pope and the other witnesses mentioned, and the appellant him-

self claimed that after Pope had asked him to obtain some liquor he bought four half pints of whisky for his own use, and put it near the stand which was used for shining shoes for a barber shop in which he worked; that Pope had previously placed in his possession three \$1 bills, and that after he put the package containing the whisky in the place mentioned he saw Pope take it, and said to him, "That is my whisky," when Pope said, "Get some more while getting is good," that the \$3 would get it; that he had previously offered to return the \$3 to Pope, stating, "That is cheap whisky for myself," when Pope said, "This will do," and appellant said, "This won't do," but further said, "I put the \$3 back in my pocket." The whisky introduced upon the trial and gotten from appellant by Pope was identified by appellant as the same whisky that he had bought and set down and saw Pope take, and said, "I kept the \$3 he gave me after he would not receive it back."

The facts are not such as to authorize us to hold them insufficient to support the conviction; and, there being no error in the trial presented for review, the judgment is affirmed.

#### On Motion for Rehearing.

We have carefully examined the record in the light of appellant's motion for rehearing.

No request for the submission of the questions whether the rule of accomplice testimony governed the state's witnesses having been made, their status would not be available to appellant upon appeal, unless they came within the accomplice rule as a matter of law and there was not sufficient corroboration. We do not think they were accomplices as a matter of law. *Sanchez v. State*, 48 Tex. Cr. R. 591, 90 S. W. 641, 122 Am. St. Rep. 772; *Wright v. State*, 7 Tex. App. 574, 32 Am. Rep. 599; *Allison v. State*, 14 Tex. App. 122; *Tones v. State*, 48 Tex. Cr. R. 368, 88 S. W. 217, 1 L. R. A. (N. S.) 1024, 122 Am. St. Rep. 759. If the contrary were true, however, we think the circumstances detailed in appellant's testimony afforded sufficient corroboration.

[6] The law does not require that the corroborative evidence be sufficient of itself and without the aid of the accomplice testimony to show guilt, but if the jury believes the accomplice testimony is true and it shows the commission of the offense and the guilt of the accused, then the corroboration is sufficient if it is to a material matter and tends directly and immediately to connect the accused with the commission of the offense. *Wright v. State*, 47 Tex. Cr. R. 434, 84 S. W. 593; *Jones v. State*, 4 Tex. App. 529. From appellant's testimony it appears that Pope was a soldier in uniform; that when requested to procure some whisky for Pope the ap-

pellant declined to do so, stating that it was unlawful; that Pope put money on the person of appellant; that appellant promptly went and got four half pint bottles of whisky and put them down at a place where Pope could and did obtain them; that appellant saw him get them, and, while he claims to have protested against it to Pope, he retained the money. The transaction as it actually occurred, as admitted by appellant, was not materially different from that described by the state's witnesses, except that from their testimony it appears that appellant was acting willingly, while from his, he claims the contrary. If the testimony which is alleged to have been that of accomplices was to be given any weight by the jury, it being corroborated in the particulars named, was sufficient to support the conclusion of the jury that in doing the things which resulted in the soldier obtaining the whisky the appellant intended that he should have it. As stated above, however, it is our opinion that the state's witnesses were not accomplices as a matter of law; and, the appellant having waived any decision by the jury as to whether they were accomplices in fact, we are not authorized to disturb the verdict.

The motion for rehearing is overruled.

(85 Tex. Cr. R. 133)

#### BUROW v. STATE. (No. 4487.)

(Court of Criminal Appeals of Texas. June 20, 1917. On Motion for Rehearing, April 2, 1919.)

#### 1. CRIMINAL LAW §1159(2, 4)—REVIEW—CREDIBILITY OF WITNESSES — WEIGHT OF TESTIMONY.

The credibility of witnesses and the weight to be given their testimony was solely for the jury.

#### 2. CRIMINAL LAW §59(3)—PARTIES TO OFFENSES—PRINCIPAL—PRESENCE.

Principal not only may perform some antecedent act in furtherance of the commission of the crime, but when it is actually committed is doing his part of the work assigned him, in connection with the plan and furtherance of the common purpose, whether he is present where the main fact is to be accomplished or not.

#### 3. CRIMINAL LAW §59(5)—PARTIES TO OFFENSE—PRINCIPALS.

When the offense is committed by the perpetration of different parts, which constitute one entire whole, it is not necessary that the offenders should be in fact together at the perpetration of the offense to render them liable as principals.

#### 4. CRIMINAL LAW §59(5)—PARTIES TO OFFENSE—"ACCOMPLICE."

An "accomplice," under Pen. Code 1911, arts. 79-85, inclusive, is one who has complet-

ed his offense before the crime is actually committed, and whose liability attaches after its commission, by virtue of his previous acts in bringing it about through the agency of or in connection with third parties.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

**5. CONSPIRACY §47—CIRCUMSTANTIAL EVIDENCE.**

Evidence in proof of a conspiracy to commit crime will generally, from the nature of the case, be circumstantial.

**6. CONSPIRACY §47—PROOF—SUFFICIENCY.**

To prove conspiracy to commit crime, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design and pursued by common means, proof that they pursued the same objects performing different parts thereof so as to complete it with a view to the attainment of the same object being sufficient.

**7. CRIMINAL LAW §59(3)—PARTIES TO OFFENSES—"PRINCIPALS"—PRESENCE.**

Parties engaged in conspiracy to commit crime performing different acts in furtherance thereof are "principals" under the statute, whether present bodily at the place of the offense or not.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Principal.]

On Motion for Rehearing.

**8. LARCENY §27 — PRINCIPAL OR ACCOMPLICE—CATTLE THEFT.**

Defendant, who agreed to purchase from cattle thieves cattle to be stolen by them, and who encouraged the theft and furnished arms and a wagon to aid in its perpetration, but who was not present at the commission of the crime and committed no act in furtherance thereof, was not a principal, but merely an accomplice, in view of Pen. Code 1911, arts. 79-85, inclusive.

**9. CRIMINAL LAW §59(3)—PARTIES TO OFFENSE—CONSPIRACY—PRINCIPALS.**

The mere fact that a conspiracy is shown does not make all parties to the conspiracy principals, whether they were present or not when the offense was committed.

Appeal from District Court, Jim Wells County; V. W. Taylor, Judge.

Charles Burow, Jr., was convicted of cattle theft, and appeals. Reversed and remanded.

S. H. Woods and W. R. Perkins, both of Alice, and Hicks, Hicks, Teagarden & Dickson, of San Antonio, for appellant.

J. E. Leslie, Dist. Atty., of McAllen, Davidson & Bailey, of Cuero, and E. B. Hendricks, Asst. Atty. Gen., for the State.

PRENDERGAST, J. Appellant was convicted of cattle theft, and his punishment assessed at the lowest prescribed by law.

Appellant, Tomas Nunez, and Manuel Garcia were jointly indicted for the theft of two head of cattle on February 14, 1916. The indictment was in three counts. The first charged the theft from the real owner; the second from a son who was in possession, control, etc., for her; and the third for receiving the cattle knowing they had been stolen. The second only was submitted to the jury; the others excluded.

Upon the motion of the defendants and in accordance with their agreement, a severance was had. Garcia was to be tried first, Nunez second, and appellant third; and the trials were so had. It seems Nunez and Garcia were both convicted before appellant was tried.

Appellant was a butcher in Alice, and dealt in and fed cattle for his butcher business, and also, it seems, bought and sold cattle. Nunez and Garcia, and also Pablino Martinez, were employed by appellant, and had been for several months, continuously working for him as ordinary hands and feeding his cattle. For the purpose of hauling feed, appellant had a team of mules and a wagon with very high sideboards and ends on it, and a large sheet or cover. Nunez handled the team and wagon and did most of the hauling of the feed. Nunez and Martinez both testified for the state against appellant.

Antonio Perez, the alleged owner, who was in charge of the cattle and ranch for his mother, had them and a large number of other cattle in a large pasture a few miles from Alice.

The contention and theory of the state—and the testimony was amply sufficient to sustain it—was: That appellant entered into a conspiracy with his said three employes, Nunez, Garcia, and Martinez, to steal from time to time, at night cattle out of said ranch. That Garcia and Martinez were to go horseback to said ranch, rope and tie the cattle. Nunez was to follow them with the wagon and team. The three to put them in the wagon, haul them back to appellant's slaughter pen, and there deliver them to him or for him, and he was to pay them therefor. That the conspiracy and agreement between them embraced all of this before the transactions were complete, and embraced the several acts by the several parties in order to complete the whole transaction. The state proved by Nunez and Martinez, in substance and effect: That this system of stealing the Perez cattle had been carried out fully on three previous occasions to the time this theft was charged, beginning in the latter part of December and winding up with the fourth time on February 14, 1916, at which time they were caught. That all these thefts from the Perez ranch of cattle were in the night, and that the delivery thereof was made at appellant's butcher pen at night, and that his said three employes were paid by him for the



cattle or for their services after their respective deliveries. That on each of the three previous occasions they had obtained and delivered, as stated, several head of cattle—as many as five or six head at a time, and on the occasion when they were caught they had three head, two only of Perez. Sometimes the cattle thus stolen and delivered were to be, and were slaughtered at once, when they were fit for slaughter and appellant needed them for that purpose at the time. When they were not in condition to be slaughtered, or he did not need so many at the time, he would then place them in his pasture with his other cattle and have them fed. That this same arrangement would have been carried out in this instance if they had not been prevented by being caught.

The state proved: That all of said Perez cattle stolen in this way had the Perez mark and brand on them; the brand in every instance was an old brand, that is, not at all fresh. That those of the cattle appellant did not at once slaughter, but sent out to be fed, he had his brand put on them over the Perez brand, and had the whole ears cut off so that the Perez mark could not be seen. In addition, that even after he had slaughtered some of these cattle, before he put his brand on them and had taken the hides off, that he then had changed the Perez brand, burned over into his brand, and that numerous of these hides which he had had inspected and sold were obtained and showed this. That on the night of February 14, 1916, in carrying out said system and scheme and conspiracy, appellant procured his said three employes to go out to the Perez ranch, as they had been doing, and get cattle for him. That they all went out after night for that purpose; Garcia and Martinez going ahead on horseback, and Nunez following with appellant's wagon and team. That he furnished his wagon and team and sheet to them for that purpose, and armed Nunez with a six-shooter. That Garcia and Martinez reached the ranch, roped and tied three head of cattle—two of Perez's and one of another owner—and when Nunez reached them with the wagon the three put the cattle in the wagon, put the sheet over them so they could not be seen, and started back to appellant's butcher pen to deliver the cattle to him therein as instructed and agreed in advance by appellant. The owner and the officers had in some way got wind of the matter and secreted themselves under a bridge near the gate where these parties would necessarily come out of the pasture going to Alice to deliver the cattle. About 11 or 12 o'clock at night, these three parties were returning with the cattle, and about the time they passed out of the gate the officers and posse made their appearance and undertook to arrest the three men. Garcia and Martinez fled and succeeded in escaping for a time, but the officers then caught Nunez with the wagon and took him and the cattle

to the jail. They got the other two later. The cattle thus stolen on this occasion, as well as most or all of the others stolen on the three previous occasions, were thoroughly identified as the Perez cattle and stolen from him. The above is, perhaps, a sufficient general statement of the state's case.

Appellant testified denying the conspiracy, and any and all connection by him with the theft of the cattle on the night of February 14th, or any of the three previous thefts. That he was not present at the time these cattle were roped and tied, put in the wagon, and started back with to Alice, was shown without question. He testified in substance that he had no agreement or understanding and no conspiracy with his said three employes, as testified to by them; that all and everything they did with reference to stealing any of said Perez cattle on the said four occasions was without his knowledge or participation in any way. He denied changing the brand on any of those cattle, or branding the hides after the cattle were killed, and denied cutting off their ears. In fact, he denied the state's case in every particular.

[1] The credibility of the witnesses and the weight to be given to their testimony was solely for the jury. Clearly the jury believed the state's testimony, and disbelieved appellant's.

Appellant's main contention is that the evidence showed that he was not a principal in the theft; that, if it showed any guilty connection by him with the theft, it was that of an accomplice and not a principal. He properly raised and saved the point in various ways.

Appellant's contention, in substance and effect, is that the theft of the cattle was complete and ended at the very time Garcia and Martinez roped and tied them, and that as he was not then and there bodily present, and all he did in advising and employing them to steal the cattle, and what arms and aid and means he furnished them, was all before they stole the cattle, it was error for the court to submit to the jury his guilt as a principal; that he could have been guilty only as an accomplice and not as principal.

There are many decisions of this court construing and applying our statutes on principals and accomplices which are directly in point and applicable to this case, and decisive against appellant.

The principles applicable are these:

[2-4] "The acts constituting an accomplice are auxiliaries only, all of which may be and are performed by him anterior and as inducements to the crime about to be committed (Penal Code, arts. 79 to 85, inclusive); whilst the principal offender not only may perform some antecedent act in furtherance of the commission of the crime, but when it is actually committed is doing his part of the work assigned him in connection with the plan and furtherance of the common purpose, whether he be present where

the main fact is to be accomplished or not. When the offense is committed, by the perpetration of different parts which constitute one entire whole, it is not necessary that the offenders should be in fact together at the perpetration of the offense to render them liable as principals. \* \* \* In other words, an accomplice, under our statute, is one who has completed his offense before the crime is actually committed, and whose liability attaches after its commission, by virtue of his previous acts in bringing it about through the agency of or in connection with third parties. The principal offender acts his part individually, in furtherance of and during the consummation of the crime." *Cook v. State*, 14 Tex. App. 101; *O'Neal v. State*, 14 Tex. App. 591.

[5-7] "Evidence in proof of a conspiracy to commit crime will generally, from the nature of the case, be circumstantial. It is not necessary to prove that the defendants came together and actually agreed in terms to have that design and pursue it by common means. If it be proved that defendants by their acts pursued the same objects, often by the same means, one performing one part and another another part of the same, so as to complete it with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object (*Slough's Case* [C. C.] 5 Fed. 680), and under our statute such acting together would make all principal offenders, whether present bodily at the place of the offense or not (*Berry v. State*, 4 Tex. App. 492; *Heard v. State*, 9 Tex. App. 1; *Wright v. State*, 18 Tex. App. 358), and they are all principals and acting together as long as any portion or object of the common design remains incomplete; in other words, until the full purpose and object of the conspiracy is consummated and accomplished." *Smith v. State*, 21 Tex. App. 124, 125, 17 S. W. 555.

"The true criterion in determining who are principals, it is believed, is: Did the parties act together in the commission of the given offense? Was the act committed in pursuance of a common intent? Was the particular crime committed in pursuance of a previously formed design in which the minds of all united and concurred? If so, then all persons who were guilty of acting together in the execution of a previously formed design, existing in the minds of all at the time the offense was committed, and actuating and prompting the actual perpetrator, then all so connected with the offense are principals, without reference to which one or more of the participants committed the offense, or at what particular stage of the proceeding, so that it was in pursuance of the previously formed scheme, and during the existence and execution of the common intent."

"All persons are principals who are guilty of acting together in the commission of an offense." So that, in determining the question whether one accused of crime is liable as a principal or principal offender, the inquiry is, not as to what occurred prior to the commission of the given offense or subsequently thereto, but, did the parties act together? Were they guilty of acting together in the commission of the crime or offense charged? Did the person or persons involved in the investigation act together with others in the commission of the

offense? If so, then he or they are, in law, principal offenders. It cannot be intended that the acts refer to the very fact of committing the offense. \* \* \* All persons who shall engage in procuring aid, arms, or means of any kind to assist in the commission of an offense while others are executing the unlawful act, \* \* \* are neither accessories nor accomplices, but are declared to be principals, and liable to conviction and punishment as such." *Welsh v. State*, 8 Tex. App. 419.

We will now cite and quote from some of the cases applying these principles and our statutes.

In *Welsh v. State*, 8 Tex. App. 417, *Welsh* had hands gathering cattle for him which they were then to drive onto a certain place. He instructed his hands to take all the cattle they could find, and he would go ahead and make arrangements to ship or sell them. He then left them and went several miles to make and did make his arrangements to sell or ship them. While he was thus away and not present, his hands took a certain cow belonging to another, placed her with the herd, and drove her with the herd to the place *Welsh* had named. He there accepted this cow and sold her. He was held to be a principal and not an accomplice, because he was engaged at the time of the theft in performing his part in the consummation of the conspiracy to steal and dispose of them. *Smith v. State*, 21 Tex. App. 124, 17 S. W. 552.

In *Scales v. State*, 7 Tex. App. 361, it was shown that the stolen animals were taken in *Wise* county by two confederates of *Scales*, and under his direction, and that after they were taken from *Wise* to *Clay* county by them, there *Scales* joined them and went with them to the *Panhandle* country, where they were soon afterwards captured with the animals. "At the time of the actual perpetration of the theft, *Scales* was in *Clay* county, and \* \* \* *Scales* and three others were partners in the enterprise, under an arrangement to share the profits equally." *Scales* was convicted as a principal, and his case affirmed.

In *Watson v. State*, 21 Tex. App. 606, 1 S. W. 451, 17 S. W. 550, it was shown that *Watson* and one *Dickerson* entered into an agreement, the substance of which was that *Dickerson* would steal hogs and bring them to *Watson's* house, where they would be slaughtered, the meat salted, etc., and the bacon to be divided equally between them. In pursuance of this agreement, *Dickerson*, assisted by *Owens*, whom *Dickerson* induced to engage with him in the theft, stole *Long's* hogs and drove them to *Watson's* house, where they were penned, slaughtered, etc. While *Dickerson* and *Owens* were engaged in committing the theft, *Watson* was performing the part assigned him by preparing the things necessary to slaughter and put away the meat. The court said:

"Although he was not actually present when the hogs were taken, he was engaged in procuring and supplying means to assist in the commission of the offense, while Dickerson and Owens were executing the unlawful act."

He was held principal, and the judgment against him affirmed.

In the case of *Smith v. State*, supra, it was shown that several persons, in the absence of Smith, stole a number of head of cattle in Erath county and drove them some 40 miles distant into Parker county where Smith was. Smith was not present when the parties took the cattle in Erath county. It was further shown that there an arrangement between Smith and said other persons whereby they were to steal said cattle, drive them to Parker county where he was when he would join them, and that he would then take the cattle on to Ft. Worth and sell them, and they would divide the proceeds. He was convicted as a principal and the judgment affirmed.

Quite a number of other cases to exactly the same effect could be cited; among them is *Mason v. State*, 31 Tex. Cr. R. 311, 20 S. W. 564, and cases there cited, and various other cases cited in those we have mentioned above. Also, the recent case of *Simpson v. State*, 196 S. W. 835, from Jefferson county, not yet officially reported, decided in an opinion by Judge Morrow on May 30th.

The facts in this case show that the conspiracy entered into between appellant and his said three employes did not terminate with their actually taking said cattle, but that it continued until they should deliver the cattle to him at his butcher pen and he pay them therefor, or pay for their services. From the state's case it was clear that this had been the course of conduct and the scheme and system which these parties had been operating upon in previous thefts exactly as this, and that in every instance his connection with the matter did not end until he had gotten the cattle himself. He instructed them to go that night and steal and deliver to him the cattle. He armed Nunez with a pistol and furnished him and the others his wagon and team to haul the cattle to his butcher pen and his sheet to conceal them while hauling them to him. He was furnishing everything that was necessary on his part to consummate the whole transaction by the delivery of the cattle to him in his butcher pen, and, if said parties had not been caught and arrested before they delivered the cattle to him, they would have done so as agreed between him and them. The evidence showed that he was a principal and not an accomplice.

His complaints of the court's charge on the subject of principals present no error. They are really disposed of in passing upon the question above that the evidence was

sufficient to show that he was a principal and not an accomplice.

What we have said above also disposes of his contention that the court should have charged alibi in his favor. If we are correct in what we have said above, the question of alibi was wholly inapplicable.

The verdict of the jury when first brought in was informal, as the court so told them. It was the duty of the court and authorized by the statute and the decisions to correct the verdict at the time with the consent and approval of the jury. When he did correct it, they as a body expressly assented to it as corrected. In addition, at appellant's instance, they were polled, and each in answer said it was his verdict.

The judgment is affirmed.

#### On Motion for Rehearing.

MORROW, J. I am not satisfied that there are facts in this case which would authorize the finding by the jury that appellant was a principal within the meaning of our statute. Article 74, P. O. This article, in connection with others following it in the same chapter, has been, I think, correctly construed in the leading case of *Smith v. State*, 21 Tex. App. 106, 17 S. W. 552, and the cases following it, including *Simpson v. State*, 196 S. W. 835. There are other decisions by this court, notably *Tittle v. State*, 35 Tex. Cr. R. 96, 31 S. W. 677, and *Dawson v. State*, 38 Tex. Cr. R. 50, 41 S. W. 599, which, in passing on the facts similar to those involved in the instant case, I think declare that the principles applied in *Smith's Case* were not applicable to this one. The cases mentioned, *Dawson* and *Tittle Cases*, were written in the light of the *Smith Case*, and without modifying it fixed a limitation upon its scope which appears to me should control this decision. The rule laid down in the leading case mentioned is that, where persons enter into a conspiracy to commit the crime of theft of property contemplating that one or more of the conspirators shall take the property from the possession of the owner and deliver it to another conspirator not present at the time of the taking, to be by him converted, and the proceeds distributed among all, and that when this conspiracy is carried into effect by the taking of the property from the possession of the owner by one or more of the conspirators delivering it pursuant to agreement to another to be converted by him, pursuant to the previous agreement, to the end that the proceeds may be distributed, all are principals within the meaning of the statute. This construction of the statute was regarded by one of our greatest jurists as unwarranted, in that there was a failure of the state to prove that the conspirator, to whom the property was delivered by those first acquiring possession of it from the own-

er, was at the time it was taken from the possession of the owner doing any act in furtherance of the common design. See dissenting opinion of Judge Hurt in 21 Tex. App. 130, 17 S. W. 552. The majority held, however, that while at the time the property was taken possession of one of the conspirators was at his home some 40 miles distant from the place of the taking pursuing his ordinary avocations disconnected with the theft, his previous agreement to take charge of the property when delivered to him and convert and divide the proceeds thereof, and the fact that he subsequently did these things, sufficiently satisfied the terms of the statute which declare that to make him a principal he must be doing some act in furtherance of the common design at the time the theft was committed. This view of the majority has since been accepted and applied by this court, and is accepted by the writer as an established interpretation of the statute which is not to be departed from, and from which there is no desire or intention here to depart. The sole question is: Do the facts from the standpoint of the state bring the appellant within this rule?

In *Tittle's Case*, 35 Tex. Cr. R. 96, 31 S. W. 677, the court, in passing upon the facts which tended to show that appellant and others conspired to steal cattle, that the others were to actually take them from the possession of the owner, and appellant to receive them, drive them to market, sell them, and distribute the proceeds, specifically held this did not bring into play the application of the rule in the *Smith Case*, supra. The facts are meagerly reported. As we understand them, however, there was evidence tending to show that appellant, after making the agreement and after the cattle were taken, did not come into possession of them, nor take part in their conversion. In the later case of *Dawson v. State*, 38 Tex. Cr. R. 52, 41 S. W. 599, *Smith's Case* was again discussed, and the construction of the statute there given held inapplicable to a state of facts in which the accused agreed to participate in an offense which was subsequently committed by his coconspirators in his absence and in which he took no actual part, and it is there held that the true rule marking the dividing line between principals and accomplices was laid down in *Bean v. State*, 17 Tex. App. 61, and this without declaring the rule applied in *Smith's Case* as sound as applied to the facts existing. The subsequent action of this court indicates that these decisions are not in conflict with the *Smith Case*, but that the facts passed upon distinguish it therefrom. For instance, in *Kaufman v. State*, 70 Tex. Cr. R. 438, 159 S. W. 58, in passing upon facts singularly similar to those involved in the case in hand, the court held that the person receiving the goods after they were taken from the owner, having previously encouraged the takers to

do so, was not a principal in the theft, but was guilty of the offense of receiving stolen property, a crime that has uniformly been held distinct and separate from the crime of theft. *Gaither v. State*, 21 Tex. App. 527, 1 S. W. 456; *Clark v. State*, 194 S. W. 158.

The element of distinction is tersely put in *Welsh v. State*, 3 Tex. App. 413, and *Rountree v. State*, 10 Tex. App. 110, in the statement that, to hold one liable as a principal, there must be a concurrence of act and intent.

In this case the state's position is that appellant, having agreed with certain Mexicans that the latter should take the cattle from the possession of the owner and bring them to the stock pens of the appellant, and that appellant would pay them a stipulated sum of money for the cattle, it being the intention of the appellant after he received the cattle to dispose of them and retain the proceeds; that to aid the Mexicans in securing possession of the cattle appellant, before they were taken and pursuant to the conspiracy, put in their possession a pistol and a wagon; that the Mexicans using the wagon took the cattle from the pasture of the owner, and while en route to appellant's pens were arrested and the cattle taken from their possession. The pens in question had been previously constructed and long used. Appellant at the time the Mexicans caught the cattle and removed them from the pasture was doing nothing in furtherance of the design, except that it may be inferred from the acts stated above. Was he a principal, or was he an accomplice? Do the facts bring him within the rule in the *Smith Case*, supra, or are they within the rule in *Dawson's Case*, supra? The facts in the *Smith Case* showed that *Smith* and others entered into a conspiracy to steal cattle which were in *Erath* county; the plan agreed upon being that the others should take possession of the cattle in *Erath* county, bring them to *Parker* county, deliver them to appellant, who would remove them to *Tarrant* county, sell them, and divide the proceeds. This was done. Appellant was held a principal upon the idea that the transaction was not complete as to any of the conspirators until the cattle were sold and the proceeds distributed. In the instant case, it was not contemplated that the Mexicans should have any interest in the cattle or in the manner of their distribution, but that they should deliver them to appellant, receive their pay; he taking the risk and assuming the responsibility of disposition upon his own account. To this extent the facts of the cases differ. The transaction was ended, so far as the Mexicans were interested, when they delivered the cattle to appellant and received the money. In the *Smith Case* the agreement was carried into effect. In this case appellant did not receive the cattle, though he intended to do so. He

was not present at the taking, and the part he was to perform after the taking was never done. Do his acts and his intent concur so as to make him a principal? Does his intention to do the act of receiving and paying for the cattle meet the requirements of the statute that he must do some act in the perpetration of the theft? The statute on accomplices is as follows:

"An accomplice is one who is not present at the commission of an offense, but who, before the act is done, advises, commands or encourages another to commit the offense; or

"Who agrees with the principal offender to aid him in committing the offense, though he may not have given such aid; or

"Who promises any reward, favor or other inducement, or threatens any injury in order to procure the commission of the offense; or

"Who prepares arms or aid of any kind, prior to the commission of an offense, for the purpose of assisting the principal in the execution of the same."

[8, 9] The acts which make one guilty as an accomplice are performed before the actual offense is committed. Branch's Ann. P. C. p. 358, § 700; West v. State, 28 Tex. App. 4, 11 S. W. 635; Pendley v. State, 71 Tex. Cr. R. 281, 158 S. W. 811, and other cases there cited. The cattle were taken by others. Appellant was not present when they were taken, and, while his coconspirators were taking them and after they were taken, did no affirmative act. Before they were taken appellant agreed to it, advised it, encouraged it, offered an inducement for it in the promise to purchase the cattle, and furnished arms and a wagon to aid in its perpetration. None of the elements constituting him an accomplice appear to be wanting. The element of actual participation at the time or during the commission of the offense required to constitute him a principal appears to be absent. Mitchell v. State, 44 Tex. Cr. R. 228, 70 S. W. 208; Menefee v. State, 67 Tex. Cr. R. 201, 149 S. W. 141; La Fell v. State, 153 S. W. 885; Silvas v. State, 71 Tex. Cr. R. 213, 159 S. W. 225; Womack v. State, 74 Tex. Cr. R. 640, 170 S. W. 141; Jones v. State, 57 Tex. Cr. R. 144, 122 S. W. 31. The mere fact that a conspiracy is shown does not make all parties to the conspiracy principals, whether they were present or not when the offense was committed. Branch's Ann. P. C. p. 359; O'Quinn v. State, 55 Tex. Cr. R. 18, 115 S. W. 39; Bell v. State, 39 Tex. Cr. R. 677, 47 S. W. 1010; Sessions v. State, 37 Tex. Cr. R. 61, 88 S. W. 605; Phillips v. State, 26 Tex. App. 247, 9 S. W. 557, 8 Am. St. Rep. 471. To hold appellant a principal, in my judgment, extends the construction of the statute beyond the limit fixed in the previous decisions of this court. It would make his guilt as a principal dependent, not upon his acts done in furtherance of the common design, but

at most upon an intent to do acts which were never done.

I therefore believe that the correct disposition of the case requires that the motion for rehearing be granted, and the judgment reversed and the cause remanded, and it is so ordered.

#### STARK et al. v. BROWN et al. (No. 414.)

(Court of Civil Appeals of Texas. Beaumont.  
March 10, 1919. On Rehearing,  
April 2, 1919.)

#### 1. ADVERSE POSSESSION §45—INTERUPTION OF CONTINUITY OF POSSESSION BY SUIT—DESCRIPTION OF LAND.

In trespass to try title, where plaintiffs' title was one by limitation, a former suit by defendants against plaintiffs' tenants did not break the continuity of plaintiffs' possession of the land involved in the instant suit, where, although the petition in the former suit described generally the land involved therein as being a certain survey which in fact included the land in the instant suit, such general description was followed by a particular description by metes and bounds, not including it; the particular description controlling the general.

#### 2. APPEAL AND ERROR §1097(1)—PRIOR APPEAL—LAW OF CASE—DICTA.

A statement unnecessary to the decision of a former appeal is not conclusive on subsequent appeal.

#### 3. TRIAL §191(4)—INSTRUCTIONS — ASSUMING ISSUES.

In trespass to try title, plaintiffs setting up title by limitation, a submission of the question of plaintiffs' adverse possession through certain named persons as tenants would be objectionable as assuming that such persons were plaintiffs' tenants, and therefore on the weight of evidence, were the facts not sufficient to warrant such assumption.

#### 4. APPEAL AND ERROR §1099(7)—PRIOR APPEAL—ISSUES DETERMINED ON PRIOR APPEAL.

Where appellants refer in their brief to the former appeal in the case for a full statement of facts, and such statement is not contested by appellees, questions of fact decided on former appeal are concluded on the subsequent appeal.

Appeal from District Court, Newton County; W. T. Davis, Judge.

Suit by Emanuel Brown and others against W. H. Stark and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Holland & Holland, of Orange, for appellants.

Wightman, Hancock & Wigley, of Newton, for appellees.

WALKER, J. This is a suit in trespass to try title, brought by appellees against appel-



vey, and is sufficient to identify the same; but, in addition, appellants followed this general description by a particular description describing the land sued for by metes and bounds.

In construing descriptions of the character involved in this appeal, Devlin, in his admirable work on Deeds (volume 2, p. 2016, § 1039), announces the following general rule:

"Where there is a repugnance between a general and a particular description in a deed, the latter will control. But, whenever possible, the real intent is to be gathered from the whole description, including the general description as well as the particular."

In support of this rule, he cites the following Texas cases: *Stafford v. King*, 30 Tex. 257, 94 Am. Dec. 304; *Cullers v. Platt*, 81 Tex. 258, 16 S. W. 1003; *Tate v. Betts*, 97 S. W. 707.

In *Tate v. Betts*, supra, Chief Justice Fisher said:

"The only question in the case is as to whether or not the trial court placed the proper construction on the deed from Bennett Hill to Metzler. If the conclusion reached by the court was correct, the judgment in appellee's favor must be affirmed. The ruling of the court is supported by *Cullers v. Platt*, 81 Tex. 263, 16 S. W. 1003, and *Bogges v. Allen*, 56 S. W. 195. In both cases the particular description contained in the deeds was held to control the general description."

In *Cullers v. Platt*, supra, the general description conveyed all the land in the Tyson survey except 140 acres belonging to the Montgomery estate, and also described the land conveyed by metes and bounds. In disposing of the same, the Supreme Court said:

"But the rule is that, where there is a repugnance between a general and a particular description in a deed, the latter will control (2 Dev. on Deeds, § 1039), although, whenever it is possible, the real intent must be gathered from the whole description, including the general as well as the particular. Where a grantor conveys specifically by metes and bounds, so there can be no controversy about what land is included and really conveyed, a general description as of all of a certain tract conveyed to him by another person, or, as in this case, all of a survey except a tract belonging to another person, cannot control; for there is a specific and particular description about which there can be no mistake and no necessity for invoking the aid of the general description."

In *Waldin v. Smith*, 76 Iowa, 652, 39 N. W. 82, the court said:

"But it is claimed by appellant that because the deeds from the subsequent owners described the land as 'lot 8 and part of lot 7,' instead of 'part of lots 7 and 8,' the whole of lot 8 was conveyed, notwithstanding that in the subsequent part of the description by metes and bounds, and in the quantity of land conveyed, part of lot 8 was expressly excluded. It is to be observed that these provisions of the deed are repugnant to each other. But when we con-

sider the circumstances surrounding the parties at the time the conveyances were made, we think the particular description by metes and bounds, which expressly excludes the north part of lot 8, should be regarded as the land intended to be conveyed by the grantors."

Looking to the intention of the parties at the time of the institution of the suit in 1910, it seems to us clear that appellants were suing only for the southern portion of the survey No. 5, that is, the portion described by metes and bounds. Mr. Cox, a witness for appellants, and a surveyor in their general employ, testified that he made the field notes to this 93 acres; that when he did so he saw the improvements north of the 93 acres which are now claimed by appellees; that the improvements were old; that the house was occupied and the land cultivated, and that he knew that Jim Brown was working a part of this land now claimed by appellees; also that there had been some trespassing on the land now claimed by appellees; and that he had gone down there to look after that. Yet, with this information in his hands, he surveyed out for appellants this 93 acres, and on these field notes his suit was brought.

We think, under the general rules of construction, as above stated, the suit filed in 1910 was only for the 93 acres specifically described.

Appellants' second proposition under their first assignment of error is that this court, in the former appeal, determined that the suit filed in 1910 was for all of the survey No. 5, and not for the particular portion described by metes and bounds, and, having so decided, such decision is now the law of this case.

Appellants cite the following paragraph from Judge Brooke's opinion:

"On August 9, 1910, defendants here, as plaintiffs, brought suit against Hannah Rhone and Jim Brown, being the persons in possession, to recover International & Great Northern survey No. 5, and plaintiffs' petition in that case describing what may be called the south part of section No. 5. In 1913 a judgment by agreement was entered in plaintiffs' favor for the land in dispute."

[2] We cannot sustain this proposition for two reasons:

(1) Because it was not necessary to a decision of the former appeal to construe this description. On the former appeal the jury found that the possession of appellees began in 1898, and the ten years' possession was complete before 1910, which possession had matured the title in appellees before the institution of that suit.

(2) Because we do not so construe the opinion. In making the statement above quoted, Judge Brooke only stated the description as it was found in the petition, without attempting to construe the same. However, later on in the opinion this language is found:

"The issue of limitation was a sharply contested issue, and a great deal of testimony pro and con was introduced before the jury on the question of whether or not the plaintiffs had made out their plea of ten years' limitation before suit was filed by appellant in 1910 for the possession of a part of the survey against Hannah Rhone and Jim Brown."

In so far as it was necessary to pass on that description, the former decision holds that it was for only a part of the survey; and now, after a careful examination of the authorities, we are of the same conclusion as indicated above; that is, that the 1910 suit was for only that portion of the survey described specifically by metes and bounds.

[3] The court submitted the issue of limitation to the jury in the following language:

"Have the plaintiffs, either in person or through tenants, Hannah Rhone, Jim Brown, and B. Snell, had and held adverse and peaceable possession of the land described in plaintiffs' petition, being a portion of I. & G. N. R. R. Co. section No. 5 in Newton county, Tex., using and cultivating the same, and claiming the same for any period of ten consecutive years prior to January 1, 1918, by a separate inclosure or inclosures and under fence entirely on said section No. 5?"

Appellants complain of this charge, asserting that the same assumes that Hannah Rhone and Jim Brown and B. Snell were the tenants of appellees, and therefore the charge is on the weight of the evidence.

As an abstract proposition, this assignment is well taken, and if, under the facts in the record, the court was not warranted in so assuming, this charge would be error.

[4] In their brief appellants refer us to the former appeal in this case for a full statement of the facts. On this statement from appellants, it not being contested by appellees, it is our duty to find that the facts on this appeal are identical with the facts on the former appeal, and hence all issues of fact determined by the court before are binding on us now, unless the correctness of such findings was an issue on the subsequent trial. Vernon's Sayles' Texas Civil Statutes 1914, art. 1639, p. 930, § 6, Issues Determined on Prior Appeal, and cases therein cited.

On the former appeal this court found as a fact that Hannah Rhone and B. Snell and Jim Brown were the tenants of appellees during the time their possession matured title in their landlord, the court saying:

"Appellees' claim of occupancy, cultivation, and use under the statute is based upon the occupancy, cultivation, and use by their tenants, Hannah Rhone, B. Snell, and Jim Brown, as hereinbefore recited, and they do not claim to have ever occupied, cultivated, or used the land otherwise for the required length of time. The tenancy of the parties is not evidenced by any writing, and is based on verbal attornment from year to year between the landlord and tenant."

As no issue was made against this finding on this trial and as appellants adopt the statements made by the court in our former opinion, it is our duty to hold that Jim Brown, Hannah Rhone, and B. Schnell were the tenants of plaintiffs, and the trial court was not in error in so assuming in his charge.

Apart from this, construing the 1910 suit to include only that portion of the land described by metes and bounds, an examination of the record shows that there was no controverting testimony on the issue of tenancy; and the court, even on the record as made on this appeal, committed no error prejudicial to appellants, in assuming that the persons named were the tenants of appellees.

Appellants have very ably presented the issue of estoppel. They specially pleaded, in answer to plaintiffs' plea of ten years' limitation, that plaintiffs were not made parties to the suit in 1910 because plaintiffs held out and represented to them that Hannah Rhone owned the land involved in that suit.

If the description in that suit had been sufficient to include all of the land in survey No. 5, appellants' plea of estoppel would be immaterial, because plaintiffs' possession would have ceased in 1910 when suit was filed against Jim Brown and Hannah Rhone; but, as that suit involved only the 93 acres, no representation made by plaintiffs as to the ownership of the 93 acres could afford a basis for a plea of estoppel as to the lands now claimed by them, and the court did not err in failing to submit this issue to the jury.

Finding no errors in the record, this case is affirmed.

#### On Rehearing.

In the original opinion we found that Mr. Cox, a witness for appellants, testified that he made the field notes of the 93 acres claimed by Hannah Rhone and described in the suit of 1910, and that he testified that the improvements north of the 93 acres were old at the time he made the field notes. We were mistaken in this statement. Mr. Cox did not make the field notes to the 93 acres, and he testified that the improvements north of the 93 acres were new in 1908, rather than old.

Appellants' attorney also complains of our statement that it was contended by him that the opinion in the former appeal determined that the 1910 suit included all of this survey. This case was very ably argued, on submission, by both parties, and very probably we misconstrued his position. On his request, in this motion for rehearing, we withdraw that part of the original opinion.

Appellants, in their motion for rehearing, assign as error our finding that Hannah Rhone was the tenant of plaintiffs while occupying the lands claimed by plaintiffs in



this suit, and that there was no testimony controverting this conclusion, their proposition being:

"Hannah Rhone was not the tenant of plaintiffs while occupying the land, because the jury were asked that question and so found, and this court is in direct conflict with the verdict of the trial jury, which finding of the jury is not even questioned on this appeal."

Question No. 9 submitted to the jury was as follows:

"Do you believe from the evidence that Hannah Rhone while occupying a portion of section No. 5, I. & G. N. R. R. Co., was asserting in herself an independent claim to 160 acres thereof?"

To this question the jury answered "Yes." This question directs the jury's attention to no particular time. Hannah Rhone testified that she lived in the B. Snell house as the tenant of her father for several years, and moved from there to the 93 acres claimed by her and described by metes and bounds in the 1910 suit. This 93 acres she did claim. The suit was filed against her for the 93 acres after she had moved off of the lands claimed by her father in this suit, and after she had ceased to be his tenant. When the suit was filed in 1910, the appellees in this suit claimed no portion of the 93 acres, and, so far as this record discloses, they never at any time claimed any portion of the 93 acres, nor any portion of I. & G. N. survey south of the point where the Keaghey and F. M. Stewart almost touch. (See map in original opinion.) Hannah Rhone and the appellees in this case thought that this I. & G. N. survey all lay above this point at the time Hannah Rhone moved onto the 93 acres.

We have carefully examined the statement of facts, in view of appellants' motion for rehearing, and are convinced that the record fully sustains us in our conclusion.

Again, appellants assert:

"The suit brought by appellants here against Hannah Rhone and Jim Brown on August 9, 1910, and prosecuted to judgment in 1913, in favor of appellants here for the land in controversy, said parties being tenants of appellees, in possession, broke the continuity of the possession of appellees commenced in 1902, and defeated, in possession, their limitation claim."

If Hannah Rhone had been the tenant of appellees in 1910, the suit against her would have broken the continuity of appellees' possession, but, under the facts of this record, she was not their tenant in 1910, having moved off of the land claimed by them in this suit, and at that time was living on the land included in the field notes to the 93 acres.

The motion for rehearing is overruled.

## BRADY v. McCUISTION. (No. 1430.)

(Court of Civil Appeals of Texas. Amarillo.  
March 5, 1919. Rehearing Denied  
April 2, 1919.)

### 1. TRIAL $\S$ 351(2)—SPECIAL ISSUES—ERRONEOUS REQUESTS.

Under Rev. Civ. St. art. 1985, requests for special issues need not embody correct propositions of law on the issue to constitute such a request as will require the court to submit the issue.

### 2. TRIAL $\S$ 351(2)—SPECIAL ISSUE—PROVINCE OF JURY—DUTY OF COURT TO DECLARE THE LAW.

In an action to recover land, the objection to the submission of an issue on the statute of limitations that it would include land not subject thereto would not justify refusal to submit the issue, since the jury were to find the facts and the court to declare the law thereon.

### 3. ADVERSE POSSESSION $\S$ 115(1)—SUFFICIENCY TO REQUIRE SUBMISSION OF SPECIAL ISSUE OF LIMITATION.

In trespass to try title evidence held sufficient to require submission to the jury of the special issue as to defendant's ownership of the land from continued privity of possession under claim of right, under the ten-year statute of limitations.

### 4. ADVERSE POSSESSION $\S$ 48(7)—PRIVITY OF TITLE—SALE—FORECLOSURE OF VENDOR'S LIEN.

Where a vendor conveyed, retaining a lien to secure purchase-money notes, and by action in court rescinded the conveyance for nonpayment of lien notes, later obtaining quitclaim deeds from the purchasers, such transactions made no break in the privity of vendor's title.

### 5. BOUNDARIES $\S$ 37(3)—EVIDENCE—SURVEYS—LOCATION OF MONUMENT—FINDINGS.

In an action to recover land, evidence held sufficient to support the finding of the jury as to the location of a monument from which surveys were run and by running courses and distances from corner so established that the strips of land in question belonged to three certain sections as contended by plaintiff.

### 6. BOUNDARIES $\S$ 3(5)—SURVEYS—CALLS FOR COURSES AND DISTANCES—UNMARKED LINES.

Calls for adjoining surveys should not be rejected because the distance gave out from this selected corner before reaching the adjoining survey called for, but such call should have its proper weight and according to evidence made at the time and found on the ground, and it is not an invariable rule that course and distance will prevail over a call for unmarked lines.

Appeal from District Court, Randall County; Hugh L. Umphres, Judge.

Trespass to try title by N. W. McCuiston against J. T. Brady and another. Judgment for plaintiff, and defendant J. T. Brady appeals. Reversed and remanded.

Kimbrough, Underwood & Jackson and Crudginton & Works, all of Amarillo, for appellant.

C. E. Gustavus, of Amarillo, for appellee.

HUFF, C. J. This is an action to establish title to certain lands. The strips of land in question will be better understood from the following sketch:

35	32	33	10
	J. T. BRADY	33.5 ACRES McGUISTION	13
	74 ACRES	BLOCK 2, A. B. & M.	
34	33	12	11
	McGUISTION	McGUISTION	

The L around 32 being the strip in controversy.

The appellee, N. W. McGuistion, sued in trespass to try title J. T. Brady and Sam Edwards. The appellee set up that he owned the west  $\frac{1}{2}$  of section 13, and was the owner of sections 12 and 33, setting out the field notes of each, and alleged that appellant and Edwards entered upon and ejected him from 155.5 acres off the west side of section 13, 24.5 acres out of the northwest corner of section 12 and 74 acres off of the south side of section 33, describing by metes and bounds the strips or parcels of land so wrongfully entered. J. T. Brady answered by general denial and plea of not guilty; also pleaded the three, five, and ten year statute of limitations and improvements in good faith. Edwards filed a disclaimer. The court submitted the case on special issues, and upon certain requested special issues by the parties. The issues of boundary we will notice later. The court submitted no issue on either plea of limitation. The appellant objected to the charge because it omitted to submit the issue on the ten-year statute, and also requested two special issues, which the court refused. One of the issues requested was:

"Has or has not defendant J. T. Brady, and those under whom he claims lands in controversy in this suit, had actual and continuous possession thereof, holding the same under fence for a period of more than ten years before the filing of this suit, and since October, 1897?"

The other issue requested is in the same language except it is not limited by the clause "since October, 1897."

[1] Assignments 1, 2, 3, 4, 6, and 7 are based upon the omission of the court to submit the issue on the ten-year statute and the failure to submit to the jury the issues as requested. The appellee objects to these assignments because it is asserted it is not error to fail to submit an issue or such error that will require a review of the action

of the court thereon upon appeal; that in order to require a review proper issues must have been requested; that the issues requested in this instance were not properly drawn or were defective, and otherwise were not proper. At this time we shall assume that the evidence raised the issue and called for the determination of that issue either by the court or jury. The first part of article 1985, R. C. S., makes it the duty of the court "to submit all issues made by the pleadings." This mandate is, however, qualified in the clause immediately following:

"But the failure to submit any issue shall not be deemed a ground for reversal of the judgment upon appeal or writ of error, unless its submission has been requested in writing by the party complaining of the judgment."

This statute gives the right to the parties to have all their issues submitted to the jury, but—

"It is only by written request that the party puts on record his dissent from the action of the court and his insistence upon the right to have the jury, rather than the judge, decide the point at issue." *Moore v. Pierson*, 100 Tex. 113, 94 S. W. 1182.

The request in writing to submit the issue to the jury is not required by the statute to embody a correct proposition of law on the issue in order to be a request for the jury to pass on the question rather than the judge. The court is notified that on the issue presented by the pleadings and evidence the party desires a finding of the jury, and not of the judge. It therefore becomes the duty of the trial court, when the request is made, to submit the issue to the jury. Our courts in some respects have treated special issues as being controlled by the rules relative to general instructions. This court has said:

"If, however, the issue so presented were duly pleaded by the party, and the issue called attention to an affirmative defense, even though defective, as we understand the rule, it will be sufficient to require the court to submit a proper issue thereon. *Roberts v. Houston Motor Co.*, 188 S. W. 257; *Olds Motor Co. v. Churchill*, 175 S. W. 787." *Texas Refining Co. v. Alexander*, 202 S. W. at pages 133, 134.

The court, having failed to submit this issue to the jury, and also having refused a written request to do so, has deprived the appellant of his statutory right if the evidence presents the issue. We regard the issue as drawn by appellant verbally inaccurate, and as drawn, perhaps, should not have been given. Appellant asserts in this court that in framing the request he had in mind the rule announced in *Houston Oil Co. v. Jones* (Sup.) 198 S. W. 290, and *Fowler v. Woods*, 200 S. W. 243, and in wording the issue transposed certain words. There should be no difficulty in drafting a

correct issue, and doubtless the trial court can do so.

[2] Another objection to the issue by appellant is that section 12 was a school section and as there were only 24.5 acres inclosed and claimed the statutory period, it would not, under the laws of Texas, give title by limitation. This objection would not apply to sections 13 and 33, which were not school sections. If the jury should find for appellant, and those under whom he holds in privity entered with the intent to claim the land as his or their own, and for himself or themselves, for 10 years, this would give title to the disputed strip unless the law prohibited the divestiture of title out of school funds by limitation. As to such of section 12 so inclosed and claimed the court could, as a matter of law, declare it, the 24.5 acres, would not be affected by the entry and possession. All the jury were required to do was to find the facts and upon the establishment of the facts the court would declare the law. We shall not at this time enter into a discussion of the question whether a holding for 10 years will divest title out of the school fund. The writer hereof agrees with Mr. Justice Hendricks' conclusion in *Whitaker v. McCarty*, 188 S. W. 502, in which, however, a writ of error has been granted by the Supreme Court, and still adheres to the conclusion reached in the case. We presume, unless the Supreme Court shall announce a different view, the trial court will follow the conclusion expressed in that case, but that should not affect the question of limitation as to sections 13 and 33.

[3] We believe the evidence in this case presents the issue of title in appellant to the strips of land sued for by appellee under the statute of 10 years' limitation. One C. G. Looney originally filed on section 32 November 8, 1891, and constructed a dugout in the southeast corner and south of where the house is now situated. These improvements are shown to be upon the disputed strips of land. Soon after filing on the land Looney sold it to W. P. Pierson, who went into possession of the land and built a house, put down a well, erected a windmill, and put up the fence on the east line of the section as he claimed it, and also on the south line of the section as he claimed it. Part of the land was placed in cultivation on the disputed strips. The fences, house, windmill, and improvements have so stood, and have been used by the various owners or their tenants ever since—nearly 27 years up to the filing of the suit. The appellant, Brady, is the owner of section 32 by mesne conveyances from Pierson and in privity with him. There is evidence which would justify a finding that either Pierson or his subsequent vendees or tenants, for the owners, have been in actual, peaceable, and ad-

verse possession of these lands, using and cultivating the same, since their occupancy. The evidence, in our judgment, presents no break in privity of possession or claim of right as would authorize the trial court to declare as a matter of law that the continuity thereof was broken. The mere fact that upon a resurvey it may be shown that the actual survey of section 32 would not reach the fence on the east and south sides or either of them would not defeat the claim made by the various owners for 10 consecutive years. It would seem the very purpose of the statute was to set at rest disputes of this nature.

[4] This case is complicated, however, with other issues which require notice at this time. In 1896 W. P. Pierson, while occupying the land, permitted the original contract of purchase from the state to forfeit for nonpayment of interest. The land was reclassified and again placed on the market for sale at \$1 per acre instead of \$2 per acre, under the former classification and sale under which Pierson had held. Under the new classification and valuation Pierson filed his application to repurchase with the proper authorities October 22, 1897. His application was accepted and the award was made to him thereon March 15, 1898. The evidence would indicate that Pierson was during the interim occupying the strips of land as he had done previous and subsequent thereto and until he sold the land. There are several conveyances from Pierson down to S. V. Gist, January 15, 1907, who thereafter died, and his wife qualified as community survivor, and as such she conveyed to J. T. Downing and Carl D. Works section 32, and by a number of conveyances the title came back to Downing August 5, 1908. In the conveyance from Mrs. Gist to Downing and Works a vendor's lien was retained to secure the payment of ten purchase-money notes. On August 15, 1908, Downing conveyed to Reeder, Graham & Williams the three strips of land in question, describing the same by field notes, purporting to bound the west and north of the strips by the east line and the south line of section 32 for the north and west lines of the strips and the fence east and south as the east and south line of the strips, reciting that the strip was a portion of sections 33, 12, and 13, inclosed within the fence inclosing section 32, and using the language:

"Each of the above tracts of land being inclosed by the same fence and with all of section 32, block 2, A. B. & M."

After the conveyance by Mrs. Gist it appears she married a man by the name of Templeton, and from a copy of the judgment in this record, dated February 28, 1910, it appears she sued Downing, Works, and Reeder, Graham & Williams, to rescind the conveyance theretofore made by her to

Downing and Works, making Reeder, Graham & Williams parties defendants. The grounds for rescission would appear to be the nonpayment of the vendor's lien notes to secure which a vendor's lien had been retained in the deed from Mrs. Gist to Downing and Works. She secured judgment canceling the conveyance of section 32 to said parties and recovered the section from all parties to that suit. Some time after the rendition of this judgment appellee obtained quitclaim deeds from Reeder, Graham & Williams. The evidence would warrant the finding that Mrs. Gist again entered into possession of this land, and continued to use the same until she sold it to appellant, and he until the suit was filed. From the time of the new application to purchase from the state made by Pierson until the time Downing purported to convey to Reeder, Graham & Williams, August 15, 1908, more than 10 years elapsed. The evidence as to possession and use of the land by the respective owners by themselves, and by tenants, during that period under a claim of title, is sufficient to submit the question of title under the 10-year statute of limitations for that period. If the title was perfected by such time when Mrs. Gist was reinvested by the judgment, she recovered all the interest either Downing, Reeder, Graham & Williams, or other parties to the suit had in the land. It is apparent, we think, that the right which Reeder, Graham & Williams secured by Downing's deed was that which he and others had to the land, and that they took it in privity with such previous owners. The record does not show any right claimed by Reeder, Graham & Williams through the owners of sections 12, 13, and 33, or that they were claiming any privity with such owners. The record does not present an adverse holding to the owners of section 32 by Reeder, Graham & Williams, but does present a holding in privity with such owners, and all the right they ever acquired by virtue of the conveyance to them by Downing was such interest as Downing and his predecessors in title had to the strip of land, and when that right or title was rescinded they had nothing, and it was divested out of them and vested in Mrs. Gist, and therefore there was never an adverse holding to her in the meaning of the statute. The appellant holds not only a deed from Mrs. Gist to section 32, but also a deed by metes and bounds to the strip of land in controversy, and if it was acquired by limitation, he has a deed to it. In so far as this record shows, Reeder, Graham & Williams were holding in privity with the owners of section 32 and adverse to the owners of sections 12, 13, and 33. It does not occur to us as being necessary to go into nice distinctions as to what passed by the conveyance of section 32. The conveyances appear generally to have been

made with reference to the lines fixed by the fences. The appellant was in possession thereof when suit was brought, and if the title had vested in the owners under whom he is in privity, appellee had no title, and could not recover. We believe the trial court should have submitted the issue of limitation under the statute of 10 years for the finding of the jury.

Substantially the same objections are made to assignments presenting the issues of boundary as to those presenting limitation. We will not further discuss the objections at this time.

[5, 6] The trial court submitted issue No. 1, which is substantially all the issue on the question of boundary submitted by him. The other issues on that point were practically on admitted facts. That issue is as follows:

"At the time block 2, A. B. & M., was surveyed and constructed, was there upon the ground and within the block and at the place afterwards referred to as Wolf Den corner a monument about 12 feet at the base, about 8 feet high, as is called for in the field notes of some of the surveys in the block?"

This issue was answered in the affirmative. The evidence is sufficient to support the findings of the jury. By running course and distance from the corner so established in block 2, A. B. & M., the evidence would authorize a finding by the trial court that the strips of land belonged to sections 12, 13 and 33, as contended by appellee.

The contention of appellant, however, is that, while the field notes of sections 162, 163, and 196 called for the corner submitted, it in fact is the corner of section 12, block 1, B. S. & F., made on the same day by the same surveyor, and it is not the only corner or line called for which should be taken into consideration in fixing the location of the sections in block 2, A. B. & M.; that the northwest corner of section 20, block B-4, H. & G. N. R. R. Co., was located on the ground which calls for a mound 12 feet at the base and 8 feet high, and the northwest corner of section 16 in block 6, I. & G. N. R. R. Co., called for same kind of corner. It was agreed upon the trial that block 1, B. S. & F., north of the main part of block 2, A. B. & M., in which the corner referred to in the issue submitted is situated, contained 48 surveys, the field notes of which bear date July 20, 1875, and are signed by Hedrik; that in block 2, A. B. & M., of which the sections in controversy form a part, there are 232 surveys made on the same day, by the same surveyor. Block 6, I. & G. N. R. R. Co., contained 208 surveys. The field notes are dated July 28, 1875, and block 8, for the same company, contains 30 surveys, and the field notes are dated June 29, 1875. Both blocks, 6 and 8, I. & G. N., lay south of block 2, A. B. & M. Block B-4,

H. & G. N. R. R. Co., contained some 60 surveys, and the field notes are dated June 30, 1875. This block lay east of block 2, A. B. & M. Block 9, B. S. & F. is west of block 2 and has some 200 surveys. The field notes are dated January 1, 1878. All the field notes of the surveys are signed by the same surveyor, H. C. Hedrick. The field notes for block 2, A. B. & M., call to begin at No. 1 and run south, calling for the west line and corners of certain sections in block B-4, lying east. The northwest corner of section 20 in that block is not called for in terms, but the evidence tends to show that this corner has been identified on the ground and can be located. The evidence is not so clear that any of the lines south of block 2, A. B. & M., have been located or fixed by markings found on the ground. Apparently it was the view of the trial court that, as the corner submitted to the jury was called for by three surveys in the field notes of block 2, A. B. & M., the block should be surveyed from that point by course and distance which would be superior to the calls for the lines of adjoining surveys. This, perhaps, would be true if the lines of adjoining surveys are open and unmarked and were called for by conjecture. There is evidence that the west line of B-4 east of block 2 is a marked line and fixed by a monument at the northwest corner of section 20 thereof. This corner appears to have been identified on the ground. The calls for that line were not therefore for an open, unmarked line on the prairie, but for a marked line, which the surveyor had placed in just a few days before he made the survey for block 2. We do not believe this call for the line should be disregarded merely because the northwest corner of section 20 thereon was not called for specifically. In fact, the corner selected by the court was a common corner to two blocks, and in a sense an outside call from block 2. It was not peculiar to block 2. Its dignity did not exceed calls for other lines or corners in other blocks made common to both blocks. Hence we do not think that calls for adjoining surveys should be rejected because the distance gave out from this selected corner by the court before reaching the adjoining survey called for, but such call should have its proper weight and according to the evidence made at the time and found on the ground. We do not think, this is in conflict with Taft v. Ward, 58 Tex. Civ. App. 259, 124 S. W. 437, but in accord therewith. It is not established as an invariable rule in this state that course and distance will prevail over a call for unmarked lines. Maddox v. Fenner, 79 Tex. 279, 15 S. W. 237; Wyatt v. Foster, 79 Tex. 413, 15 S. W. 679.

"Those calls should control, even though of the lowest rank, which, under all the facts and

circumstances in evidence, most clearly indicate the intention of the grant, or which point out with the greatest probability the footsteps of the surveyor. Stafford v. King, 30 Tex. 237, 94 Am. Dec. 804; Lilly v. Blum, 70 Tex. 710, 6 S. W. 285; Huff v. Crawford, 89 Tex. 223, 34 S. W. 610. The reason why a call for an unmarked prairie line will usually not control a call for distance is that, being unmarked, the surveyor probably did not know where such line was, but supposed it to be at the place indicated by his call for distance, and that he actually ran his line the distance called for in his field notes, and called for the unmarked line of the old survey upon the mistaken belief that he had reached it. On the other hand, a call for an unmarked prairie line has sometimes been allowed to control the call for distance, for the reason that, although the line was invisible, yet, its location being easily ascertained by running it out from its other known lines or corners, or from its connecting lines in the vicinity, it is reasonable to suppose that the surveyor ascertained its true location by running it from such connection, and therefore did not make any mistake as to its location, but more probably made a mistake in measuring the distance to such line." State v. Sulflow, 60 Tex. Civ. App. 615, 128 S. W. 652.

See Austin v. Espuela Land & Cattle Co., 107 S. W. 1138.

It would appear from the field notes of block 2, A. B. & M., it was the purpose of the surveyor thereof to occupy all the space between the lines on the east, south, and north, as he made all the surveys at or about the same time, and if the lines on the east and south can be established, it would seem that block 2, should be so extended. At any rate, one corner should not control the entire location, when there are other calls which may be found or established and should have consideration in establishing the location and boundary of the sections constituting the block.

The case will be reversed and remanded.

# HENRIETTA OIL & GAS CO. v. W. B. WORSHAM & CO. (No. 1507.)

(Court of Civil Appeals of Texas. Amarillo.  
March 28, 1919. Rehearing Denied  
April 16, 1919.)

## 1. GUARANTY $\Leftrightarrow$ 100—GUARANTOR'S RIGHTS—REIMBURSEMENT.

Where a bank guaranteed certain subscriptions for a bonus to a factory, and another guaranteed other subscriptions for the same purpose, the bank, in seeking reimbursement for the amount paid by it under its guaranty was not chargeable with an amount paid to it by one of the other subscribers, the bank being merely his agent to receive his money and pay it over.

## 2. ESTOPPEL $\Leftrightarrow$ 95—SUBSCRIPTION CONTRACT—PAYMENT.

Where a "Boosters' Club" procured a bank to guarantee subscriptions for a bonus to a fac-

tory without informing the bank that one subscription was payable in gas, a surplus collected by the bank over the bonus to be paid to the club, its members were estopped to claim that payment in gas was not valid as to them.

**3. GUARANTY  $\Leftrightarrow$  100—GUARANTOR'S RIGHT AS TO PRINCIPAL—REIMBURSEMENT.**

Where a bank guaranteeing subscriptions for a bonus to factory was constituted a trustee to collect and pay a sum to satisfy a mortgage on the factory site, the amount so paid by the guarantor could be recovered in a suit by it against a subscriber for his subscription.

**4. GUARANTY  $\Leftrightarrow$  100—PAYMENT OF SUBSCRIPTION TO BONUS—RIGHTS OF GUARANTOR.**

Where a bank guaranteed subscriptions to a bonus which the bank paid when due, a subscriber who failed to inform the bank that his subscription was payable in gas, was estopped, in a suit by the guarantor to recover his subscription, from claiming payment so made; the subscriber being chargeable with notice that the guarantor was bound to pay over the bonus.

**5. GUARANTY  $\Leftrightarrow$  100—SUBSCRIPTIONS—PAYMENT BY GUARANTOR—NOTICE TO PRINCIPAL.**

Where a bank guaranteed subscriptions to a bonus under an agreement whereby the subscribers were to pay their money to the bank as their subscriptions fell due, no duty rested upon the bank to notify the subscribers that it had paid over the installments of the bonus when due.

Appeal from District Court, Clay County; Wm. M. Bonner, Judge.

Action by W. B. Worsham & Co. against Henrietta Oil & Gas Company and another. Judgment for plaintiffs, and the named defendant appeals. Reformed and rendered in part, and affirmed in part.

Taylor, Allen & Taylor, of Henrietta, for appellants.

P. M. Stine, of Henrietta, for appellees.

HALL, J. This suit was brought by W. B. Worsham & Co., bankers, against the appellant, hereinafter styled Gas Company, and S. J. Slade to recover upon a subscription contract the sum of \$1,750. Appellees alleged in substance that appellants had subscribed that amount as their part of a bonus payable to H. H. Howard, for the erection and operation of a glass plant in the town of Henrietta; that appellees guaranteed in writing the amount of said subscription at the request of appellants; and that the said Slade agreed to indemnify appellees against loss upon its said guaranty; that appellees took over the subscription contract signed by a number of other subscribers as collateral, to secure them against any payment they might have to make by reason of their guaranty of this and other amounts subscribed to the said Howard, in making up a total bonus of \$12,000; that upon the failure

of appellants to pay said subscription appellees, as guarantors, paid the same. Appellees sue for themselves and for the use and benefit of the Henrietta Boosters' Club, an organization which took charge of and was active in securing the subscriptions. Appellant Slade pleaded the statute of frauds, and the Gas Company alleged that at the time it subscribed the \$1,750 it was agreed by and between the Gas Company and the said Howard that its subscription was to be paid in gas to be furnished by appellant Gas Company, to Howard, in operating the glass plant, and that it had so paid said subscription to Howard; that appellees knew that appellant was paying it in gas; that they did not notify the appellant that they had paid such subscription as guarantors, but stood by and permitted said subscription to be paid by the appellant in gas, and soon after said subscription had been so paid in full the said Howard became insolvent, and that appellees are estopped from recovering from appellant because of their silence in not informing appellant that they had made such payment. In a trial before the court without a jury judgment was rendered in favor of Slade and against the Gas Company for \$896.71. Upon request of the parties the court filed the following findings of fact and conclusions of law:

1. The court finds as a fact that on or about the 19th day of December, 1915, the contract introduced in evidence was executed between the Henrietta Boosters' Club as first party and Harry H. Howard as second party; that by the terms of said contract the Boosters' Club and its associates undertook to pay to Harry H. Howard the sum of \$12,000 and to furnish a building site as a bonus for the building of a glass factory in the town of Henrietta; that the said \$12,000 was to be paid as provided in the contract in three equal installments of \$4,000 each. The first to be paid when the plant should arrive in the railroad yards at Henrietta, the second when the plant was under roof, and the third when the plant was completed and in operation.

2. For the purpose of raising the funds for the payment of said bonus and the purchase price of said building site the Henrietta Boosters' Club, first party, procured numerous parties, who agreed to pay various sums set opposite their names in the several subscription lists introduced in evidence, said subscription lists referring to the contract above referred to between the Henrietta Boosters' Club and Harry H. Howard, and which provided that the payment should be made in cash; that on the subscription list appeared the subscription of the defendant Henrietta Oil & Gas Company, in the sum of \$1,750; that several of the subscriptions on such list as placed there by the subscribers were qualified in this way, at least one bearing the indorsement of the subscriber, "to be paid upon the final completion of the plant," and otherwise qualified by the subscriber "to be paid in board"; that there was nothing on the subscription list or in the contract with

reference to the subscription of the defendant Henrietta Oil & Gas Company to indicate or suggest that the same was not to be paid in cash, but it appeared by the subscription list by a dollar mark placed opposite the subscription and from the wording of the contract, to which reference was made, that the subscription of the defendant Henrietta Oil & Gas Company was to be paid in cash.

3. As a matter of fact it was the intention of the Henrietta Oil & Gas Company, defendant, to subscribe the sum of \$1,750 and to pay the same, not in money, but in gas, and this was understood by the several officers of the Henrietta Boosters' Club, and was discussed generally by those present at the time the subscription was made by the Henrietta Oil & Gas Company, but was not stated in the subscription contract in any way.

4. Previous to this time, and during the year 1915, the Henrietta Boosters' Club had undertaken to contract with some other party to locate a glass plant in the city of Henrietta, and had endeavored to raise some similar amount to pay them as a bonus for so locating said plant; that the defendant Henrietta Oil & Gas Company had subscribed to that undertaking also, and its subscription to that contract appeared on the face of it to be qualified "to be paid in gas." And at the time that Harry H. Howard first entered into negotiations with the Henrietta Boosters' Club, to secure a bonus for locating his plant at Henrietta, this former contract was shown to him, and from which he saw that the subscription of the Henrietta Oil & Gas Company was to be paid in gas, and from discussion which the said Harry H. Howard had with A. C. Parks, secretary of the Henrietta Boosters' Club at said time, the court finds that said Harry H. Howard was aware of the fact that the subscription of the Henrietta Oil & Gas Company to be made was so to be made in gas, or at least the said Harry H. Howard was in possession of facts and notice sufficient to put him upon inquiry as to those facts, and therefore I conclude as a fact that the said Harry H. Howard had notice of the fact that the subscription of the defendant Henrietta Oil & Gas Company was to be made in gas.

5. I find that after the subscription was secured in some sum in an amount of \$12,000 the said Harry H. Howard, being absent from Henrietta, was advised that the sum had been secured, and was notified to proceed to ship his plant to Henrietta, Tex., to be located according to the terms of the contract entered into between him and the said Henrietta Boosters' Club, and that thereupon he advised said Boosters' Club that he would require said subscriptions to be indorsed and guaranteed by one or both of the banks then doing business in Henrietta, to wit, the plaintiff bank, W. B. Worsham & Co., and the Merchants' & Planters' Bank of Henrietta; that thereupon the said Henrietta Boosters' Club and the defendant S. J. Slade and others began negotiations in substance to induce said bank to guarantee to said Harry H. Howard that the said amount of \$12,000 would be paid him in cash by said banks, and that the said banks would then look to the subscribers for reimbursement.

6. I find that said Merchants' & Planters' Bank of Henrietta, after looking over the subscription list, agreed and undertook to guaran-

tee to Harry H. Howard a certain amount of \$12,000, to wit, the sum of \$3,815, and did so by executing a written guaranty to said Harry H. Howard, and agreed with the Henrietta Boosters' Club, S. J. Slade, and others that they would look to certain subscribers, whose names appeared on the subscription lists, and who for the most part were customers at its bank, for the payment of the amount subscribed by these several parties, and in this way reimburse and indemnify itself for the amount so guaranteed to be paid by it to said Harry H. Howard, and by notation made on said subscription list in pencil, viz. "M. & P." (indicating Merchants' & Planters' Bank), and placed opposite the names of certain subscribers, for the most part customers of said bank. The Merchants' & Planters' Bank selected certain parties who were to pay their subscriptions into its said bank, and among this number did not select the defendant Henrietta Oil & Gas Company as one of the subscribers who were to pay into said bank, as said Henrietta Oil & Gas Company was at that time a customer and depositor of the plaintiff, W. B. Worsham & Co.

7. I find that negotiations were had between the officers of the Henrietta Boosters' Club, S. J. Slade, and others, with the cashier and manager of W. B. Worsham & Co., plaintiff, in an effort to induce said bank to also guarantee the remaining portion of said \$12,000 to said Harry H. Howard, and to accept as collateral and indemnity the obligations of the remaining subscribers to the subscription contracts, but that said officers of the plaintiff declined to do so, and referred the parties to Mr. Carl M. Worsham, the president and the principal owner of said banking concern, and who was not in daily attendance at the bank, but who was engaged a large part of his time in looking after his ranching and other interests, and that thereafter Mr. L. W. Parrish, one of the officers of the Henrietta Boosters' Club, and the defendant Slade started out from the town of Henrietta to locate Mr. Worsham to negotiate with him personally concerning the matter; that they located Mr. Worsham at his garage near his home in the city of Henrietta, and there discussed the matter with him. Mr. Worsham at first declined to accept the proposition made him, and considerable discussion ensued between those three parties about the matter.

8. I find that S. J. Slade stated to Mr. Worsham that in his judgment subscribers remaining on said lists which had not been checked off by the Merchants' & Planters' Bank were in his judgment good for the amount subscribed by them, and that those amounts would be paid according to the contract, and that, if Mr. Worsham would sign the guaranty to Harry H. Howard, that would insure that plant being located in Henrietta, and would be advantageous to the community at large, and that Worsham & Co., bankers, would not lose anything on the subscription because said subscribers would pay the amounts appearing on the subscription contract into Worsham & Co. bank, and that in fact more would be paid into said Worsham & Co. bank than would be necessary to reimburse said bank for the amount to be guaranteed by it to said Harry H. Howard, and that this surplus would be paid as provided in the contract: First, \$250 to the Worsham heirs, of which Carl M. Worsham was one, in consideration of a re-

lease to be executed by said heirs to cover the lot on which the plant was to be located, and on which the Worsham heirs held a mortgage, in connection with other property, executed by W. G. Eustis; and, second, that the surplus there remaining was to be paid to the Henrietta Boosters' Club, as provided in said contract.

(A) I further find that the defendant Slade stated to Carl M. Worsham at said time and place that he (Slade) was a man of considerable means, and that he personally would see that said W. B. Worsham & Co., bankers, would not lose anything in the transaction, and that if for any reason any of the subscribers remaining unchecked on said subscription list should fail to pay into the Worsham bank the amount of their subscription, and that the amounts actually paid in were insufficient to repay the said W. B. Worsham & Co. for amounts to be paid out by them on its proposed guaranty to Harry H. Howard, then he, the said S. J. Slade, would personally pay any such deficiency to said W. B. Worsham & Co., bankers.

(B) I find that L. W. Parrish also stated to Carl M. Worsham at said time and place, and had previously so stated to the Merchants' & Planters' Bank, that most all of the bar of Henrietta had agreed to furnish their services free of charge to the banks to enforce the collection of the subscriptions, which should not be paid as provided for in the contract, and that upon these assurances given to Mr. Worsham, he then and there agreed and forthwith did execute a written guaranty, which was in evidence, and which was delivered later to Harry H. Howard, and which was in the sum of \$8,185, and that contemporaneous therewith the subscription lists were turned over and delivered to the plaintiff to be held by said W. B. Worsham & Co., bankers.

9. I find that in said conversation between L. W. Parrish, an officer of and acting for the Henrietta Boosters' Club, together with S. J. Slade, who was then and for a long time had been the president of the defendant Henrietta Oil & Gas Company, and who made the subscription of \$1,750 for said company with Carl M. Worsham, nothing was said directly or indirectly to indicate or suggest to the said Carl M. Worsham that the said subscription of the Henrietta Oil & Gas Company of \$1,750 was to be paid in gas, and nothing was said which would put said Carl M. Worsham upon inquiry that the same was to be paid other than was indicated on the face of said subscription contract, to wit, cash, and therefore that at the time he signed said written guaranty said Carl M. Worsham, acting for W. B. Worsham & Co., bankers, had no notice of any kind that said Henrietta Boosters' Club, Harry H. Howard, and the Henrietta Oil & Gas Company had agreed among themselves that said \$1,750 subscription of the Henrietta Oil & Gas Company was to be paid to the proposed glass factory in gas; that is, to furnish gas to it when it begun operations to the value of \$1,750.

10. I find that Harry H. Howard, upon receipt of said written guaranty by said bank, and upon receipt of information that the same had been signed by said bank, proceeded to ship the glass factory to Henrietta, and thereafter in every way complied with the obligations which the contract imposed to erect and operate said glass plant.

11. I find that upon delivery of said glass plant at the depot at Henrietta, the plaintiff, W. B. Worsham & Co., bankers, paid said Harry H. Howard about \$2,500, which was paid about the 29th of February, 1916, and that they thereafter paid the second installment about the 1st of April, 1916, in the sum of \$2,500, and that thereafter, on or about June 5, 1916, they paid to said Howard the remaining \$3,185.

12. I find that one J. J. Roberson had subscribed \$250 on the subscription contract, and that he was one of the parties that the Merchants' & Planters' Bank had selected to pay said amount into its bank; but that for some reason the said J. J. Roberson paid the said \$250 into the W. B. Worsham & Co. bank, and that this amount was also paid by said W. B. Worsham & Co. to said Howard, making an aggregate amount on the third installment of \$3,435.

13. I find that when the first installment came due to said Harry H. Howard that W. B. Worsham & Co. mailed out notices to the several subscribers which it looked to to pay the amounts subscribed by them into its bank, notifying them of the fact that the subscription was due, and for them to come forward and deposit same with its said bank, and that such notice was mailed by said bank to the Henrietta Oil & Gas Company, but not received by said defendant; that said W. B. Worsham & Co. nevertheless, without waiting for said subscription to be paid into its bank, proceeded to pay to Harry H. Howard the first installment due, and thereafter, when the second installment became due, mailed out notices to the several subscribers that the second installment of their subscription was due, but there is no positive evidence that the second or third notices were mailed to the defendant Henrietta Oil & Gas Company, but said bank nevertheless proceeded in the same way on the second and third installments, and paid same to said Harry H. Howard, as the same became due; that is to say, that when said Harry H. Howard demanded the payment of any installment the Henrietta Boosters' Club would hold a meeting of its officials and investigate the facts, and then would declare that said Harry H. Howard was entitled to the payment of the several installments, and would so notify the banks, and the amounts would thereupon be paid.

14. I find that the defendant Henrietta Oil & Gas Company connected its pipes with said glass plant of Howard, and proceeded to furnish gas from the time it began operations in Henrietta and throughout the time that said plant was in operation in the city of Henrietta, which was up until December, 1916, when it became insolvent, and that said company never did collect from Harry H. Howard any sum until after said glass plant had used gas in excess of the amount of \$1,750, said company understanding all the time that it was paying its subscription of \$1,750 to said glass plant in gas and was not indebted to said W. B. Worsham & Co., bankers; and that said Henrietta Oil & Gas Company, after furnishing said glass plant with \$1,750 of gas, proceeded to furnish additional gas to the value of several hundred dollars, for which it collected in cash from said glass plant. But this fact was not known to said W. B. Worsham & Co. at the time of the



payment of the three installments paid by it to Harry H. Howard.

15. I find that said Henrietta Oil & Gas Company furnished gas to said glass factory in the month of May, \$175; June, \$426.50; July, \$513.60; August, \$83.25; September, \$411.15; October, \$590.20; and that the entire amount collected for these months amounted to \$2,339.70, being \$489.70 over and above the \$1,750 subscribed by defendant, and which said amount was paid to the defendant company by Harry H. Howard, by a check drawn on plaintiff, W. B. Worsham & Co. bank; and when this check was paid some time the last of October or the first of November, by the plaintiff company, then W. B. Worsham & Co. definitely learned for the first time that the agreement between Henrietta Boosters' Club, and the Henrietta Oil & Gas Company, at the time that defendant made its subscription of \$1,750 was that the same should be paid to the glass factory in gas.

16. I find that about the 10th day of July, 1916, and prior and subsequent thereto, one Eaton, manager and collector of the Henrietta Oil & Gas Company, had a custom of collecting certain gas tickets through the plaintiff company's bank, that is, by leaving the tickets at said bank in order that persons owing the same might pay the amount at said bank, and such amounts would thereupon be credited by said bank to the defendant gas company's account, it being a customer of said plaintiff bank at this time; and that on or about the 10th day of July, 1916, said Eaton left with said plaintiff bank three gas tickets along with others, evidently for collection, the same being tickets for the months of May, June, and July, in the amounts above stated, and being made out to the Western Flint Glass Company (the corporate name of Harry H. Howard's glass plant); that at the time of leaving said tickets at said bank said Eaton had some conversation with one William Culwell, cashier of the plaintiff bank, which was, however, very brief, and which in effect was that these tickets were not to be collected by the bank, and that the bank need not expect payment from the glass company of the same because of some understanding, which his, the defendant's, company had with said glass plant with reference to the defendant's subscription contract; and I find that said William Culwell thereupon stated to said Eaton that he knew nothing of any understanding, and that he would look into the matter to determine whether said glass plant should pay its gas bills monthly. I find that these facts were sufficient to put said Culwell, cashier of the plaintiff's company, upon inquiry as to the truth of the facts surrounding the transaction within a reasonable time, and that by the 1st of August, 1916, said bank could and should have, if the same was material to it, learned the facts of the transaction, to wit, that the subscription of the Henrietta Oil & Gas Company was in fact intended to be paid in gas, but that said bank having already paid on June 5, 1916, the last of the three installments guaranteed by it, it did not pursue said inquiry, and did nothing with reference to the matter.

17. I find that at the time it paid each of said three installments plaintiff bank did so without notifying the defendant Henrietta Oil & Gas Company that it was doing so, and that it would look to said defendant company for reim-

bursement, except, as above stated, that it mailed at least one notice to the defendant company along with other subscribers, to notify it along with other subscribers that its subscription was due and payable at plaintiff's bank.

18. I further find that of the amounts paid into plaintiff's bank nothing was ever credited to the Worsham heirs in payment of its release of the mortgage held by them against W. G. Eustis for the lot conveyed by Eustis to the glass factory, and that said bank never collected more than \$7,228.30 from the subscribers, and that of this amount \$250 was paid by said J. J. Roberson, whose subscription was guaranteed by the Merchants' & Planters' Bank.

#### Conclusions of Law.

I conclude as a matter of law:

1. That plaintiff, having never credited any amount to the Worsham heirs for their having released the mortgage on said lot conveyed by Eustis to the glass plant for a site, and having applied all amounts received to the payment of its own debt, cannot now recover the \$250, the value placed on their mortgage interest in said lot or site.

2. I conclude that plaintiff, being under no obligation to pay Howard none of the amount guaranteed by it, should have given itself credit for all amounts paid into its bank by all subscribers and the subscriber J. J. Roberson, and therefore should have credited the Roberson payment of \$250 to its own debt against the several subscribers, and having failed to do so, this \$250 must now be held to have been paid into said bank for its own use, and no recovery for said amount had under these facts for said amount against defendant.

3. I conclude that the defendant Slade is not personally liable to plaintiff because of his defense setting up the statute of frauds of this state.

4. I conclude that the defendant Henrietta Oil & Gas Company is liable to plaintiff for the remainder of the amount paid out by it and never collected from other subscribers, because of the fact that its president's (S. J. Slade) being authorized to act for it in the matter in any way he saw fit, and his authority was not being questioned in any way at any time, having subscribed the amount of \$1,750 in gas, failed to state the fact that it was subscribed in gas to plaintiff at any time, and plaintiff, being unaware of this fact, took the subscription contract from said Slade in good faith, and paid the amount for which it obligated itself, although the subscription contract was a nonnegotiable instrument, and equities between the original parties could ordinarily be set off as against any subsequent holder of the instrument, yet, when the president of defendant company, Slade, knew that said subscription contract was to be negotiated to plaintiff bank, and when he for the defendant company actually assisted in getting plaintiff to take the same as collateral, stood by, and saw the same negotiated without indorsing defendant's equities thereon in any manner apprising Carl M. Worsham that the defendant company had equities (were to pay same in gas and not in money), that said defendant company is now estopped from setting up this defense, as the same was to be paid in gas and not in money.

5. I conclude that the plaintiff cannot recover any amount for the use and benefit of the Hen-

rietta Boosters' Club, because said Boosters' Club, having full notice of all the facts as to defendant company's subscription contract being intended to be paid in gas, could not itself recover from defendant, and therefore plaintiff cannot recover for its use and benefit.

[1-3] The court arrived at the amount of the judgment it seems, by subtracting from \$8,185, being the total amount of subscriptions guaranteed by the appellees, the sum of \$7,288.30, which, according to the findings, is the amount collected by the appellees. As stated in the eighteenth subdivision of the findings, this sum includes \$250 paid by Roberson, whose subscription was guaranteed by the Merchants' & Planters' Bank. We think the court is in error in charging this amount to the appellees, since it was not collected from any of the subscribers whose subscriptions they had guaranteed. Not having been collected from a subscriber whose name appears upon their lists, they were simply the agents of Roberson to receive his money and pay it to Howard. They were performing a duty which under the contract of all the parties rested upon the Merchants' & Planters' Bank alone. According to the facts set out in the eighth subdivision of the findings, and the statement made by S. J. Slade, the president of the Gas Company, to Carl M. Worsham, at the time the subscription lists were delivered to Worsham & Co., Bankers, the latter were made trustees for the collection of the several sums shown on the lists and for the purpose of paying off the bonus to Howard to the extent of Worsham & Co.'s guaranty, the surplus, if any, to be applied, first, to the claim of the Worsham heirs, amounting to \$250, in satisfaction of their lien on the lot upon which the glass factory was constructed, and the remainder of any such surplus to be paid to the Henrietta Boosters' Club, as provided in the contract. Since the court found that the members of the Boosters' Club understood at the time S. J. Slade entered the subscription for the Gas Company that such subscription should be paid in gas, we think the trial judge is correct in his conclusion that nothing can be recovered in behalf of the Boosters' Club. The payment by the Gas Company in gas is in accordance with the understanding, and the members of the Boosters' Club are estopped as such payment in gas is a valid payment of the subscription as to them. The effect of the eighth finding, being that Worsham & Co. were constituted trustees to collect and pay to the Worsham heirs the \$250 mentioned therein entitled them to collect the said amount in this action.

Appellant presents the case here upon two assignments, contending that, because appellees failed to inform the defendant Gas Company that they had already paid the \$1,750 subscribed by the Gas Company, and "stood by and allowed the defendant to pay said

Howard said subscription in gas," appellees are estopped from recovering any judgment against appellant for said amount, since it is shown that Howard and the Glass Manufacturing Company plant are insolvent. The second assignment is:

"The court erred in his fourth conclusion of law, wherein he held this defendant liable to the plaintiff because this defendant did not notify the plaintiff at the time it indorsed said subscription and took same as collateral that said subscription was to be paid in gas, because this fact could not in any manner relieve the plaintiff of the duty of notifying this defendant that it, plaintiff, had paid said contract of subscription to said Howard, when it saw that this defendant was going to again pay said subscription to said Howard, in gas," etc.

[4, 5] Both of these assignments present practically the same question, and are overruled. When Worsham & Co., by a separate written instrument, guaranteed the payment of appellant's subscription, they had no knowledge whatever of the secret understanding between appellant and Howard that appellant should furnish the glass factory with gas. Their guaranty bound them to pay the several amounts guaranteed in three installments; the first when the equipment for the factory was unloaded at Henrietta, the second when the roof was on the factory, and the third when the factory was completed and in operation. The record shows that Slade, as the president and principal owner of the appellant corporation, knew that the guaranty had been executed by Carl M. Worsham, and delivered to Howard, and in fact it had been so executed at his special request and in consideration of his promise to indemnify Worsham & Co. against loss. Appellant further knew when the factory was completed and in operation, because, as shown by the record, it furnished the gas necessary to operate the plant. It also knew when the three installments of its subscription were due and must be held to know that, if it did not pay the amount of the subscription when the several installments were due Worsham & Co. under their guaranty were bound to pay it. It cannot be said, in view of the written guaranty of Worsham & Co., that it made the payment to Howard as a volunteer. 1 Brandt, *Suretyships & Guaranty* (3d Ed.) p. 624, note 45; *Volts v. National Bank of Ill.*, 153 Ill. 532, 42 N. E. 69, 30 L. R. A. 155; 20 Cyc. 1494. In making such payment they were discharging an obligation which the failure of the gas company to pay according to the contract as it was understood by Worsham & Co. they were bound to discharge. The court found that the bank mailed one notice to appellant of the payment by it of the first installment. As we understand the law, it was not required to do this. Since the appellant had signed the subscription, knew the terms under which it was to be paid, and

that it had not paid it, Worsham & Co. owed it no duty whatever with reference to notice. Of course if Worsham & Co. had known of the secret agreement between Slade and Howard that the \$1,750 should be paid in gas, a different question would be presented. There is no element of estoppel in the failure of Worsham & Co. to notify appellant Slade that the subscription had been paid according to contract.

Appellee has filed several cross-assignments, in the first of which it is insisted that the court should have rendered judgment for the whole sum of \$1,750 and in addition for \$250 for the Worsham heirs. As heretofore indicated, we think appellees are entitled to recover the \$250 for the Worsham heirs, but nothing in behalf of the Boosters' Club, which would be the effect of recovering the full sum of \$1,750 evidenced by the subscription. We sustain the cross-assignment to the effect that the court erred in failing to expressly find that the Worsham heirs released the mortgage upon the Eustis property according to the agreement, as this fact is shown by the uncontradicted evidence.

The other cross-assignments are disposed of by what has been said above. The judgment is reformed and here rendered that Worsham & Co. recover for themselves the sum of \$1,146.70, with 6 per cent. interest on said amount under the rule of *Faires v. Cockerell*, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528, and the further sum of \$250, for the benefit of the Worsham heirs, with interest at 6 per cent. from the 5th day of June, 1916, and that it take nothing in behalf of the Boosters' Club.

The judgment of the trial court as to S. J. Slade is affirmed.

Reformed and rendered in part, and affirmed in part.

#### MILLERS' MUT. FIRE INS. CO. v. CITY OF AUSTIN. (No. 6198.)

(Court of Civil Appeals of Texas. San Antonio. March 26, 1919.)

##### 1. APPEAL AND ERROR §837(4)—REVIEW—DEMURRER—DETERMINATION.

The sufficiency of a petition challenged by general demurrer cannot be tested on appeal by any fact in evidence before the court, but must be tested by its allegations.

##### 2. APPEAL AND ERROR §759—ASSIGNMENTS OF ERROR—BRIEF.

Assignments of error not copied in the brief are not before the court.

##### 3. APPEAL AND ERROR §742(3)—ASSIGNMENTS OF ERROR — PROPOSITION — STATEMENT.

Statement under assignment attempting to urge error in overruling general demurrer to

petition in action by city against fire insurance company for taxes on certain property merely stating as to contents of petition that the petition alleges defendants' name to be "M. Mutual Fire Insurance Company" is insufficient under Court of Civil Appeals rule 31 (142 S. W. xiii), and will not support a proposition based on defendant being a "mutual insurance company" operating under Acts 28th Leg. c. 109, and by section 10 exempt from tax other than on gross premiums.

##### 4. TAXATION §204(2) — STATUTES — CONSTRUCTION—EXEMPTION.

In view of Const. art. 8, § 2, forbidding exemption from taxation except as therein specified, for a statute imposing a certain tax to be construed as commuting other taxes the commutation must clearly appear from the terms of the law, and cannot be extended by construction or implication beyond the clear import of its terms.

##### 5. TAXATION §230—MUTUAL FIRE INSURANCE COMPANIES—GROSS PREMIUMS TAX — COMMUTATION.

Acts 28th Leg. c. 109, § 10, providing that mutual insurance companies operating under the act shall pay gross premium tax, and that "no other tax shall be required" of them, provides for an occupation tax, and not an ad valorem tax on property, and the exemption or commutation of other taxes applies alone to occupation, and not to ad valorem, taxes.

##### 6. APPEAL AND ERROR §742(3)—ASSIGNMENTS OF ERROR—STATEMENT.

An assignment of error not being followed by a statement, reference to the petition to ascertain the allegations attacked through the special demurrer, the overruling of which is assigned as error, is not a compliance with the rule as to briefing.

##### 7. MUNICIPAL CORPORATIONS §971(3) — TAXATION—OMITTED PROPERTY — "HERETOFORE."

Sp. Laws 1909, c. 90, amending the charter of the city of Austin and giving the city assessor authority to have any property omitted from assessment listed and assessed according to the rule of taxation of the years it was omitted, covers all omitted property, whether the omission was made before or after the passage of the law; for the word "heretofore," therein used, should be read "theretofore."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heretofore.]

##### 8. STATUTES §189—CONSTRUCTION—LITERAL INTERPRETATION.

While the intention of the Legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of law should not be sacrificed to a literal interpretation of such words.

##### 9. STATUTES §245 — CONSTRUCTION — TAX LAWS.

In the construction of provisions of tax laws which point out the subjects to be taxed, and indicate the time, circumstances, and man-

ner of assessment, there is no reason for peculiar and rigid rules.

**10. TAXATION — 362—ASSESSMENT—OMITTED PROPERTY.**

Before an assessor can place omitted property on the assessment roll, there must be a law authorizing such assessment.

**11. TAXATION — 195—CONSTITUTIONAL PROVISION—COMMUTATION—EXEMPTION.**

The condemnation of exemption from taxation contained in Const. art. 8, § 2, carries with it condemnation of commutation of taxes.

**12. MUNICIPAL CORPORATIONS — 971(3) — TAXATION—OMITTED PROPERTY—NOTICE.**

A property owner cannot complain that notice was not given him by a municipality that his property was placed on its assessment rolls for prior years as property omitted to be taxed during such years, where he does not claim that the value of the property was improperly assessed, or that any injury was suffered from the failure to give notice.

**13. CONSTITUTIONAL LAW — 284(2) — DUE PROCESS — TAXES—NOTICE OF PROCEEDINGS.**

Where a law imposes a tax or assessment on property according to its value, notice of every step in the tax proceedings is not necessary; the owner is not deprived of property without due process of law if he has an opportunity to question the validity or the amount of such tax or assessment either before that amount is finally determined or in subsequent proceedings for its collection.

Appeal from District Court, Travis County; George Calhoun, Judge.

Suit by the City of Austin against the Millers' Mutual Fire Insurance Company. From judgment for plaintiff, defendant appeals. Affirmed.

E. C. Gaines, of Austin, for appellant.

J. Bouldin Rector, J. W. Maxwell, and Lightfoot, Brady & Robertson, all of Austin, for appellee.

**FLY, C. J.** This is a suit instituted by appellee to recover taxes alleged to be due for the years 1904, 1905, 1906, 1909, 1910, 1911, 1912, and 1913 on certain property owned by it in the city of Austin. The court heard the cause without a jury, and rendered judgment in favor of appellee for the taxes of 1904, 1905, 1906, 1909, 1910, 1911, 1912, and 1913, declaring a lien on notes owned and deposited by appellant on the respective dates named; the total taxes for the eight years named being in the aggregate \$1,867.03, with interest as therein provided.

[1-3] The first assignment of error assails the action of the court in overruling a general demurrer to the petition. It is stated in a parenthesis attached to the assignment that the second and seventh assignments of error are the same in substance as the first, and the only proposition under the assignment

purports to be made also under the second and seventh assignments. Those assignments are not copied in the brief, and this court is not in position to know what they contain, and the proposition can be considered only with reference to the first assignment, which attempts an attack on the sufficiency of the petition to state a cause of action. The statement under the assignment is totally inadequate to show the allegations or want of allegations which render the petition open to attack through a general demurrer. The only facts stated are that the petition alleges appellant's name to be "Millers' Mutual Fire Insurance Company," and that appellant was incorporated and doing business under Act April 3, 1903, Twenty-Eighth Legislature of Texas, c. 109, and has paid the required tax to the commissioner of insurance. Of course, the sufficiency of the petition cannot be tested by any fact that was in evidence before the court, but must be tested by its allegations. It follows that the attack is made on the petition because the name of the appellant was stated in it, and the inference is, although not stated, that the name of appellant brings it within the class of insurance companies known as "mutual insurance companies." Instead of an attack on the petition, the only proposition under the assignment of error is a defense of the authority of the Legislature to provide a tax on gross premiums in lieu of all other taxes. It is not stated that the allegations of the petition show that appellant is endeavoring to collect taxes from a company claimed to be exempt from taxation by the city of Austin, and no attempt is made to disclose what the petition did allege except to state the name of appellant. The statement is utterly insufficient under rule 31 for Courts of Civil Appeals (142 S. W. xiii), and should not, under numerous decisions, be considered.

The brief of appellant, as hereinbefore stated, fails to name the property belonging to appellant upon which the tax was sought to be collected, and the only assignment of error that seeks to attack the authority to collect the tax because of exemption by the state is the first, which is defective and attempts to urge error in overruling the general demurrer. The statement following the assignment does not disclose any allegation whatever of the petition upon which to base the proposition that—

"The Legislature may provide a tax on the gross premiums of an insurance company which shall be in lieu of all other taxes, and such a statute will not violate the constitutional provisions against exemption of property from taxation and that all taxation shall be equal and uniform and according to value."

At the probable expense of rules, and at the risk perchance of delivering dicta, we have considered the question attempted to be raised by the assignment.

The law relied on by appellant to exempt it from all further taxation of any character on any property, real, personal, or mixed, in the state of Texas, is section 10, Acts of 1903, p. 169, which provides:

"Each and every mutual insurance company operating under this act shall pay to the insurance commissioner annually on the 31st day of December, one-half of one per cent. of all the gross premiums received during the year, and no other tax shall be required of such mutual insurance companies, their officers and agents, except such fees shall be paid to the commissioner of insurance as is required by law."

The act of 1903 was amended in 1913, and the amendment is carried into chapter 10, Vernon's Revised Statutes, and in article 4907n of that chapter, while the taxes named are different, the same provision exists as to exemption from further taxes.

[4] The contention is that the words "no other tax" were intended to and do cover all taxes, occupation, ad valorem, or otherwise, and under such contention the insurance company might purchase land and erect very valuable office buildings in every city in Texas where it desired to do business, and not only would the state of Texas, but municipalities in which the property was situated, be precluded from taxing it. We cannot imagine that any such legislative intention existed, but, if it did, it would be clearly an exemption from taxation of the rankest kind, and plainly violative of the provisions of article 8, § 2, of the Constitution, which, after enumerating property which may be exempted from taxation, provides that—

"All laws exempting property from taxation, other than the property above mentioned, shall be null and void."

It has been held by a number of courts, both federal and state, that—

"Where a certain sum is specified for a certain percentage upon valuation, or upon receipts or acquisitions in any form, this is in the nature of a commutation of taxes, the state agreeing that the sum named is, under the circumstances, a fair equivalent for what the customary taxes would be, or the fair proportion which the person bargained with ought to pay, and the power thus to commute, though liable to abuse, is undoubted." Cooley, Taxation, p. 110.

It is also held that the "commutation," to employ the tenderer term than "exemption," must clearly appear from the terms of the law, and it cannot be extended by construction or implication beyond the clear import of its terms. There must be no room for doubt or controversy. As said by the Supreme Court of the United States, in *Railroad v. New Orleans*, 143 U. S. 192, 12 Sup. Ct. 406, 36 L. Ed. 121:

"Exemption from taxation is never to be presumed. The Legislature itself cannot be held

to have intended to surrender the taxing power, unless its intention to do so has been declared in clear and unmistakable words."

[5] The tax provided for in the law of 1903 is undoubtedly a tax allowing mutual insurance companies to pursue their business in Texas, an occupation tax, and it is not an ad valorem tax on property. A similar tax on railroad companies has been held to be an occupation tax by the Supreme Court of this state. *State v. Railway*, 100 Tex. 153, 97 S. W. 71; *Texas Co. v. Stephens*, 100 Tex. 639, 103 S. W. 481; *Fire Association v. Love*, 101 Tex. 376, 108 S. W. 158, 810; *Life Ins. v. Love*, 101 Tex. 531, 109 S. W. 863; *Producers' Oil Co. v. Stephens*, 44 Tex. Civ. App. 327, 99 S. W. 157. Being an occupation tax, under a strict construction of the statute, which is always applied to statutes exempting, or commuting, if such be the proper term, taxation, it must be held that the exemption applied alone to occupation taxes, and not to ad valorem taxes. The taxation of property was not in contemplation of the Legislature when the exemption from further taxation was granted, but it was confining its attention to the business before it, that of fixing an occupation tax, and providing that no further such tax should be collected by state. It has no reference to ad valorem taxes. Any other construction of the statute would render it discriminatory and unconstitutional and void.

The decision in the case of *State v. Railway*, 100 Tex. 153, 97 S. W. 71, herein cited, was reversed by the Supreme Court of the United States, by a five to four decision, found in 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031, but only on the ground that the imposition of the taxes affected, and was a burden on, interstate commerce. The decision of the federal court cannot, however, have influence in this state so far as its state taxes on a state corporation doing business in this state are concerned. We do not understand that the Supreme Court of Texas, in following the doubtful opinion in the case cited, has repudiated its holding that the taxes under consideration are occupation taxes. *Railway v. State*, 108 Tex. 314, 192 S. W. 1054. It has never been questioned in this state that an occupation tax, as in the case of the former liquor dealer, could be levied as well as ad valorem taxes, and we are dealing with a domestic corporation.

[6] The third assignment of error is not followed by a statement. Reference to the petition to ascertain the allegations attacked through the special demurrer is not a compliance with the rules as to briefing.

[7, 8] The fourth assignment of error assails the action of the court in not sustaining a special exception to the petition on the ground that it showed that taxes had been assessed for several years back on omitted property. This court is not informed in any statement what was contained in the peti-

tion on the subject of back taxes. However, there is nothing in the petition which shows that the city did not have the authority under the charter and laws of Texas to make the assessments alleged. On the other hand, it was alleged that the property had been assessed under and by authority of the charter. The amendment to the charter of the city of Austin, passed by the Legislature on March 24, 1909, gives full authority to the assessor to have any property omitted from assessment listed and assessed according to the rule of taxation of the years it was omitted. The word "heretofore," used in section 24 of the amended charter, when construed with other portions of the statute, should be read "theretofore" instead of "heretofore." The section would then read as follows:

"If the city assessor and collector shall discover any property, real or personal, which was subject to taxation for any year *theretofore*, and which from any cause has escaped taxation, he shall require the same to be listed and assessed according to the rate of taxation levied for the year or years it was omitted, and enter the same as a supplement to his next roll, stating the year, and the taxes thereon shall be collected in the same manner as other assessments; provided, that such supplement rolls may be made at any time and reported to the city council for its approval, and any number of such rolls may be made that may be necessary." Special Laws 1909, p. 634.

The whole context indicates that the narrow construction contended for by appellant is untenable, and that the provision was intended to cover all omitted property, whether the omission was made before or after the passage of the law. The power was given the city not to impose new taxes, but to collect those that had been evaded by delinquents, and should not be construed so as to defeat the obvious purpose of the Legislature. While the intention of the Legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of law should not be sacrificed to a literal interpretation of such words. No sound reason could be offered for giving authority to assess property omitted before the act was passed and denying it as to property omitted thereafter. As said by Mr. Sutherland:

"The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statute." Lewis' Sutherland, Stat. Const. § 376.

In the state of Maryland a statute (Acts 1890, c. 536) was passed which required certain things of corporations chartered "since January 1, 1890"; the law being approved on April 8, 1890. It was contended that the word "since" could only mean from January 1st to the time the act became effective, but the Supreme Court of Maryland held that

the word "since" should be construed to mean "after." The court said:

"What we have to do is to discover the legislative intention, and to give to it, when ascertained in accordance with established canons or rules, full and complete effect. The mere words which the Legislature may use are not always controlling." *Roland Park v. State*, 80 Md. 448, 31 Atl. 298.

In Nevada a law was passed that—

"All officers and members of the volunteer militia of this state, on becoming members and performing duty, must take and subscribe the following oath," etc. St. 1887, c. 102, § 2.

The statute was held to apply to those who were already members as well as to those who afterwards became members. *State v. Ross*, 20 Nev. 61, 14 Pac. 827. See, also, *People v. Hinrichsen*, 161 Ill. 223, 43 N. E. 973.

[8] In the construction of provisions of tax laws which point out the subjects to be taxed, and indicate the time, circumstances, and manner of assessment, there is no reason for peculiar and rigid rules. As said by the Supreme Court of Connecticut in *Cornwall v. Todd*, 38 Conn. 447, and quoted in *Cooley on Taxation*, p. 462:

"Statutes relating to taxes are not penal statutes, nor are they in derogation of natural rights. Although taxes are regarded by many as burdens, and many look upon them even as money arbitrarily and unjustly extorted from them by government, and hence justify themselves and quiet their consciences in resorting to questionable means for the purpose of avoiding taxation, yet, in point of fact, no money paid returns so good and valuable a consideration as money paid for taxes laid for legitimate purposes. \* \* \* In construing statutes relating to taxes, therefore, we ought, where the language will permit, so to construe them as to give effect to the obvious intention and meaning of the Legislature, rather than to defeat that intention by a too strict adherence to the letter."

[10] Applying the general principles, as herein stated, the Supreme Court of Colorado, in construing a statute empowering the placing of omitted property on the tax rolls, held in answer to a narrow contention as to the scope of the statute:

"The purpose of the statute evidently is to prevent property from escaping taxation through oversight, omission, or mistake, and to enable the taxing officers to impose upon all property its just and equal proportion of the public burden. \* \* \* We are of the opinion that, while the case before us does not come within the strict letter of the statute, it does come clearly within its spirit, and the court below properly so held." *Aggers v. People*, 20 Colo. 348, 38 Pac. 386.

So in this case a reasonable hypothesis cannot be entertained other than that it was the intention of the Legislature of Texas to give power to the assessor of the city of

Austin to not only place property that had been omitted prior to 1909 on the assessment roll, but also property that might be omitted in the future. The reason for the grant of power in the one instance could be no more cogent than in the other. There is nothing in the case of *State v. Cage* (Tex. Civ. App.) 176 S. W. 928, contrary to the construction placed on the statute giving power to the assessor to place omitted property on the assessment roll. We agree fully with that holding that there must be a law authorizing such assessment, and we hold there is such a law governing this case.

[11] While in federal courts, as well as other state courts, it has been held, as hereinbefore stated, that the power of commutation of taxes can be exercised even though the Constitution forbids exemption from taxation, it has been held differently in this state. *Austin v. Gas Co.*, 69 Tex. 180, 7 S. W. 200; *Altgelt v. City of San Antonio*, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383. It is clearly held in those cases that condemnation of exemption from taxation carries with it condemnation of commutation of taxes. So, if the Legislature by the act of 1903 commuted the taxes of insurance companies, its act was unconstitutional and void so far as the commutation was concerned. However, we do not think an exemption from ad valorem taxes was contemplated. The attack made upon the two Texas decisions by appellant is not justified, because they are thoroughly in accord with reason and the state Constitution, and have several times been cited with approval. *Reynolds v. McCabe*, 72 Tex. 57, 12 S. W. 185; *Dallas v. Railway*, 95 Tex. 268, 66 S. W. 835; *Barbee v. Dallas*, 26 Tex. Civ. App. 573, 64 S. W. 1018. If the decisions are correct, then commutation is exemption, and no such exemption being named in the Constitution, it would be null and void. But we hold that full occupation taxes are required by the statute, and there was no effort to exempt from other taxes.

Appellant cites a number of cases from other states bearing upon the point at issue, but none of them that is accessible to this court was delivered under a statute with language similar to that in the Texas statute. In the statutes we have examined there was a specific exemption from all other taxes, naming the kind of taxes. There could be no doubt as to what was meant by the Legislature in those cases. Even in the Oklahoma case of *In re Wolverine Oil Co.*, 53 Okl. 24, 154 Pac. 362, L. R. A. 1916F, 141, so confidently relied on by appellant, who says that the statute provided for a tax "in lieu of all other taxes," the Supreme Court of Oklahoma held the statute provided "that the payment of the gross production tax shall be in lieu of any other tax that might be levied \* \* \* on said property upon an ad valorem basis." The difference is apparent. So

it is in the other cases examined by this court. In all the cases it is also stated that the acts of the Legislature were sustained because they levied taxes appearing to be a fair equivalent for the customary taxes. *People v. Coleman*, 121 N. Y. 542, 25 N. E. 51; *State v. Ill. Central R. Co.*, 246 Ill. 188, 92 N. E. 814; *Gas Co. v. Roberts*, 168 Cal. 420, 143 Pac. 700; *Bank v. Worrell*, 67 Miss. 47, 7 South. 219.

If the theory of appellant, as expressed through the fifth and tenth assignments of error, was the law, all property held by a trustee, although the beneficiaries were numbered by the hundreds, would have to be assessed in perhaps infinitesimal portions to the beneficiaries. No authority is offered for the proposition, except articles 4909, 4910, 4912, 4913, Rev. Stats., which were long since repealed, and could not have had any bearing on the point presented when in full force and effect. Judge Cooley, in his work on Taxation (3d Ed.) p. 660, says:

"In general, personal property in the hands of a trustee is to be assessed to him at the place of his domicile."

The principle is recognized that the property can be assessed as against the trustee. To the same effect is *Perry on Trusts*, §§ 331-527.

[12, 13] The sixth and eleventh assignments of errors are not supported by a statement sufficient to call for consideration. If the exception of which mention is made was ever considered and passed upon by the trial court, the statement fails to reveal it. We are not called upon to search the record to supplement the statement. However, the tenth assignment is as to a finding by the court to the effect that notice was not given to appellant by appellee that the property was placed on the assessment rolls, and that would probably be sufficient. It is not claimed that the value of the property was improperly assessed or that any injury was suffered from the failure to give notice. Appellant has no cause for complaint on account of lack of notice. As said by Cooley (page 60):

"Where a law imposes a tax or assessment upon property according to its value, notice of every step in the tax proceedings is not necessary; the owner is not deprived of property without due process of law if he has an opportunity to question the validity or the amount of such tax or assessment either before that amount is finally determined or in subsequent proceedings for its collection."

The text is supported by numerous decisions and also by other text-writers. *Gray, Lim. Tax Power*, §§ 1157 to 1162.

We have considered every point presented by the brief of appellant, and, finding no error requiring a reversal, the judgment is affirmed.

## SCHULTZ v. SCOTT. (No. 1513.)

(Court of Civil Appeals of Texas. Amarillo.  
March 28, 1919.)

TRUSTS  $\S$  17, 18(6)—TRUSTS IN LAND—PAROL AGREEMENTS.

A parol agreement to acquire interest in land for the joint benefit of the parties, where the deed was taken in the name of one, is enforceable as a trust upon the legal title, although promise of party seeking to enforce such agreement was not a consideration paid for the joint interest in land.

Appeal from District Court, Wichita County; Wm. M. Bonner, Judge.

Action by Charles F. Scott against A. J. Schultz. Judgment for plaintiff and defendant appeals. Affirmed.

Martin, Bullington, Boone & Humphrey, of Wichita Falls, for appellant.

Walter Nelson, of Wichita Falls, for appellee.

HUFF, C. J. This action was brought by appellee, Scott, against Schultz, and in his amended petition he alleged substantially that he was employed by the Magnolia Petroleum Company and was earning about \$180 per month, and at the special instance and request of appellant, who owned a well rig, that appellant and appellee entered into a verbal contract, whereby appellee was to resign his position and take active charge, control, and management of appellant's oil well rig and machinery, and that as a consideration for said services, among other things, appellee was to have an undivided one-fourth interest in said rig and machinery, and in addition thereto a working interest in all oil and gas leases afterwards acquired by appellant, upon which said rig was to be operated, and that on and prior to March 27, 1917, appellant, W. C. Myers, and appellee were negotiating for an oil and gas lease from J. B. Evans and wife, and that at the time and prior thereto it was agreed by and between appellant and appellee that their interest in same, which was an undivided half interest, would be taken in the name of appellant, but in trust for the use and benefit of both appellee and appellant, and that appellee's interest was an undivided one-eighth of the one-half interest taken in the name of appellant; that said oil and gas lease was on that day so acquired, same being on 160 acres of land, and that before and at the time of said transfer and conveyance from Evans and wife to the appellant and W. C. Myers, it was agreed and understood as aforesaid, by and between appellant and appellee, that while the title to one-half of said lease would be taken and remain in the name of the appellant, yet said lease would be in trust for

the use and benefit of appellee as well as appellant, and that appellee's interest would be an undivided one-sixteenth interest fully paid in the entire lease. That in obedience to the terms of the contract by and between the parties and in compliance with the terms and conditions of said lease appellee took charge of the rig and machinery, and moved it upon the above-described tract of land, and succeeded in drilling an oil well upon same, which rendered the lease very valuable, after which Myers and Schultz sold the lease to Silk & Donahue, and Schultz refused to pay plaintiff his one-sixteenth part of the price secured, amounting to \$4,562.52, for which he brought this suit.

The appellant, by general and special exception and by plea, interposed the statute of frauds, claiming that the contract was not enforceable, because verbal; also pleaded that the contract was conditional upon the plaintiff doing his work in a manner satisfactory to defendants and acting in all respects for defendants' best interests, and the plaintiff had violated his agreement, and had not been true to his trust.

The case was submitted to a jury on special issues, and in answer to which they found that plaintiff and defendant entered into a contract by the terms of which the plaintiff was to resign his position he then held and take active charge, control, and management of the well, rig, and machinery, of which the defendant was the owner, or was interested in, and as a consideration for said services on the part of the plaintiff, plaintiff was to have, among other things, an undivided one-fourth interest in said rig and machinery, and in addition thereto an interest in all the oil and gas leases afterwards acquired by the defendant and upon which said rig was to be operated; that the defendant Schultz, at and prior to the time he, with one W. C. Myers, acquired a certain oil lease from J. B. Evans and wife, did so acquire his interest in the same, with the understanding and agreement between himself and the plaintiff, Scott, that the plaintiff, Scott, was to own an undivided one-sixteenth interest in the same, and that the title thereto should be taken in the name of Schultz, but in trust, to the one-sixteenth interest, for the use and benefit of plaintiff. They further found that plaintiff Schultz's promise of the one-sixteenth interest in the Evans lease was made before he and W. C. Myers acquired title to the lease. The court, upon the findings of the jury, entered judgment for the appellee against Schultz for the sum of \$4,156, from which this appeal is taken.

The appellant's assignments assert that the contract set up by the petition and proven is contrary to the statute of frauds. The contract was not for the sale of land, but an agreement to acquire land, entered into before the title vested in the holder of the legal



title. By argument, it seems to be appellant's contention that there should be a payment of some sort of consideration before the title was acquired by the trustee, and that it could not be based upon services to be rendered upon the land after it was so acquired. As we understand this case, the trust set out, proven, and established by the verdict of the jury is an express trust. Such a trust is distinguishable from a resulting trust in which the law creates a trust in favor of the party who pays the consideration, by which title has been acquired in the name of another, and which must be paid, and the trust must arise, at the very time of the transaction. *Parker v. Coop*, 60 Tex. 118. One of the first cases in this state, if not the first (*James v. Fulcro*d, 5 Tex. 512, 55 Am. Dec. 743), to hold that a parol express trust created before the title vested does not fall under the statute of frauds, also held:

"A consideration may be defined to be something that is given in exchange, something that is mutual, or something which is the inducement to the contract, and it must be a thing which is lawful and competent in value, to sustain the assumption. A valuable consideration is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. A mutual promise amounts to a sufficient consideration, provided the mutual promises be concurrent in point of time."

The fact upon which that case was decided established an agreement between plaintiff and defendant, who purchased together a certain town lot, to be divided equally, each taking the part nearest his property. The defendant therein bid in the property, and afterwards the plaintiff tendered his part of the purchase money, which was refused by the defendant. It will thus be seen that in that case nothing was paid at the time. There was only the mutual promise of the parties. In a later case, *Gardner v. Randall*, 70 Tex. 456, 7 S. W. 782, the Supreme Court said:

"A parol contract by which two or more persons agree to purchase land for their joint benefit, the title to be taken in the name of one, is valid at common law, and is not prohibited by our statutes, and hence may be enforced here without reference to the question whether the consideration be paid by the cestui que trust at the time the deed is taken or not. Why should it make any difference if one party should pay the whole consideration, the other agreeing at the time to refund his proportion at some future date?"

The appellant cites the cases of *Sprague v. Hafnes*, 68 Tex. 215, 4 S. W. 371; *Allen v. Allen*, 101 Tex. 362, 107 S. W. 529; *Emporia Lumber Co. v. Tucker*, 103 Tex. 547, 131 S. W. 408; *Bringham v. Texas Co.*, 39 Tex. Civ. App. 500, 87 S. W. 893; *Dietrich v. Heintz*, 44 Tex. Civ. App. 602, 99 S. W. 417. In each of the above cases it appears the proposed gran-

tor was at the time of the parol contract the owner of the land with the title then vested in him. Clearly those cases fall under the statute (Rev. St. 1911, art. 3965) rendering parol "contract for the sale of real estate or the lease thereof" nonenforceable. The distinction is well illustrated in the case of *Sparks v. Taylor*, 99 Tex. 411, 90 S. W. 485, 6 L. R. A. (N. S.) 381, where the husband and wife entered into an agreement to acquire title to land for the use of the wife's separate estate, and where the deed was taken to the land in the name of the husband, and where at the time of the agreement the husband signed a note with the wife to procure money on a mortgage executed against her separate estate. The court there said:

"It is evident that this contention is not sustained by the decisions of the court, for in every case cited above the husband signed notes for deferred payments, and the court held in each case that the fact of agreement that the notes should be paid by the separate funds of the wife fixed upon the land purchased the character of separate property, the controlling facts being the intention of the parties and the investment of the wife's separate funds."

See, also, *McClintic v. Midland*, 106 Tex. 32 at pages 36, 37, 154 S. W. 1157.

This court has held that a parol agreement to acquire land for the joint benefit of the parties, where the deed was taken in the name of one and the consideration partly paid or promised to be paid by the other, enforceable as a trust upon the legal title. *Ellerd v. Ellison*, 185 S. W. 876; *McBride v. Briggs*, 199 S. W. 341. It is apparently appellant's contention that the drilling of a well on the land after its acquisition is not a consideration paid for the lease, or, in other words, not a part of the purchase price. It must be borne in mind it was the agreement to acquire the land that engrafted the trust on the legal title when acquired. If there was a consideration for the agreement, it was then valid and binding. The jury found, with evidence to support it, that the agreement for one-sixteenth of the land was in consideration that appellee quit his job with the Magnolia Petroleum Company, take charge of appellant's rig, and give it all his time and skill as a driller, and the facts further show that he specially agreed to drill on the particular land in question for a one-sixteenth interest, and that thereafter he did so and brought in a producing well. We believe these facts sufficient to show a consideration for the contract for the one-sixteenth interest in the lease when acquired. Again, the statement of facts in this case shows that the lease so acquired in the name of *Schultz & Myers* was an ordinary oil lease. Usually the consideration moving to the lessor for the lease is to drill for oil and to secure its production for the royalty to be paid him.

Evidently the drilling of the well for oil was part of the consideration for the lease obtained in this case. We believe the case should be affirmed; and accordingly it is so ordered.

**KINGSVILLE COTTON OIL CO. v. DALLAS WASTE MILLS. (No. 1492.)**

(Court of Civil Appeals of Texas. Amarillo.  
March 12, 1919. Rehearing Denied  
April 16, 1919.)

**1. SALES — 58 — CONDITIONAL CONTRACTS — MANUFACTURE AND SHIPMENT OF GOODS.**

A contract whereby defendant was to make 200 bales of cotton linters, mill run, being seller's make, at 3½ cents per pound, f. o. b. cars, and to ship them to plaintiff in car lots "as fast as made," was not a contract conditional on the making of the linters; the phrase "as fast as made" relating only to the shipment, and not being a condition precedent to the duty to ship.

**2. SALES — 172 — BREACH — EXCUSE.**

Where a contract for the manufacture of cotton linters did not mention the question of power in running defendant's mill, the failure of a power company to furnish power to defendant, whereby defendant was prevented from manufacturing the linters, did not excuse a breach of the contract, it being possible for defendant to have procured power elsewhere.

**3. CONTRACTS — 309(1) — BREACH — IMPOSSIBILITY OF PERFORMANCE.**

One may by an absolute contract bind himself to perform contracts which subsequently become impossible or to pay damages for non-performance, and such construction is to be put on an unqualified undertaking where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arose from the act or default of the promisor.

**4. CONTRACTS — 309(1) — BREACH — IMPOSSIBILITY OF PERFORMANCE.**

Where the event which prevents the performance of a contract is of such a character that it cannot reasonably be supposed to have been in contemplation of the contracting parties, they will not be bound by general words which, though large enough to conclude, were not used with reference to the possibility of the particular contingency which afterwards happened.

**5. APPEAL AND ERROR — 931(6) — REVIEW — ADMISSION OF EVIDENCE.**

Where the trial is by a court without a jury, and there are no findings of fact in the record, it will be presumed on appeal in support of the judgment that the court did not consider improper testimony although admitted.

Appeal from District Court, Dallas County;  
W. F. Whitehurst, Judge.

Action by the Dallas Waste Mills against Kingsville Cotton Oil Company for breach of

contract. Judgment for plaintiff, and defendant appeals. Affirmed.

Claude Pollard, of Houston, and E. H. Crenshaw, Jr., of Kingsville, for appellant.  
C. M. Smithdeal, of Dallas, for appellee.

HALL, J. On August 28, 1915, J. G. Leavell Company, brokers, negotiated a contract between the parties to this suit, whereby appellant sold appellee—

"200 bales of cotton linters, mill run, free from trash, being seller's make, at 3½ cents per pound, f. o. b. cars Kingsville, Texas."

"Shipment. Beginning October, and shipped in car lots as fast as made."

Only 25 bales were delivered under the contract, and appellee sued appellant for damages on account of the breach, alleging, in substance, that by the terms of the contract appellant was obligated to begin shipping cotton linters in October, 1915, and continue to ship in carload lots as fast as made until the contract was fulfilled; that the average bale of cotton linters was 500 pounds, and that it was so intended by the parties to said contract; that appellant had delivered to plaintiff under said contract 25 bales, but failed and refused to deliver any more; that after due notice, on January 25, 1916, appellee bought 175 bales of linters at 5¼ cents per pound, f. o. b. Texas common points, which was the lowest price at which said linters could be bought; that at said price the difference between the contract price and the market price of said linters was \$2,296.87; that appellant had had a reasonable time and more in which to perform the contract before January 27, 1916, but had failed and refused to do so; that, if it should be held that appellant was entitled to have until the end of the cotton season in which to fulfill the contract, then in such event plaintiff's damages amounted to \$4,000, for the reason that at the end of the season the difference between the contract price and the market price was 2¼ cents per pound.

Appellant demurred generally and specially, pleaded the general issue, and specially, in substance, that the contract sued upon was a contract of manufacture and sale; that it was contemplated by both parties that the linters should be manufactured by appellant and shipped to appellee, beginning with the month of October, 1915, and thereafter as fast as made; that in compliance with said contract appellant shipped to appellee, in the month of October, 25 bales, and was prevented from further shipments by circumstances over which it had no control, to wit, that the electrical power company, which at that time, and for a long time prior thereto, had furnished the power to operate appellant's mill, and which had been a dependable source of power, broke down suddenly and without

warning, and ceased furnishing power to appellant; that said power plant could not be repaired until late in January, 1916, and that by said last-named date the cotton oil mill season had practically ended, and seed could not be obtained for making linters of the grade and quality required; that on August 13, 1916, an unprecedented tropical hurricane struck and demolished the mill of appellant, and that appellant exercised due diligence to rebuild its mill; that during the season of 1916 and 1917 no cotton was raised within the territory occupied by said mill, and appellant manufactured no linters except during the month of February, 1917, when it manufactured 35 bales, which it shipped to appellee to apply on the contract sued upon, at the contract price of 3½ cents per pound; that said shipment was accepted by appellee without prejudice to the rights of either party; that except said 35 bales appellant had neither manufactured nor sold any linters since October, 1915. Appellant pleads certain items of credit, aggregating \$579.94, and prays that in the event appellant should recover that it have credit for said sum. By supplemental petition appellee alleged that appellant had authorized the J. G. Leavell Company, brokers of Houston, Tex., to sell said 200 bales of linters; that at said time appellant's mill was in operation, and it had cotton seed on hand from which to manufacture said linters; that appellant expressly and impliedly represented to Leavell Company, its agents and broker, and Leavell Company expressly and impliedly represented to appellee, that appellant had the seed on hand from which to make the linters and had its mill in operation and was able to perform the contract; that appellee relied on said representation of fact being true, and entered into the contract; that appellee had sold the linters to its customers, and in order to keep its contract was compelled to buy from other sources, at an advanced price, the linters which appellant had agreed to furnish. A trial to the court resulted in a judgment in appellee's favor for \$1,862.90, with interest and costs.

The first assignment is that the court erred in not sustaining appellant's general demurrer to the plaintiff's first amended original petition. Appellant's general demurrer was not urged until after the first supplemental petition was filed. If the original and supplemental petitions, considered together, state a cause of action, the court did not err in its ruling on the demurrer. We think the plaintiff's pleadings, taken together, show its right to recover. The contention under this assignment is that because the plaintiff's original petition shows that by the terms of the contract the linters were to be delivered as soon as they were made, and does not by further allegation show that appellant ever made any more than the 25 bales delivered in October, the petition is insufficient; that

appellant's obligation to deliver the remaining 175 bales rested upon the condition that it thereafter made that number.

[1] In our opinion, the contract cannot be construed as a conditional one. The recitation is the sale of "two hundred bales of cotton linters, mill run, \* \* \* being seller's make, at 3½ cents per pound, f. o. b. cars, Kingsville, Texas." We may infer from this recital that appellant expected to manufacture at its own mill at least 200 bales of linters during that season. The recital, "Shipment. Beginning October, and shipped in car lots as fast as made," was not a condition limiting or in any manner modifying the obligation of appellant to ship fully 200 bales mentioned in the contract, but was simply a stipulation fixing the time when appellant should commence shipping, and binding it to continue shipments in carload lots as rapidly as it could make them. That term was inserted for the benefit of appellee, and, since no date was fixed when the last carload should be shipped, appellant was bound to make the linters and complete the shipment within a reasonable time. The words, "as fast as made," relate only to the time when the several shipments should be billed out, and should not be construed to be a condition upon the performance of which appellant's obligation rested. To hold that the making of the linters by appellant was a condition precedent to its duty to ship would, in effect, relieve it, at its option, of any obligation to comply. Such a construction would render the contract unilateral and void for want of mutuality. We are convinced of the soundness of our holding by a consideration of the facts set up by appellant by which it sought to justify its failure to fulfill the contract.

[2] It is alleged that it failed to make the linters during the season because a certain electrical power company, from which it obtained the power to operate its mill, broke down and could not furnish it power. The failure of the electrical power company was the condition which caused the breach—a condition not mentioned in the contract, and not within the contemplation of the parties at the time it was executed, but which arose thereafter. Such a condition will not excuse the breach. The contract was made without regard to the question of power used in running the mill, since it is not mentioned therein. *Northern Irrigation Co. v. Dodd*, 162 S. W. 948; *Henry v. McCardell*, 15 Tex. Civ. App. 497, 40 S. W. 172. The doctrine governing the liability of appellant in like cases is stated in volume 3, *Elliot on Contracts*, § 1891, as follows:

"The general doctrine that, when a party voluntarily undertakes to do a thing without qualification, performance is not excused by unavoidable accident or other contingency not foreseen, it becomes impossible for him to do the act or thing he agreed to do, is well settled. As

a man consents to bind himself so shall he be bound. Where no express or implied provision as to the event of impossibility can be found in the terms or circumstances of the agreement it is a general rule of construction, founded on the absolute and unqualified term of the promise, that the promisor remains responsible for damages notwithstanding the supervening impossibility or hardship."

Even if the words, "as fast as made," should be construed to be a condition, the same authority (section 1897) declares:

"It is no excuse for the nonperformance of a condition that it is impossible for the obligor to fulfill it, if the performance be in its nature possible."

6 R. C. L. p. 998, § 365, states the rule in this language, with reference to implied conditions excusing nonperformance:

"But when it is admitted that implied conditions in an absolute contract may excuse performance, when performance has become impossible, the question whether subsequent impossibility is an excuse for nonperformance seems to become one of construction. Viewing the subject in this way, the conclusion reached in some modern decisions seems to be at variance with the rule as stated in the early English decisions. It has been said that the words of a mere general covenant will not be construed as an undertaking to answer for the happening without the covenantor of a subsequent event which renders performance of the covenant itself not merely difficult, or relatively impossible, but absolutely impossible, owing to the act of God, the act of the law, or the loss or destruction of the subject-matter of the contract. Where the performance is thus rendered impossible, the inquiry naturally arises whether there was a purpose to covenant against such an extraordinary, and therefore presumably unapprehended, event, the happening of which it was not within the power of the covenantor to prevent.

[3] "In other words, there can be no doubt that a man may, by an absolute contract, bind himself to perform things which subsequently become impossible, or to pay damages for the nonperformance, and this construction is to be put upon an unqualified undertaking where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arose from the act or default of the promisor.

[4] "But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to conclude, were not used with reference to the possibility of the particular contingency which afterwards happens."

We do not intend to convey the impression that we think the furnishing of power by the electric company was an implied condi-

tion, or that the failure to furnish such power by the electric company rendered performance of the contract by appellant impossible. Upon the failure of such power it became appellant's duty to substitute other power or pay the damages incident to a breach, since there is nothing in the contract indicating that the power with which it operated its mill would likely fail. The reasonable inference from the language of the writing is, as alleged by appellee, that appellant had and would continue to have the power necessary to run its mill and the cotton seed available from which to obtain the lint, else some mention of it would have been made in the instrument. This case is distinguishable from the case of *Wright v. Farmers' National Bank*, 31 Tex. Civ. App. 406, 72 S. W. 108, and the Texas cases therein cited, in that here the intention of the appellant to fulfill the contract is manifest and may be inferred from its sale of and agreement to make and ship 200 bales of lint. The absolute promise is inferable from the failure to mention the contingency which actually prevented performance. In the *Wright Case* and the cases cited therein, the inability to perform until the happening of the conditions upon which the promises to pay are predicated are expressed in the contracts themselves. In the instant case no doubt is expressed as to the appellant's ability to fulfill the contract. The rule with reference to excuses for nonperformance of similar contracts is thus stated in 13 C. J. § 706:

"The general rule is that where a person, by his contract, charges himself with an obligation possible to be performed, he must perform it unless its performance is rendered impossible by the act of God, by the law, or by the other party; it being the rule that in case the party desires to be excused from performance in the event of contingencies arising it is his duty to provide therefor in his contract. Hence performance is not excused by subsequent inability to perform, by unforeseen difficulties, \* \* \* by inevitable accident, or by the breaking of machinery. \* \* \*"

What has been said also disposes of the fifth and sixth assignments.

[5] By the remaining assignments appellant insists that the court erred in admitting certain evidence. There are no findings of fact in the record, and since the trial was by the court without a jury, even if we grant that the admission of the evidence is error, we must presume in support of the judgment that the court did not consider improper testimony. *Robinson v. Dale*, 62 Tex. Civ. App. 277, 131 S. W. 308. There is sufficient evidence, without that objected to, to support the judgment, and it is affirmed.

**MARKUM v. MARKUM. (No. 1495.)**

(Court of Civil Appeals of Texas. Amarillo. March 12, 1919. On Motion for Rehearing, April 9, 1919.)

**1. HUSBAND AND WIFE ⇨119(3)—HUSBAND'S CONVEYANCE TO WIFE—COMMUNITY PROPERTY.**

Though husband did not know full legal effect of a deed conveying a lot to his wife as her separate property, but where it was partly intended by him to hide his interest in property from creditors, its different effect, though not contemplated, was not a mistake of fact of either party or the attorney preparing the conveyance.

**2. EQUITY ⇨7—MISTAKE OF LAW—RELIEF.**

A mistake of law is no ground for relief, as ignorance is not mistake, and equity will not grant relief upon the mere supposition that the party was ignorant of the legal effect of his act or of his omission to act.

**3. CONTRACTS ⇨93(1)—"MISTAKE OF FACT."**

A mistake of fact is an unconscious ignorance or forgetfulness of the existence or non-existence of a fact, past or present, material to the contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mistake of Fact.]

**4. HUSBAND AND WIFE ⇨119(3) — HUSBAND'S DEED TO WIFE — WIFE'S SEPARATE PROPERTY OR TRUST.**

Before a trust, either implied or expressed, can be impressed upon a clause in a conveyance of a lot caused to be executed by a husband to his wife making it her separate property, it must first be shown that such provision was inserted either through fraud, accident, or mistake.

**5. HUSBAND AND WIFE ⇨119(3)—DEED TO WIFE — SEPARATE PROPERTY OR TRUST — ESTOPPEL.**

Where a husband, with knowledge of the terms of a conveyance, caused it to be executed to his wife, making the lot conveyed her separate property, and it was delivered to her with his consent and his knowledge that title to lot was in her, and where there was no understanding between them as to any trust, he was estopped to ingraft an unimplied trust on the deed or title.

**6. HUSBAND AND WIFE ⇨235(4)—DEED TO WIFE—SEPARATE PROPERTY—MISTAKE.**

Where jury did not find any mistake in drafting a conveyance of a lot to a wife as her separate property, and found that husband did not intend to make it her separate property, and did not know that deed as drawn would have that effect, but that it was delivered with his knowledge that title to lot was in her name, and that he intended to put title in her to protect it from his creditors, there was no finding that separate property clause was inserted by mistake.

**On Motion for Rehearing.**

**7. HUSBAND AND WIFE ⇨119(3)—DEED TO WIFE—SEPARATE PROPERTY.**

If a husband causes a deed for property paid for with community funds to be made to the wife for her separate use and causes the deed to so recite, it will vest the title in wife as her separate estate.

**8. HUSBAND AND WIFE ⇨235(4)—CONTRADICTIONARY FINDINGS—JUDGMENT.**

Where husband claimed that a lot conveyed to his wife as her separate property was community property, the jury's findings that he did not intend to make it her separate property, and did not know that deed had that effect, but intended to put title in her to protect it from claims of his creditors, were contradictory, and would not support a judgment for husband.

**9. FRAUDULENT CONVEYANCES ⇨172(2) — HUSBAND AND WIFE—ESTOPPEL.**

Where a husband had creditors when he caused a conveyance of a lot to be made to his wife as her separate property, in order to hide his property, it was fraudulent, and he could not be heard to say that he did not intend to put title in her.

**10. HOMESTEAD ⇨31, 32 — INTENTION — OCCUPANCY.**

It takes more than a mere intention to constitute a homestead, and while actual occupancy of the land is not, under all circumstances, indispensable, there must be something more than mere intention where there has been no actual occupancy as a homestead, such as an existing bona fide intention to dedicate it as a homestead, evidenced by some unmistakable acts showing an intention to carry out such design.

**11. TRUSTS ⇨361—ACTION—SETTING ASIDE DEED.**

If land conveyed to a wife by a deed reciting it to be her separate property was held in trust for husband, a suit could be maintained by him, it not being necessary to set aside or correct deed before suing for the interest claimed.

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Suit for divorce by Mrs. I. L. Markum against J. F. Markum, with cross-action by defendant seeking an undivided one-half interest in land. From a decree for defendant in his cross-action, plaintiff appeals. Affirmed in part, and reversed and remanded for a new trial.

Muse & Muse and Scott, Fagan & Cardwell, all of Dallas, for appellant.

Brooks, Worsham & Graham, of Dallas, for appellee.

HUFF, C. J. This appeal challenges the correctness of the judgment of the trial court in giving appellee, J. F. Markum, an undivided half interest in and to a certain lot situated in the city of Dallas. The ap-

pellant, Mrs. Markum, brought a suit against appellee, her husband, for divorce. He filed a cross-action, asking for judgment for an undivided one-half interest in and to a lot which had been acquired during coverture. As there is no issue presented on this appeal as to the proper disposition of the case in granting a divorce and awarding the custody of the minor child, and the disposition of the other property, it will be unnecessary to state the pleadings other than on the issue as to whether the lot in question was the separate property of the wife or the community property of the husband and wife. Mrs. Markum alleged that a lot 25 feet by 149 feet, out of block 631, according to Murphy & Bolanz map of the city of Dallas, was her separate property. In answer to that part of her petition the appellee pleaded substantially that the lot in question was the community property, purchased with community funds; that while the deed recited that it was paid out of the separate funds of the wife, and was made for her sole and separate use, that such recitation was not true, but that it was paid for out of the community funds; that it was acquired for a residential and business homestead for appellee and his family and was immediately so occupied; that prior thereto appellant met with business reverses, and had sacrificed his estate in paying his debts, and that both appellant and appellee were desirous of securing a homestead which would not be subject to the payment of fictitious claims and stale demands; that he owed no valid and subsisting debts, and did not thereafter contract any debts on the faith of such property; that appellee possessed no knowledge of conveying and had no experience therein, and was ignorant as to the effect of recitals in deeds, and that in the purchase of the property he relied upon his attorney, in whose ability and integrity he had implicit confidence, preparing the deed in proper form, and that it was prepared by the attorney without direction from appellee, save and except as to the wish and desire of appellant and appellee, as above mentioned; that at said time it was understood and agreed by and between the parties, appellant and appellee, that the property should constitute their community estate, and that appellant should hold the same in trust for such community; that appellant well knew that in accepting the deed, with the recitals, that appellee did not make, or intend to make, her a gift of the property, and that he did not admit, or intend to admit, the payment therefor had been made, or would be made, out of her separate means and estate; that appellee accepted the deed and caused the same to be placed of record in reliance upon said attorney, and in ignorance of the legal effect of the recital therein, and in the belief that it was so drawn to preserve the community

interest therein; in such belief he paid, and caused to be paid, the consideration out of his personal earnings while he and his wife were living together, by reason of which she holds the legal title in trust for the community; that, if the deed should be construed as to make it the separate property of appellant, then he alleges the recitals were the result of a mistake of the attorney and the mutual mistake of appellant and appellee, and should be reformed to carry out the purpose and intent thereof; that, if he was mistaken in the allegations as to an express trust for the community, by reason of the facts above set out appellant is bound and obligated in law to hold the property in trust for the use and benefit of the community estate.

The appellant urged several special exceptions to this plea, which in some measure will be noticed later in the opinion. The case was submitted to a jury on special issues.

The record of the evidence in this case presents the deed by an abstract, which shows that the deed was dated February 20, 1899, the grantor thereof being Mrs. Alice Aarons, joined by her husband, Arnold Aarons, to Mrs. I. L. Markum, for her separate use and benefit; that the deed is a general warranty, and was filed for record March 9, 1899, the recited consideration being \$250 cash, and eight notes, for \$100 each, due 1, 5, 12, 18, 24, 30, 36, 42, and 48 months from date, with 8 per cent. interest, payable semiannually, as the notes accrued. The notes were secured by deed of trust on the lot executed by I. L. Markum and her husband, J. F. Markum, to J. P. Murphy, trustee, and bear date the same date and recorded at the same time as the deed. The deed of trust shows to have been released November 16, 1900, by Aarons and Murphy to Mrs. I. L. Markum. Both parties treat the deed as reciting that the consideration was paid out of the estate of Mrs. Markum, and that it was conveyed to her for her sole use and benefit. The findings of the jury are to the effect that Mrs. Markum had \$150 at the time of her marriage to appellee, but that none of said sum went into the property in question; that the \$250 cash paid was paid out of the community, and that the deferred purchase-money notes were also paid out of the community. At the request of appellant the court submitted the following issues, which are given, with the jurors' answers thereto:

"Issue No. 22. The proof shows that J. P. Murphy wrote the deed from Aarons and wife to Mrs. I. L. Markum, conveying the said Harwood street property described in the petition, which original deed is in evidence. Was the said deed, so written by J. P. Murphy, written by him at the instance and in accordance with the direction of Charles Bolanz?" Ans.: "Yes."

"Issue No. 23: Did J. F. Markum authorize

Chas. Bolanz to have the deed from Aarons and wife to Mrs. I. L. Markum executed in accordance with the terms of said deed, as written?" Ans.: "No."

"Issue No. 24: Was the deed from Aarons and wife to Mrs. I. L. Markum in evidence delivered with the knowledge and consent of the defendant, J. F. Markum, that the title to the said property was in the name of his wife, Mrs. I. L. Markum?" Ans.: "Yes."

"Issue No. 25: Was it the intention of the defendant, J. F. Markum, to put the title to the property on Harwood street, described in plaintiff's petition, in the name of his wife, Mrs. I. L. Markum, in order to protect said property from the claim of his existing creditors, or of the claims of his future creditors?" Ans.: "Yes."

At the request of appellee the court submitted the following issues and obtained answers thereto by the jury as here set out:

"Special Issue No. 11: Was it the understanding and intention of the defendant, J. F. Markum, at the time said purchase was made and said deed was drawn, that said lot, when paid for, should constitute the separate property of the plaintiff, and that he would have no interest therein?" Ans.: "No."

"Special Issue No. 18: Did the defendant, J. F. Markum, rely on his attorney to prepare the deed to the Harwood street property in proper form?" Ans.: "Yes."

"Special Issue No. 19: Did the defendant, J. F. Markum, know at the time said deed was drawn, and at the time the deferred payments were made, that the deed was so drawn as to make the lot the separate property of the plaintiff and to deprive him of all interest therein?" Ans.: "No."

"Special Issue No. 20: Was the Harwood street property purchased by the defendant with the intention of using and occupying it as a business and residential homestead?" Ans.: "Yes."

"Special Issue No. 21: Was the Harwood street property actually used and occupied by the defendant and his family as a business and residential homestead?" Ans.: "Yes."

"Special Issue No. 22: Did the defendant contract any debts on the faith of his ownership of the Harwood street property?" Ans.: "No."

In answer to a special issue, in which community property was defined, the jury answered generally that all the property described in the plaintiff's petition, which consisted of other realty and personal property, was community property and paid for out of the community funds. As the jury appears to have rejected Mrs. Markum's evidence in toto as well as that of Mr. Bolanz, and accepted Mr. Markum's statement, we will state as near as we may his testimony with reference to this property. He purchased the property from Aarons about the date of the deed, through Murphy & Bolanz, agents, and paid for the same out of the community funds, or, if the wife paid any of the money, she got it from that source. It was not his purpose to make her a gift of the funds of the property. He did not

know who drew up the deed, and there was no discussion between him and the agents as to how the deed should be drawn.

"There was no understanding who should claim the property. I didn't know the deed was drawn in the way it was, containing the recitals that were set out of separate property of Mrs. Markum, and the conveyance was made for her sole and separate use. I found that out in 1911 or 1912, when I went out of business. I didn't have enough money to settle my bills. I had turned over my business on account of illness, and I didn't have the money to pay all of my bills."

He testified he did not know the legal effect of the recitals in the deed, and if he had known he would not have signed the deed; that Judge Camp, for him, examined the title, and that he only had a conversation with him over the phone with reference to the preparation of the deed. Camp asked him how he wanted the deed made, and—

"I says, 'Judge, I don't care how you make it; that will be our home;' and he said, 'You had better make it to Mrs. Markum;' and I says, 'That is immaterial to me.' I didn't know of the recitals in that deed, and I found out about that after they filed the suit."

He stated after his marriage he failed in business in 1893, and again started business in 1896. He again asserted he didn't see the deed when he signed the deed of trust and never wrote it; "Judge Kemp (Camp) examined that." That he didn't have any talk with Bolanz before the deed was sent to Aarons for execution.

"After the deed was recorded, on March 9, 1899, it was probably two months before my wife and I moved into the Harwood street property in controversy. \* \* \* During that time we were occupying another place as our business homestead and residence homestead, and I bought that Harwood street property for a like purpose. \* \* \* I don't think at that time that it was my intention to buy a residence homestead. I didn't know that I would be able to pay for that one or not."

The effect of his evidence is that Judge Camp examined the abstract for him before either the deed or the deed of trust were executed. That when Camp asked him how he wanted it written he left the matter entirely in Camp's hands, and when Camp suggested that it be placed in his wife's name he assented. He thought Camp wrote the deed until the trial disclosed differently, and testified:

"I do not know whether the deed being in the form it is in now would have been in the same 'separate property of the wife' if Camp had written it. I didn't direct Mr. Camp to put it in any form; I told him just to put it in the name of my wife if he thought it was best. If I had known how to have written it I would have done it myself to save trouble. I knew all along that the deed was in my wife's name."

Appellant offered a paragraph of an abandoned pleading, which in effect alleged that it was not intended by him to make a gift of this property to his wife.

"But that said recitals were made in said deed for the purpose of preventing oppressive and unremitting creditors of both plaintiff and defendant from subjecting said property to the payment of their unjust and exorbitant debts."

On further examination the appellee admitted that he failed in 1893; that his books showed an indebtedness of about \$5,000, and his stock of goods amounted not to exceed \$1,800; that Armstrong & Co. at that time had obtained a judgment against him for about \$700, which was unpaid when the property in question was purchased, and when the deed was made to the wife, but that the judgment had not been kept alive by issuing thereon execution. This question was then asked him:

"But you still had the same idea when this pleading was filed (the amendment of the original answer upon the trial), to protect that property against anything that might come up in the past or anything that might come up in the future? A. Anything in the future; I didn't know of anything that might come up in the past. Q. And it was for that reason that you designed and intended that it should be put in the name of your wife? A. Yes, sir."

It appears that some time in 1910 or 1911 he was again in the grocery business, and on account of ill health failed; that at that time he was indebted to Atkins-Polk Company \$200 or \$300, which he did not pay. Upon investigation Mr. Atkins found that the property in question was in the name of appellee's wife. The appellee, Markum, when he called upon him about the debt, told Atkins the property was his wife's, and he could not pay the debt, but that he would work it out. The company charged off the debt and didn't collect it. This evidence does not appear to be denied. It also appears at that time that appellee and his wife were occupying other property as a home-stead. A Mr. Usury testified that about 10 years before the trial he called upon Mrs. Markum to know if she would sell it, and she referred him to her husband, stating they were both interested in the property. Mrs. Markum testified she told Bolanz when the deed was made that she wanted the deed in good shape, and that it would be hers; that her husband did not hear what she said to Bolanz, but that when he came in Bolanz told him, and asked him if it was satisfactory, and appellee said it was. Bolanz had no definite recollection about the conversation, or as to the statements or directions with reference to the deed, but does testify that he consulted both together about the trade. Mr. Murphy, of the firm of Murphy & Bolanz, wrote the deed, and it is in his writing. He testified that he drew the

deed according to the instructions received from Bolanz. The trial court, with reference to this property, rendered judgment upon the findings of the jury for appellee for an undivided half interest in the lot in question.

The first seven assignments of appellant are based upon the exceptions presented to the appellee's answer, which were overruled by the trial court, which, in effect, excepts to the answer because no facts are alleged setting out mistake by appellee's lawyer, or either party to the deed, or this suit, or in what the mistake consisted; that there are no facts upon which a trust could be based, either by agreement or in law; that there was no fraud or mistake alleged touching the preparation of the deed by the attorney, or by the appellee, or by the vendors, or between appellant and appellee, and no facts constituting such mistake alleged.

[1-3] Our courts are quite liberal in ingrafting trusts on deeds to land held in the name of either the husband or wife, in favor of either spouse, or the community. The allegations of appellee in his answer may be sufficient as to an express trust; that is, an agreement to hold the title in the name of the wife in trust and for the benefit of the community. However, the averments are somewhat contradictory in that respect. It is alleged that there were stale demands and fictitious debts outstanding against the community, and to save the property from these debts a lawyer, in whom appellee had confidence, was procured and the deed prepared by him without direction from appellee, "save and except as to the wish and desire of plaintiff and defendant as above mentioned." Then it is alleged that, if the deed had the effect to make the lot the separate property of the appellant, the recitals were the result of a mistake of said attorney. If the attorney understood the law, as appears he did from the statement in the pleadings, as to appellee's financial condition, and his desire to cover up his property from fictitious debts and stale demands, he drew the deed to effect "the wish and desire" of appellee and according to his instructions. There is no mistake shown on the attorney's part if the appellee gave him direction to so draw the deed as to effect such "wish and desire."

It may be the appellee did not know the full legal effect of the deed he caused to be drawn, and that it accomplished more than he intended it should; but it does appear that it was intended by him, as one of its effects, to hide his interest in the property, and now that it had another effect, then not contemplated, cannot be said to be a mistake of fact of either party or the attorney, but it may have been ignorance of the law on the part of somebody. Mr. Justice Washington said:



"If the mistake be nothing more than a misconception of the law, \* \* \* I can only say that such a mistake is not a ground of relief, for ignorance is not mistake; and equity will not grant relief upon the mere supposition that the party was ignorant of the legal effect of his acts, or of his omission to act." *Sims v. Lyle*, Fed. Cas. No. 12,892.

Our Supreme Court, in discussing mistake, has said:

"The most philosophical definition we have found is that presented by Pomeroy: \* \* \* 'An unconscious ignorance or forgetfulness of the existence of nonexistence of a fact, past or present, material to the contract.' This definition contains several elements, each of which, as above suggested, must be explained and qualified in its practical application. Thus, the ignorance must be unconscious; that is, not a mental state of conscious want of knowledge whether a fact which may or may not exist does so. *Kerr, Fraud & M. 422*. This idea is involved in, and furnishes a reason for, the exception pointed out by Dixon, C. J., in *Heard v. Hall*, 12 Wis. 112, 127, on authority of *Kelly v. Salari*, 9 Mees. & W. 54, viz. where a party enters into a contract ignorant of a fact, but meaning to waive all inquiry into it, or waives an investigation after his attention has been called to it, he is not in mistake, in a legal sense. These limitations are predicated upon common experience that, if people contract under such circumstances, they usually intend to abide \* \* \* either way of the known uncertainty, and have insisted on and received consideration for taking that chance." *Ry. Co. v. McCarty*, 94 Tex. 298, 60 S. W. 429, 53 L. R. A. 507, 86 Am. St. Rep. 854; *Lott v. Kaiser*, 61 Tex. 665.

The appellee cites section 845, vol. 2, Pomeroy's Equity Jurisprudence:

"The first which I shall mention is clearly connected with the doctrine stated in the last paragraph but one. It was there shown that, if an agreement is what it was intended to be, equity would not interfere with it because the parties had mistaken its legal import and effect. If, on the other hand, after making an agreement in the process of reducing it to written form, the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief."

Section 843, Id., referred to in the above section, in part reads:

"If an agreement or written instrument, or other transaction, expresses the thought and intention which the parties had at the time and in the act of concluding it, no relief, affirmative or defensive, will be granted with respect to it upon the assumption that their thought and intention would have been different if they had not been mistaken as to the legal meaning and effect of the terms and provisions by which such intention is embodied or expressed, even though it should be incontestably proved that their intention would have been different if they had been correctly informed as to the law."

There are no facts alleged which show a mistake of fact. The title, according to the allegation, was to be in the name of the wife for the purpose of preserving the property from appellee's creditors. The appellee did not rely upon his inadequate knowledge of the law, but called in one learned in the law, and in whom he had confidence, to draw the deed. There is no allegation showing that he suggested any form for the deed, and gave no instructions except as to have it drawn to accomplish the "wish and desire" to save the property from the creditors. The lawyer is not shown to have been ignorant as to any fact or that he was under a misapprehension as to any fact. As a lawyer he must have known to have caused the Aarons to deed the land to Mrs. Markum would have left it exposed to the stale demand and fictitious debts against appellee, and that the only effective deed which could be drawn was one placing, not only the title in the name of the wife, but making the property her separate property, and for her separate use and benefit. In employing a lawyer appellant made the acts of the lawyer his acts and the knowledge of the lawyer his knowledge. The answer, in our judgment, alleges no such mistake as will authorize a cancellation of that provision of the deed put in there for the purpose of protecting the property from the creditors. As above suggested, this may not have prevented the establishment by evidence of an express trust upon agreement between the husband and wife. This would seem to be the holding of *Du Perier v. Du Perier*, 59 Tex. Civ. App. 224, 126 S. W. 10. However, in that case the deed to the wife did not purport to place the title in her for her separate use. It may well be doubted whether the express terms of a deed giving the terms upon which the title is held can be contradicted by proving a parol trust without alleging and proving fraud, accident, or mistake.

[4] In *Kahn v. Kahn*, 94 Tex. 114, 58 S. W. 825, our Supreme Court, in discussing a clause in a deed from the husband to the wife, the terms of which are similar to the one in the instant case, said:

"The statement in the deed from Kahn to his wife is more than a mere statement of a fact. Under the decisions referred to, its legal effect is to show the character of the right to be created by his deed, and is as much a contractual recital as any in the instrument, and belongs to that class of particular and contractual recitals which in deeds estop the parties from denying them."

Again, it is said in that case:

"Nor was the evidence admissible under the rules which allow the ingrafting of parol trusts upon legal titles. No trust of the kind known as implied trust could arise from the facts stated. \* \* \* It cannot be admitted that it remained so after Kahn conveyed it to his wife.

for the plain reason that his deed converted it into separate property of the wife. The testimony \* \* \* does not tend to show any express trust in the wife. Its only tendency is to show the absence of an intention plainly expressed in the deed."

That case would seem to hold before a trust, either implied or expressed, could be shown, the clause making the property the separate property of the wife must first be shown to have been inserted either through fraud, accident, or mistake. We do not believe any valid reason can be asserted why the rule announced in the above case should not apply to this. The fact that appellee did not execute the deed to his wife under the pleadings ought not to affect the rule. He alleges he caused the deed to be made to his wife to subserve his own ends and purposes, and recorded it for that purpose. Not only his intent, but also his acts, concur to estop him. We believe the court should have sustained the exceptions as to the allegations of mistake as pleaded in this case. This would have left practically only the issue of an express trust set up by the answer.

The remaining assignments are based on refusals to give instructions for a verdict for appellant, and to exceptions to the special issues submitted at the request of appellee, and the refusal to enter judgment upon the findings of the jury on issues requested by appellants. Nos. 24 and 25, heretofore set out.

[5] The facts in this case, we think, present the issue of estoppel. While the deed was not executed by appellee, the facts raised the question of knowledge on his part as to its terms at the time it was executed, and again in 1911 and 1912, and the jury found that it was delivered to his wife with his knowledge and consent, knowing that the title to the lot was in her. Perhaps on the facts, aside from the deed, the court ought not to charge as a matter of law that appellee was estopped; but in this case we find no evidence of an express trust, but, on the contrary, the appellee testified there was no understanding between him and his wife. In such an event he could not ingraft an implied trust on the deed or title, and, no express trust having been proven, the deed should have been given proper legal effect. *Kahn v. Kahn*, supra.

[6] The jury did not find that there was a mistake in drafting the deed. The effect of their finding is it was the understanding and intention of appellee not to constitute the property the separate estate of the wife; that he did not know when the deed was drawn that it would make it her separate property without any interest left in him. They did find, however, it was delivered with his knowledge and consent that the title to the lot was in the name of his wife. We do not believe this presents a

finding that the clause was inserted by mistake of any one. In looking to the evidence, we think it is shown it was inserted purposely and to accomplish the legal purport of the deed; that, if he himself did not examine the deed, he employed an attorney to attend to it for him. The jury also found it was his intention to put the title in his wife in order to protect the property from the claims of existing creditors, or the claims of future creditors, and the evidence shows without dispute that in 1911 or 1912 he did use this deed to prevent the property being levied on by his creditors. We do not think under the pleadings, the evidence, and the findings of the jury the judgment should have been entered for appellee for an undivided one-half interest in this lot. We believe the cases cited by appellee as to the effect of a recital in deeds of this character sustain appellant's contention in this case. *McCutchen v. Purinton*, 84 Tex. 603, 19 S. W. 710; *National Bank v. Hall*, 30 S. W. 74; *Hatchett v. Conner*, 30 Tex. 112; *Story v. Marshall*, 24 Tex. 307, 76 Am. Dec. 106; *Owen v. Tankersley*, 12 Tex. 411; *Smith v. Boquet*, 27 Tex. 507; *Hodges v. Taylor*, 57 Tex. 198; *Hoeser v. Kraeka*, 29 Tex. 450; *Lott v. Kaiser*, 61 Tex. 665; *Hunter v. Hunter*, 45 S. W. 821; *Kahn v. Kahn*, 94 Tex. 114, 58 S. W. 825; *Shook v. Shook*, 125 S. W. 638; *Davis v. Davis*, 44 Tex. Civ. App. 238, 98 S. W. 198.

We have decided not to discuss the testimony with reference to the purpose of placing the title in the name of the wife to defraud the creditors, further than to state that it does not appear conclusively that at the time the property was purchased that it was then or would be exempt from execution. This will be apparent from reading the statement set out by us in the beginning of the opinion. The rules of law governing such question need no discussion from us.

We believe the judgment, giving appellee an undivided one-half interest in the lot in question, should be reversed and remanded for a new trial, but in all other respects the judgment will be affirmed.

Reversed and remanded in part and affirmed in part.

#### On Motion for Rehearing.

On the original hearing we held, under the allegations made by appellee, he caused the deed to be executed to his wife for the purpose of protecting it from the fictitious and stale demands of his creditors; that in making the deed for the separate use of his wife he had the title placed in her, and the deed, having expressed the trust upon which the estate was held by her, could not be contradicted by proving a resulting or implied trust for the use and benefit of the community in the absence of fraud or mistake; that the answer or cross-petition of appellee alleged no facts constituting mistake, but

the allegation negatived a mistake in fact, in that the allegations showed the deed effected the very purpose designed by appellee, and that he made no specific direction as to the form or terms of the deed further than to state the purpose desired to his attorney; that, having caused the deed so to be made, he should be bound by its terms as much so as if he himself had executed the deed direct to his wife.

[7] "If he causes a deed for property, paid for with community funds, to be made to the wife for her separate use, and causes the deed to so recite, it will vest the title in the wife as her separate estate." *McCutchen v. Purinton*, 84 Tex. 603, 19 S. W. 710. It is true that case does say that testimony to show the recitals in the deed were not paid out of the separate funds in a proper case would be admissible. One instance in which it would have been proper to admit such evidence would be when the creditor attacked the deed as being in fraud of creditors; another might be when it was shown that the clause was inserted through fraud or mistake. *Kahn v. Kahn*, 84 Tex. 114, 58 S. W. 825; *Lott v. Kaiser*, 61 Tex. 665. The appellee insists that the court, in the case of *Strickland v. Baugh*, 169 S. W. 181, reached a different conclusion to the one announced by us. The facts alleged in that case and this we regard as materially different. In that case it was the purpose and direction of the husband, in having the deed executed to be so drawn as to vest title in his wife after his death; but, instead of so drawing the deed, it was made to vest a present title in the wife as her separate estate, and also it was shown the wife did not know of that deed. The deed there to be drawn was to be testamentary in character, but instead it was drawn so as to vest title in present. This the court evidently found was a mistake in the draftsman and was not drawn according to direction. In this case the deed, according to the allegation, was drawn so as to effect the purpose of appellee without any direction as to its form or terms. This case falls nearer under the rule announced by the Supreme Court in the case of *Lott v. Kaiser*, supra. We did not decide the case on estoppel arising upon a purpose to defraud creditors, but on the ground that the deed itself expressed the trust upon which the title was held, and was so executed by the procurement of the husband. We were of the opinion that the pleadings as to mistake were not sufficient on their face. The assignments presenting error in failing to instruct a verdict or to render judgment upon the motion of appellee were not sustained; that is, to the extent of holding that the court should have rendered judgment for the appellee upon the verdict.

[8, 9] We doubt very seriously whether the findings of the jury authorized a judg-

ment for any one, as we regard them as being in their nature contradictory. That is, they find it was not the intention of appellee to constitute the property the separate estate of the wife, and that he did not know it would be her separate property, but they also find it was his intention to put the title to the property in the wife in order to protect it from the claims of existing creditors and the claims of future creditors. If that was his intention, there could not be a mistake in so wording the deed as to make it effectual. These findings we regard as contradictory, and, in our opinion, would not support a judgment; and again, if he had creditors at that time and he sought to cover up his property, it was fraudulent, and he will not be heard to say that he did not intend to put the title in his wife. It is insisted also that the property was exempt. If it was, there was no fraud on the creditors in deeding it to his wife. While the jury found appellee bought the property with the intention of occupying it as a business and residential homestead, and that it was actually so used, they do not find when it was so used. The appellee testified that it was two months after recording the deed before he moved on the property, and during that time he and his family were living on another place as a business and residential homestead.

[10] It takes more than a mere intention to constitute a homestead; that is only a part. As we understand, actual occupancy of the land is not, under all circumstances, indispensable; but there must be something more than mere intention, where there has been no actual occupancy of the land as a homestead, to vest it with that quality. There must be an existing bona fide intention to dedicate the property as a homestead, and this must be evidenced by some unmistakable acts showing an intention to carry out the design. At the time of the conveyance and for two months thereafter appellee and his family occupied other property as a homestead. Can it be said that the mere intention at some future time to make the property so bought a homestead at the time the wife took a deed thereto in her separate right will invest it with that character? *Loan Co. v. Blalock*, 76 Tex. 85, 13 S. W. 12; *Parrish v. Hawes*, 95 Tex. 185, 68 S. W. 209. We refer to the question of homestead in the original opinion as not being conclusively shown. While the jury did find it was the intention so to use the property, and that it was subsequently so occupied, they did not find when it was occupied. The question is presented by appellee's evidence whether he had in fact abandoned his former home when he caused the deed to be executed to his wife. We were not satisfied that the findings of the jury would authorize the judgment, and hence concluded it to be our duty to reverse the case. At this

time we desire to state that we did not hold that the action was barred by the statute of limitation.

[11] It is our view, if the land was held in trust by appellee, the suit could be maintained. It was not necessary to set aside the deed or correct the deed before suing for the interest claimed. *Insurance Co. v. Brannon*, 99 Tex. 391, 89 S. W. 1057, 2 L. R. A. (N. S.) 548, 13 Ann. Cas. 1020; *Alfalfa, etc., v. Mudgett*, 199 S. W. 337. As we view this case, it should be reversed for a new trial as to the lot in question.

The motion for rehearing will be overruled.

**PULLMAN CO. v. MCGOWAN et al.**  
(No. 6175.)

(Court of Civil Appeals of Texas. San Antonio.  
March 12, 1919. Rehearing Denied  
April 9, 1919.)

**1. TRIAL §88(1)—RECEPTION OF EVIDENCE—HYPOTHETICAL QUESTION—OBJECTION.**

An objection to a hypothetical question put to an expert witness that it was "a hypothetical question in which all the facts are not before the witness" held too general and indefinite to be sustained, especially where, when the attorney asking the question asked for the facts omitted, none were given, and the same hypothetical questions were asked and like answers returned by other expert witnesses without objection.

**2. DEPOSITIONS §109—MODE OF MAKING—OBJECTIONS.**

Objections to interrogatories because they were prefaced by a synopsis of the allegations of the petition and because they were leading were objections going to the form and manner of taking, and therefore could not be considered where they were not made in writing and taken as required by Rev. St. 1911, art. 3676, and called to the attention of the court, but were made in open court during the trial.

**3. CARRIERS §416—SLEEPING CAR COMPANY—INJURY FROM UNHEATED CAR—EVIDENCE—ADMISSIBILITY.**

In action against sleeping car company for injury from being transported in an insufficiently heated car, testimony of the defendant's assistant superintendent as to the duty of the defendant's porter to build a fire in the sleeper was properly admitted.

**4. APPEAL AND ERROR §1050(1)—ADMITTING TESTIMONY—SIMILAR TESTIMONY RECEIVED WITHOUT OBJECTION.**

Appellant cannot complain of the admission of improper testimony where other witnesses testified to the same fact without objection.

**5. CARRIERS §411—SLEEPING CAR COMPANY—INJURY TO PASSENGER—DEFENSES.**

Where sleeping car passenger was aroused by sleeping car employé and compelled to leave the car in which he was sleeping and directed to

another car not heated, in which he was refused a berth, and compelled to sit in clothing which had become wet by exposure to rain during the transfer, the sleeping car company was liable therefor, and could not defend by showing that the railway company had told it to make the transfer.

**6. CARRIERS §416—INJURY TO PASSENGER—SUBMITTING LIABILITY OF JOINT TORT-FEASORS TO JURY.**

In passenger's action for injuries against sleeping car and railroad companies, the sleeping car company could not complain that the liability of the railway company was not submitted to the jury, so far as the judgment rendered against it in favor of the passenger was concerned; both it and the railway company being joint tort-feasors.

**7. CONTRIBUTION §5—JOINT TORT-FEASORS.**

Although railway company ordered that passengers in a sleeping car be transferred to another car, if the sleeping car company compelled a passenger, in making the transfer, to walk through rain and mud, and refused to heat the second coach and to give a berth therein to the passenger, it had no right to demand contribution from the railroad for the passenger's damages from injuries so received; it being the active and direct agent concerned therein.

**8. CONTRIBUTION §5—JOINT TORT-FEASORS.**

The doctrine of contribution is never applicable to one who was concerned in committing the tort.

**9. CARRIERS §411—SLEEPING CAR COMPANY—RESPONSIBILITY FOR ACTS OF PORTER.**

Where sleeping car company gave orders requiring certain action on the part of its porter, it was liable for such action, although in performing it the porter failed to act with ordinary prudence.

**10. CARRIERS §411—SLEEPING CAR COMPANY—NEGLIGENCE IN TRANSFERRING PASSENGERS.**

The duty arising from the relation of carrier and passenger between a sleeping car company and its passenger to use proper care in transferring the passenger from one sleeper to another is not affected by the fact that the company does not control the trains to which its coaches are attached.

**11. APPEAL AND ERROR §742(5)—ASSIGNMENT OF ERROR—STATEMENT.**

In action by sleeping car passenger for injuries from being carried in an unheated car, an assignment of error of the company complaining of refusal of instruction that the comfort of passengers who were asleep could not be sacrificed in the interest of those awake by putting on the heat could not be sustained, where, in the statement following the assignment, appellant failed to point out how any such sacrifice would have resulted.

**12. NEGLIGENCE §2—RULES OF CORPORATIONS.**

Rules of corporations cannot justify negligence.

**13. TRIAL ¶233(1)—INSTRUCTIONS—SUBMITTING TWO ISSUES.**

In action by sleeping car passenger for injuries from being refused a berth in a sleeper to which he was transferred, a charge submitting the issue as to whether a berth was requested by him and refused by the defendant sleeping car company was not objectionable as submitting two issues.

**14. TRIAL ¶261—INSTRUCTIONS REQUESTED EN MASSE.**

Where defendant asked the submission in bulk of 23 issues, on different matters, they were properly refused, when at least a portion thereof had been embodied in the charge of the court, as the court, under such circumstances, was under no obligation to attempt to pass upon the correctness of such a mass of issues.

**15. TRIAL ¶282(2)—INSTRUCTIONS—GENERAL CHARGE.**

A requested general charge requiring a general verdict in a case submitted on special issues is properly refused.

**18. NEGLIGENCE ¶61(i) — "PROXIMATE CAUSE"—CONCURRING CAUSES.**

It is not essential that a cause should act alone in order to constitute it the "proximate cause"; but, if it concurs with another cause in producing the injury, it will be a proximate cause, and one or both of the instruments setting the cause in motion will be liable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

**17. CARRIERS ¶411—SLEEPING CAR COMPANY—INJURY TO PASSENGER—PROXIMATE CAUSE.**

Notwithstanding the concurrent negligence of another, if a sleeping car company's negligence in causing the transfer of its passenger to another sleeper and in failing to heat the second sleeper or refusing a berth therein produced a condition from which the passenger's tuberculosis developed, the causal connection between such acts and the tuberculosis was unbroken, and the company was liable.

**18. DAMAGES ¶132(1)—EXCESSIVENESS.**

Where sleeping car company compelled its passenger to transfer from one coach to another, exposing him to rain and cold, and then failed to heat the second coach, and denied him a berth therein, from which acts he contracted tuberculosis and was without hope of recovery, a verdict for \$30,000 was not excessive, where he was only 46 years old and was incapacitated from work and had been earning \$4,000 a year.

Appeal from District Court, Bexar County; R. B. Minor, Judge.

Suit by J. A. McGowan against the Pullman Company and others, with cross-action by the named defendant against the San Antonio & Aransas Pass Railway Company. From a judgment for plaintiff in the first action, and for defendant Railway Company in the cross-action, the Pullman Company appeals. Affirmed.

Guinn & McNeill, of San Antonio, for appellant.

Boyle, Ezell & Grover, Ernest Feilbaum, H. C. Carter, Champe G. Carter, Randolph L. Carter, and Perry J. Lewis, all of San Antonio, for appellees.

**FLY, C. J.** This is a suit for damages, instituted by J. A. McGowan against the Pullman Company, the San Antonio & Aransas Pass Railway Company, and the St. Louis, Brownsville & Mexico Railway Company, in which it was alleged that the first-named railway company operated a line of railroad from San Antonio to Sinton, Tex., and the last-named railway company a line from Sinton to Brownsville; that the three companies were operating sleeping coaches belonging to appellant over the two lines from San Antonio to Brownsville; that on October 26, 1914, McGowan bought a ticket from the San Antonio & Aransas Pass Railway Company from San Antonio to Brownsville, and also secured a ticket for the sleeper between the two points; that he was assigned his berth in the sleeping coach, and was transported to Sinton, and the sleeping coach placed by the initial carrier on transfer track used by the two railway companies, and while there the servants of appellant awakened the pleader and directed him to leave his berth and transfer to another sleeper, which he did by walking through mud and water, exposed to cold, and when he reached the other sleeper no berth was furnished him, and he was compelled to sit the rest of the night in his wet clothing, the car not being heated. He alleged that he had become ill from the exposure, and sustained great and permanent damages. The cause was submitted to a jury on special issues, and upon the answers thereto judgment was rendered in favor of appellee McGowan against appellant for \$30,000. Upon the cross-action of appellant against the San Antonio & Aransas Pass Railway Company the verdict was in favor of the latter, and the suit was dismissed by McGowan as against the St. Louis, Brownsville & Mexico Railway Company. This appeal is by the Pullman Company alone.

The facts showed that appellant was negligent in causing McGowan to leave the sleeping coach at Sinton during the night, in bad weather, and walk through mud and water to get another coach, and in not heating the second coach, and in not providing a berth for him in the second coach. That negligence was the direct and proximate cause of illness and a fatal disease from which he will never recover. The jury found that the Aransas Pass Railway Company had not been guilty of negligence causing the injuries to McGowan, and the evidence was sufficient to justify such finding.

The petition was clear and explicit in al-

leging the negligence of appellant and its connection with and relation to the two railway companies, and the first assignment of error, which assails the action of the court in not sustaining the two special exceptions to the petition, is overruled. The petition goes into details and minutia, probably not absolutely required, and it is certainly not open to the charge of vagueness, inconsistency, uncertainty, or a failure to allege any and all facts necessary to show the liability of appellant. The exceptions are so indefinite and uncertain as to come almost, if not quite, within the definition of a general demurrer. They fail to specifically point out the objections to the petition.

There is no merit in the second assignment of error, and it is overruled. If the exception, which it is claimed should have been sustained, was acted upon by the court, the record fails to show it. However, if it had been, it should have been overruled.

The allegations of the petition clearly show that the negligence of appellant was the direct and proximate cause of the sickness of McGowan and the damages resulting therefrom. Appellant compelled him to leave his coach in which he was sleeping and go out into an inclement night and enter another coach in which no arrangements were made for his accommodation or comfort; and sickness was produced by such negligence from which he will never recover. The third, fourth, and fifth assignments are overruled.

[1] The following question was asked Dr. Wolf, a physician who had treated McGowan:

"Doctor, from your treatment of him, from all you saw of the case, saw of Mr. McGowan, and adding to that the hypothesis that I put to you, that in the latter days of October he was subjected to an exposure while on a trip to Brownsville, in which he was required to get out of his berth in a warm sleeping car, out into the cold, cool, damp air; that it was wet and damp; that he got his feet both muddy and wet, and then sat in a cold car afterwards for several hours in a thoroughly chilled condition, and then contracted this cold and this gripe, in which you saw him in the early days of November—with the history of that exposure, and then the cold and gripe, as you first saw him, and the history of the case subsequently, as you know it, what would you say in your opinion was the origin of the tuberculosis?"

To that question before answered was added:

"That, when taking this trip to Brownsville, he was in good health, was a strong, robust man; then he sustained that exposure, as I outlined in this same question, returned to San Antonio, and was in the condition that you saw him in November, when he had the bad cold and bronchitis—upon that hypothesis, what would you say; where did the tuberculosis have its origin?"

The objection urged to the question was:

"Because it is a hypothetical question in which all the facts are not before the witness, and, on account of the great uncertainty that attends an opinion of that kind, we do not think that such an opinion is competent testimony, and we object to it for those reasons."

It will be noted that the objection is very general and indefinite, and when the attorney for McGowan asked for the facts omitted, none were given, although counsel attempted to answer the question. The objections are too general and indefinite to be sustained. The question objected to was put as a hypothesis or an opinion based upon proven facts, and was properly presented, and the answer of the witness thereto was unobjectionable. Expert testimony is elicited by hypothetical questions and is the opinion of the expert based upon certain facts stated in the question or heard by the expert from other witnesses. Dr. Wolf clearly qualified himself as an expert. The matter is thus clearly presented by Chief Justice Shaw in *Dickenson v. Fitchburg*, 13 Gray (Mass.) 546:

"In order to obtain the opinion of a witness on matters not depending upon general knowledge, but on facts not testified of by himself, one of two modes is pursued, either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him; and in either case the question is put to him hypothetically, whether, if certain facts testified of are true, he can form an opinion, and what that opinion is."

Rogers on Expert Testimony, p. 65, states:

"Counsel, in framing the hypothetical question, may base it upon the hypothesis of the truth of all the evidence, or on an hypothesis especially framed on certain facts assumed to be proved for the purpose of the inquiry. The question is not improper simply because it includes only a part of the facts in evidence."

The same questions were asked and like answers returned by other medical experts without objection. The sixth assignment of error is overruled.

[2] The seventh assignment of error objects to interrogatories to J. S. Bowles, Albert Brown, and Mrs. Albert Brown, because they were prefaced by a synopsis of the allegations in the petition. The preamble did not tend to lead the witnesses, but merely informed them of the allegations of the petition. The objections went to the form and manner of taking, and were not in writing, taken as required by statute, and called to the attention of the court. The objection was made in open court during the trial. The objection was that the questions were leading, and it is settled that such objections go to the manner and form of taking. *Rev. St. art. 3676; Gill v. Bank*, 61 S. W. 146; *Hugo v. Hirsch*, 63 S. W. 163; *Pottery Co. v. Black*, 149 S. W. 735.

[3, 4] The eighth assignment of error assails the action of the court in permitting Hoffman, appellant's assistant superintendent, to testify that it was the duty of appellant's porter to build a fire in the Pullman sleeper when standing on a transfer track, and striking out additional matters stated by the witness as to the effect that it was the duty of the railway company to see that the car was kept comfortable. Of course, McGowan had no interest in what the duty of the railway company may have been, and it could not affect him. The testimony as to the duty was proper, coming as it did from appellant's officer, but, if it had been improper, appellant could not complain because the Pullman conductor and porter testified without objection to the same fact as to the duty of the porter.

The objection to certain testimony presented by the ninth assignment is one that has no bearing upon the case of appellant, but relates to appellant and the railway company, and it is overruled. As will hereinafter appear, it is of no importance as between appellant and the San Antonio & Aransas Pass Railway Company on the question of contribution.

The statement following the tenth assignment fails to disclose the testimony to which objection was urged, and there is no bill of exceptions in the record addressed to Isaacs' testimony as to whose duty it was to build fires in the Pullman coach. Other testimony tending to show that it was the duty of the porter to build the fires was offered without objection, and consequently the evidence of J. A. Davis on the same subject could not have injured appellant. Davis was the superintendent of appellant, and he ought to know whether the porter should build fires in the sleeping coaches, and ought to be permitted to testify to it.

The eleventh assignment of error raises a question which does not concern McGowan, but arises between the railway company and the appellant. It may be stated, however, that the superintendents of the companies were more competent to testify as to the practice and customs existing between the companies than any one else. There was nothing in writing to show those things, and we think the evidence was permissible. The assignment is overruled.

The bill of exceptions referred to by appellant does not sustain the twelfth assignment of error, which objects to Dimalline's evidence as being an opinion and a conclusion of the witness. The bill of exception shows that the witness was asked if under certain circumstances the Pullman Company exercised control over its cars. The assignment complains of a question being asked as to what would occur if the Pullman Company requested the handling of cars. The assignment does not bear upon the claim of McGowan, but is a matter purely between

the two companies, all of which objections will be disposed of hereinafter in disposing of the matter of contribution between the companies. The negligence of appellant was shown beyond the peradventure of doubt, which negligence was the proximate cause of the damages sustained by McGowan. In the motion for new trial no claim was made that the evidence did not fully sustain the issues submitted to the jury, which fixed the culpability and liability of appellant.

[5] It is no concern of appellant's that no issue as to the liability of the San Antonio & Aransas Pass Railway Company was submitted unless the doctrine of contribution prevailed between them, and in that event errors occurring as between the two companies could not affect the right of McGowan to recover from one or both of them. The special issues submitted by the court which are complained of in the fourteenth, fifteenth, and sixteenth assignments of error were called for by the evidence, which showed without contradiction that appellant, against the will of the plaintiff and over his protest, required him to transfer from the car Salona to the car Pavia, through cold, mud, and water. Appellant was guilty of the wrongs enumerated, and it could be of no importance, so far as the plaintiff was concerned, how it was brought about. No matter who was back of appellant in causing its action, it was guilty, and could not hide itself behind the culpability of another. The record fails to disclose any reluctance upon the part of the appellant to cause the transfer, to refuse a berth, and neglect to build a fire. These things were all done by appellant, and it is no defense to say that another company had told it to commit the wrongs. Pullman Co. v. Hocker, 41 Tex. Civ. App. 607, 93 S. W. 1009. The passenger was aroused and compelled to leave the car in which he was sleeping by an employé of appellant. He was directed to another car which was not heated, and refused a berth by an employé of appellant, and was compelled to sit in the second car in wet clothing by an employé of appellant. The Hocker Case is directly in point, and was approved by the Supreme Court.

[6] The seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, and twenty-ninth assignments of error are complaints that the liability of the San Antonio & Aransas Pass Railway Company to appellant was not submitted to the jury. As hereinbefore stated, that cannot affect the judgment obtained by McGowan against appellant. McGowan has not complained that he did not recover judgment against the railway company. He is satisfied with his judgment, and any differences appellant may have with its joint tort-feasor will not be allowed to interfere with the rights of McGowan.

The case of *San Antonio Gas Co. v. Singleton*, 24 Tex. Civ. App. 341, 59 S. W. 920, is cited by appellant to sustain its contention that the failure to submit the liability of the railway company to the jury was error of which it can complain. The Singleton Case was decided by this court, and it was held that the appellant and the city of San Antonio were joint tort-feasors, and it was said:

"The right to a judgment against both parties was one that belonged to appellee, and she does not complain because the city of San Antonio was not found jointly liable; and it does not appear in what manner appellant is injured by a failure to find against both parties, as, under the facts, appellant would be bound to indemnify the city for the damage. \* \* \* Each of the defendants was separately and individually liable to appellee for the damages, and appellee could, at least under the circumstances of this case, take a judgment against one or both of the tort-feasors."

In that case it was held that the city was entitled to contribution, because it was not an active agent in producing the injury and knew nothing of the existence of the trench dug by the gas company into which the appellee fell. The facts in this case make a different showing. If both of the companies are guilty of negligence, appellant was the active party in producing the injuries received by McGowan.

Again, in the case of *Moore v. Kopplin*, 135 S. W. 1038, which is cited by appellant, and which was decided by this court, appellee was struck by an obstruction in the streets of San Antonio, three parties were defendants, and it was held:

"As to joint tort-feasors, the rule is that each is liable for the whole of the damages, though they are jointly, as well as severally, liable. In negligence, as well as in trespass, if two persons concur in doing the negligent act, they may be sued jointly, and they are jointly and separately liable for the whole of the damages. As there can be no contribution between joint tort-feasors even where there is a judgment against both and the whole of the damages is collected from one, it is not a subject of complaint that 'one was taken and the other left.'"

Again this court said:

"Where there is no moral turpitude involved in an act of negligence, and it is not against the policy of the law to inquire into the relative delinquency of the parties, although both are wrongdoers so far as the injured party is concerned, the law may adjust the matter as between the tort-feasors so as to compel the real guilty party to bear the burdens arising from his active negligence; that of his codefendant being merely passive, involving no moral turpitude."

[7] Let it be admitted that the railway company ordered the coach to be put where it was; that it ordered that the passengers be transferred from one coach to another.

It did not prevent the two cars from being placed close to each other; it did not compel the passengers to walk through rain and mud and water; did not refuse to heat the second coach; and it did not refuse a berth to McGowan. Both may have been guilty of negligence, but certainly appellant was not a passive, but an active, agent in bringing about the injuries to the passenger. Certainly appellant had no right to demand contribution from the other tort-feasor; it being the active and direct agent concerned in the negligence which culminated in the injuries to McGowan.

The general rule as to contribution is thus stated by Judge Cooley in his work on Torts, p. 254:

"The general rule may be found in the maxim that no man can make his own misconduct the ground for an action in his favor. If he suffers because of his own wrongdoing, the law will not relieve him. The law cannot recognize equities as springing from a wrong in favor of one concerned in committing it."

There are, it is true, exceptions to the rule which are named by Judge Cooley as follows:

"They are of cases where, although the law holds all the parties liable as wrongdoers to the injured party, yet as between themselves some of them may not be wrongdoers at all, and their equity to require the others to respond for all the damages may be complete. There are many such cases where the wrongs are unintentional, or where the party, by reason of some relation, is made chargeable with the conduct of others."

Illustrative of the relation mentioned is that, where a servant is guilty of negligence which is imputed to the master, the latter might recover from the servant.

[8] The doctrine of contribution is never applicable, however, to one who was concerned in committing the tort. *Railway v. Railways*, 83 Tex. 509, 18 S. W. 956; *Frankenthal v. Lingo*, 16 Tex. Civ. App. 232, 40 S. W. 815; *Corsicana v. Tobin*, 23 Tex. Civ. App. 498, 57 S. W. 319; *Railway v. Black*, 49 Tex. Civ. App. 390, 109 S. W. 410. The doctrine is as old as systematized law, and is embodied in the old Latin maxim: "In pari delicto potior est conditio defendentis."

In the case of *Kampmann v. Rothwell*, 101 Tex. 535, 109 S. W. 1089, 17 L. R. A. (N. S.) 758, it was held that appellees were liable to appellant for contribution because appellant was not an active agent in the tort, while appellees were, which is in thorough accord with the rule propounded by Cooley and now being followed by this court. To the same effect are *Railway v. Wiggins*, 48 Tex. Civ. App. 449, 107 S. W. 899; *San Antonio v. Smith*, 94 Tex. 288, 59 S. W. 1109; *Railway v. Nass*, 94 Tex. 255, 59 S. W. 870, and same case by this court, 57 S. W. 910.

[9] The porter was acting under the orders of appellant, and while he might under



the circumstances have acted as any other person of ordinary prudence who was an employé of a corporation would have acted under like circumstances, still, appellant having given the orders that required the action on the part of the porter, it would be liable, and the special issue copied into the thirtieth assignment of error was properly refused. The porter may have acted prudently in carrying out his orders, but appellant was negligent in giving such orders, and such negligence was followed by other negligence in causing McGowan to ride in a cold car and in refusing him a berth. The court presented the issue clearly as follows:

"Did the defendant the Pullman Company, by its employes, against the will of plaintiff and over his protest, require him to transfer from the car Salona to the car Pavia, through cold, mud, and water?"

[10] The charge the refusal of which is complained of in the thirty-first assignment of error sought to inform the jury that appellant was not liable for its negligence in transferring passengers from one of its cars to another, and was properly refused. It did not embody the law and was a palpable invasion of the province of the jury. The law does not license the Pullman Company to commit acts of negligence and disregard the rights of its passengers because it does not control the trains to which its coaches are attached. The courts of Texas have never subscribed to any such theory. *Pullman v. Pollock*, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31; *Pullman v. Matthews*, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873; *Pullman v. Smith*, 79 Tex. 468, 14 S. W. 993, 13 L. R. A. 215, 23 Am. St. Rep. 356. The relation of passenger and carrier existed between appellant and McGowan, and the former owed the latter the duty arising from that relation. *Railway v. Packard*, 193 S. W. 397.

The charge whose rejection is assailed in the thirty-second assignment of error was in effect a request for a peremptory finding in favor of appellant, which, under the facts, could not be for a moment considered. The assignment is overruled.

The thirty-third assignment has been disposed of in the consideration of other assignments, and it is overruled. The court fully and fairly presented every issue bearing on the case to the jury, and their findings were sustained by the facts.

The thirty-fourth assignment of error assumed facts that did not exist. To have required the jury to have answered in the negative to the issue, as appellant desired, would have been a gross invasion of the domain of the jury, and directly in the face of the facts, which showed that appellant alone was responsible for the condition of the car, Pavia, into which McGowan was transferred, being cold, damp, and unheat-

ed. No effort was put forth to make the passengers comfortable, although fire could have been kindled or heat turned on with little or no trouble.

[11, 12] Appellant sought to have the jury instructed that the comfort of the passengers who were asleep could not be sacrificed in the interest of those awake by putting on the heat. If any such sacrifice would have resulted, appellant fails to point it out in its statement following the thirty-fifth assignment of error, which causes the assignment to be a mere abstraction, and it is overruled. In this connection it may be said rules of corporations cannot justify negligence.

[13] The charge complained of in the thirty-sixth assignment of error submitted the issue as to whether a berth was requested by McGowan and refused by appellant, and is not subject to attack for submitting two issues. The assignment is without merit and is overruled.

[14] Appellant asked the submission in bulk of 23 issues, on different matters, and complains in the thirty-seventh assignment of error that the court refused them. A number of the issues were clearly inappropriate and incorrect, and the court was under no obligation, even if they had been proper, to attempt to pass upon the correctness of such a mass of issues, when at least a portion of the mass had been embodied in the charge of the court. As said by our lamented Associate Justice Swearingen, for this court, in *Ice Co. v. Scott*, 186 S. W. 418:

"It is a well-settled rule that instructions requested en masse should be refused by the trial court if any one of them has been substantially given by the court in its main charge, or if any one of those requested en masse should have been refused."

To the same effect is *Messimer v. Echols*, 194 S. W. 1171, by the Court of Civil Appeals of Texas. The thirty-seventh assignment of error is overruled.

[15-17] The charge rejection of which is assailed in the thirty-eighth assignment of error not only did not embody the law, in that it not only ignored the doctrine of concurring causes of the injury, but sought to destroy it, and it should not have been given even if it had embodied the law because it was a general charge requiring a general verdict in a case submitted on special issues.

"It is not essential that a cause should act alone in order to constitute it the proximate cause; but, if it concurs with another cause in producing the result, it will be a proximate cause, and one or both of the instruments setting the cause in motion will be liable for the damages arising therefrom. \* \* \* One tortfeasor cannot be allowed to excuse his negligence by the plea that his negligence would not have produced the result if another tortfeasor had not also been negligent. Each will be responsible for the results of his negligence."

*Railway v. Volrath*, 40 Tex. Civ. App. 46, 89 S. W. 279.

The quoted language applies with peculiar force to this case. If the act of negligence in causing the transfer or the act in furnishing a cold car or refusing a berth produced bronchitis, severe cold, and grippe, and from those diseases tuberculosis resulted, the causal connection between the acts of negligence and the tuberculosis was unbroken, and appellant is liable. It would have been error to have instructed the jury that the failure to furnish the berth must have been the primary cause of the tuberculosis. If such act concurred with the other causes in producing the consumption, that was sufficient. The thirty-ninth assignment of error is overruled.

[18] The fortieth assignment of error complains of a refusal to give a peremptory instruction in favor of appellant, and is fully met by our conclusions of fact. The evidence presents a clear and flagrant case of negligence for which appellant should be held liable. No reasonable excuse is offered for forcing a passenger from his berth in a coach out into rain, cold, and mud, and then compelling him to ride in a cold coach, and denying him the use of a berth. A man strong and in excellent health, by the exposure forced upon him by appellant, lost his health and contracted a disease from which there can be no reasonable hope of recovery. He was only 46 years of age, in the vigor of mature manhood, and he has been permanently robbed of health, vigor, and happiness by the negligence of appellant. He is one of those most pitiable and miserable men, a consumptive in the last stages. If appellant, by its negligence, brought McGowan to his present state, the verdict for \$30,000 is not excessive. The evidence showed that McGowan at the time of his injury was earning over \$4,000 a year, and he is now incapacitated for any work.

As a further evidence of the negligence of appellant, it may be stated that the coach Salona, from which the passengers from San Antonio had been emptied by the porter, was then attached to the car Pavia, into which the passengers had been directed, and carried empty as far as Robstown, and then, on account of a washout, detoured to Corpus Christi. The negro porter called it "mistake in orders," but the jury rightly named it gross and inexcusable negligence. Appellant makes no attempt to excuse it, and offers no extenuation for its conduct except that it was acting under orders from another corporation, with whom it desires to share the damages. If it has any proper grounds for it, indemnity in a separate suit may be sought by it from its partner in negligence and a total disregard for the com-

fort and health of its passengers, but it cannot complain in this case that it has been forced to answer for its failure to perform its duty to the traveling public. It is a carrier of passengers, both by law and under the terms of its contract with the railway companies. Not only was it receiving the fare for berths and seats, but two cents a mile for every mile it allowed the railway company to transport its cars. It at least owed to its passengers ordinary care, which was all that was demanded of it by the instructions. We are not prepared to hold that it did not owe to its passengers a much higher degree of care than ordinary care.

This court has leniently and indulgently considered a number of assignments not presented according to the rules, and finds no error justifying a reversal. The cross-assignments need not be considered, as they are presented only in case there had been a reversal of the judgment.

The judgment is affirmed.

#### AYCOCK v. RELIANCE OIL CO. et al. (No. 429.)

(Court of Civil Appeals of Texas. Beaumont.  
March 27, 1919. Rehearing Denied  
April 16, 1919.)

#### 1. MINES AND MINERALS ⇄73—OIL AND GAS LEASE—CONSTRUCTION.

Under oil and gas lease provisions that lessor was to be at no expense arising from the operation or development, that lessees were authorized to partition the land, and that the drilling obligation was not to be binding until partition, the burden of partitioning rested upon the lessees and not upon the lessor.

#### 2. MINES AND MINERALS ⇄73—OIL AND GAS LEASE—CONSTRUCTION.

Oil and gas leases are construed most favorably to the lessor.

#### 3. MINES AND MINERALS ⇄58—OIL AND GAS LEASE—MUTUALITY.

The objection that an oil and gas lease is void for want of mutuality because lessees are not bound to proceed with development is untenable, where lessees have paid an independent consideration.

#### 4. CONTRACTS ⇄212(2)—MINES AND MINERALS ⇄58—OIL AND GAS LEASE—MUTUALITY.

That an oil and gas lease failed to stipulate a time in which lessees should proceed with development would not render it unilateral, since, where a contract fixes no time for performance, the law presumes the parties intended a reasonable time.

#### 5. MINES AND MINERALS ⇄78(1)—OIL AND GAS LEASE—OBLIGATION OF LESSOR.

The payment by lessee of a valuable consideration for his oil and gas lease does not relieve

him of his obligation to proceed with diligence in the performance of his part of the contract.

Appeal from District Court, Hardin County; J. Llewellyn, Judge.

Suit by B. L. Aycock against the Reliance Oil Company and another. From judgment for defendants, plaintiff appeals. Reversed and remanded.

A. M. Hill and J. M. Combs, both of Kountze, for appellant.

A. Ludlow Calhoun, of Beaumont, for appellees.

**WALKER, J.** We take the following statement of the nature and result of this suit from the brief of appellee.

Appellant on the 18th day of June, 1918, filed his suit in the Seventy-Fifth judicial district court of Texas, sitting at Kountze, Hardin county, Tex., against the Reliance Oil Company and the Paraffine Oil Company, corporations of the state of Texas, alleging that the principal consideration moving him to execute the lease with W. W. Dies, and which is hereinafter set out and marked "Exhibit A," was the development of the interests for oil; that appellees were the assigns of W. W. Dies; that the transfer of all the oil except the royalty one-eighth contained in the land was the consideration moving appellees in the purchase of said lease; that the Sun Company operating on a tract of land adjacent to the land conveyed in said lease did, on the 8th day of September, 1917, bring in an oil well producing oil in paying quantities, and that by the happening of same appellees were required to commence drilling on the land covered in said lease contract, at least to drill an offsetting well. Appellees were notified to produce the original lease, its assignment to Jack Dies, and Jack Dies' assignment to appellees. Appellant asked that the contract be construed by the court, and that appellees be required to drill within a reasonable time a well at its cost on said 10 acres of land described in the lease, to commence drilling in not less than 80 days, and in good faith perform said contract; and, further, if the lease could not be held enforceable by reason of its being too uncertain and unambiguous, that same be annulled, vacated, and set aside.

Appellees answered, setting out its plea in abatement by showing that before the institution of suit appellant had filed his suit against appellees in the justice court of precinct No. 1, Hardin county, Tex., asking damages for violation of the lease contract upon which the suit in the Seventy-Fifth district court was based; and, further, that appellant had filed his suit in the county court of Hardin county for damages because of appellees'

alleged violation of the terms of said lease contract, and which suit had been tried before a jury, and judgment was for appellees, and appellant was perfecting his appeal to this court, and that by reason of the institution of said suits, the subject-matter and parties being the same, appellant had asserted his remedy, and therefore he would be estopped from asserting the remedy asked for in this suit. Appellant further entered a general denial, and that the contingencies set out in said lease had not happened and no obligation rested upon appellees to drill.

Appellant filed his supplemental petition, with special exception to the pleas in abatement and bar, and appellees filed their first supplemental answer, on which pleadings the case went to trial before his honor, J. Llewellyn, judge of said court, without a jury. The court rendered judgment that appellant take nothing by his suit, and upon request of appellant the court filed its findings of fact and conclusions of law. The findings being duly excepted to, motion for new trial being overruled, and notice of appeal being given, same was brought to this court without a statement of facts.

#### "Exhibit A.

"The State of Texas, County of Hardin.

"This contract made and entered into by and between B. L. Aycock of Hardin county, Texas, hereinafter called party of the first part, and W. W. Dies, of Hardin county, Texas, hereinafter called party of the second part, witnesseth:

"First. For and in consideration of the sum of three hundred (\$300.00) dollars paid to party of first part by party of second part the receipt whereof is hereby acknowledged, and of the covenants and agreements herein embraced and undertaken by the second party, said first party does by these presents demise, let and lease and assign unto the second party the tract of land hereinafter described, for the purpose of exploiting the same for, and the production of minerals therefrom, and he does by these presents also grant and convey all of the oil, gas and other minerals in and under said land except as set out in paragraph 4 hereof, also the exclusive right of drilling and operating thereon for oil or gas, together with the right of way for and a right of way to lay pipe lines to convey water, oil, steam and gas, and the right to have sufficient water, oil and gas from the premises to drill and operate any wells that he may bore, and also such other privileges as are reasonably requisite for the conduct of said operations, and the right to remove at any time from said premises, any and all property which may have been placed thereon by said W. W. Dies. The said premises as to which this instrument does apply are situated in Hardin county, Texas, and described as follows: An undivided one-fourth interest in ten acres out of the Champion Choate survey of five hundred and fifty-three and one-half acres, in the Batson oil field, being my entire interest in said acres, and more particularly described as follows:

[Here follows description of said ten acres by metes and bounds.]

"Second. The party of the second part is hereby given the exclusive right and privilege to go on and upon said land, and take possession thereof for the purpose of holding possession thereof as the lessee and tenant of the first party, and for the purpose of drilling for and prospecting for oil and other minerals thereon.

"Third. The party of the second part shall develop said land for oil, and other minerals whenever it is necessary to protect said land from being drained by wells on adjacent land, and within a reasonable time, that is to say, when a well or wells shall have been completed and are producing oil in paying quantities within 200 feet of the boundary lines of the land covered by this lease. Second party is hereby authorized to partition said ten acres with Gulf Production Company. The drilling obligation herein not to be binding until said land is partitioned.

"Fourth. Party of the second part agrees to deliver to party of the first part one-eighth of all oil or other minerals produced by virtue hereof in pipe line, free of expense to first party.

"Fifth. The second party shall have the right to abandon the operation of any well or wells on said land whenever it becomes unprofitable to continue the operation thereof. In such event he shall thereafter have the right to pull the casing therefrom and remove any and all improvements placed upon said land by him.

"Sixth. The party of the first part is to be at no expense or liability whatsoever, connected with, arising from or growing out of the operation or development of said land for oil or other minerals by second party hereunder.

"Seventh. All rights, privileges, and conditions hereto between the parties hereof, shall extend to the heirs or assigns of the parties, and to their executors and administrators.

"Eighth. For any default herein upon the part of the party of the second part, or his assigns of the obligations undertaken herein, this lease and all rights hereunder shall become null and void.

"Ninth. Party of the first part hereby warrants and agrees to defend the title to the property hereby leased unto party of the second part, his heirs and assigns, by, through, or under him.

"Witness our hands at Kountze, Texas, this 17th day of May, 1916. B. L. Aycock.

"W. W. Dies."

This case was tried before the court without a jury, and the trial court filed findings of fact and conclusions of law. We give here the fifth finding of fact, to wit:

"I find that the Sun Company, a corporation, did drill an oil well on what is known as the Milhome tract and known as well No. 59, which was within 200 feet of the boundary line of the 10-acre tract in the Champion Choate survey, in which plaintiff had an undivided one-fourth interest, and which was leased to W. W. Dies and by proper conveyances to the defendants in this cause, and which came in producing oil in paying quantities on September 8, 1917, and produced oil until the 19th day of October, 1917, when it sanded up, and from

which day it has not produced oil. The well produced 2,801 barrels of oil during said time"

—and the second conclusion of law, as follows:

"That well No. 59 of the Sun Company was a well producing oil in paying quantities as stipulated in the oil lease contract, and the drilling obligation of said clause had matured, and defendants would have been obliged to drill an offset well, but for the clause in said contract which stated, 'That drilling obligation herein not to be binding until said land is partitioned.' That under the lease contract the obligation to partition was not mandatory or obligatory upon the defendants, and, the plaintiff not having secured a partition of the land, no duty rested upon defendants to drill, and therefore they had not violated the lease contract, and plaintiff was not entitled to relief prayed for."

On these findings of fact and conclusions of law the trial court rendered judgment for the appellees. We further find that, notwithstanding the lessees paid a very substantial independent consideration for this lease, construing the whole instrument together, the real and moving consideration was that this land should be prospected for oil with due diligence on the happening of the contingencies stated in the lease; that is, when a well producing oil in paying quantities had been completed within 200 feet of the boundary lines of the land, and when this land had been partitioned.

[1, 2] Appellant assigns as error the construction of the contract as made by the court, his proposition being that under the express terms of this contract the burden of partitioning this land rested on appellees and not on him. Without applying to this contract the peculiar rules of construction applicable to oil leases, we believe this proposition is sound. Paragraph 6 of this lease provides:

"The party of the first part is to be at no expense or liability whatsoever, connected with, arising from or growing out of the operation or development of said land for oil or other minerals by second party hereunder."

Paragraph 3 makes the partition of this land a condition precedent to the beginning of drilling operations. It seems to us clear from the express terms of this contract that the partitioning of this land must be considered as a part of the operation and development of this land for oil. If so, then under the sixth paragraph, the expenses of this partition must be borne by appellees. The effect of the third paragraph is to vest in appellees the authority to make a partition by agreement with the other holders of the title, and, if not able to do so, to save this lease from forfeiture pending the contingencies and delays of a suit in court to force partition. However, this construction of the contract, we think, is made more

manifest by the following rule of construction applied to oil leases. Archer in his *Law and Practice in Oil and Gas*, p. 6, announces this rule as follows:

"In the construction of oil and gas leases different rules obtain from those applied to the construction of ordinary leases, or other mining leases, owing to the peculiar nature of the mineral, and the danger of loss to the owner from drainage by surrounding wells. The general rule is that oil and gas leases are construed most strongly in favor of the lessor."

This rule is well supported by the decisions of many states, and especially by *Emery v. League*, a Texas case, reported in 81 Tex. Civ. App. 474, 72 S. W. 606. This same rule is announced by Donahue in his work on *Petroleum and Gas*, p. 149, and in the Third Edition of Thornton on the *Law of Oil and Gas*, § 251.

This lease contract does not, by its terms, require appellant to partition the land. Appellees insist that it does not require them to do so. But by the express terms of the contract, it is provided, "The drilling obligation herein not to be binding until said land is partitioned." Thus, it clearly appears that the parties to this contract intended that the one or the other should assume this burden. Construing the contract as a whole, and applying to this contract the rule above quoted, construing the same most favorably to appellant, this duty rested upon appellees.

[3] Appellant further assigns that this contract is unilateral and void for want of mutuality. We do not think so. Under the settled authorities construing oil leases, as we understand them, this contract to give it the construction contended for by appellees, that is, that appellees are not bound to partition this land, would make the same void for want of mutuality, but for the independent consideration paid, because there is nothing in the contract requiring appellant to partition the land, and, if appellee is not required to partition the same, then there is no enforceable obligation on either party. The court says, in *Emery v. League*:

"The primary purpose of the contract being the development of the land, if the lessee was not bound to proceed with such developments the lessor would not be bound to perform his part of the contract."

—and hence, the contract would be void for want of mutuality. However, the independent consideration paid relieves this contract of this criticism.

Wilkinson and Richardson, in their *Law of Oil and Natural Gas*, p. 120, announce the following rule:

"But if an independent valuable consideration sufficient to support the contract has been paid, the fact that further undertakings by the purchaser were not absolute, but merely things

which were to be done at his option, would not render the contract void as being an option or unilateral contract without consideration. If the matters left optional with him were conditions to his acquiring or retaining the rights granted, either expressly or by implication, he might forfeit his rights by failure to perform, but the question becomes then one of forfeiture of a conditional grant, rather than of the validity of an optional or unilateral contract. This distinction may not always have been kept in mind in the language of the decisions above reviewed. Compare *Presidio Mining Co. v. Bullis*, 68 Tex. 581, 4 S. W. 860; *Emery v. League*, 31 Tex. Civ. App. 474, 72 S. W. 603; *Roberts & Corley v. McFadden, Weiss & Kyle*, 32 Tex. Civ. App. 47, 74 S. W. 105; *National Oil & P. L. Co. v. Teel*, 95 Tex. 586, 68 S. W. 979; s. c., 67 S. W. 545; *Witherspoon v. Staley*, 156 S. W. 537; *Great Western Oil Co. v. Carpenter*, 43 Tex. Civ. App. 229, 95 S. W. 57; *Owens v. Corsicana Pet. Co.*, 169 S. W. 192."

[4, 5] The failure of the contract to stipulate a time in which to partition the land does not make it unilateral. As said by the court in *Emery v. League*, supra:

No time being fixed within which to secure partition, "the presumption of law is that the parties intended a reasonable time. \* \* \* The payment of a valuable consideration for a lease of this character can in no way affect the obligation of the lessee to proceed with diligence in the performance of his part of the contract."

There is no statement of facts in this record; and, as we are not able to dispose of same properly on the findings of fact made by the trial court, we remand this cause for a new trial, with instructions to give this contract the construction herein indicated.

This cause is reversed and remanded.

# AYCOCK v. PARAFFINE OIL CO. et al. (No. 437.)

(Court of Civil Appeals of Texas. Beaumont.  
March 28, 1919. Rehearing Denied  
April 16, 1919.)

## 1. MINES AND MINERALS §78(1)—"OIL IN PAYING QUANTITIES."

In action for breach of oil and gas lease requiring drilling when oil should be found in paying quantities on adjacent land, it was not error to instruct that the term "oil in paying quantities" means that the oil can be marketed in such manner as to offset the expense of drilling the wells producing it and the additional expense of operating.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Paying Quantities.]

## 2. MINES AND MINERALS §78(1)—"OIL IN PAYING QUANTITIES."

The definition of "oil in paying quantities" as not including, but, excluding the cost of drilling, is applicable, where the lessee has

drilled the well and is operating it under the contract, and the lessor is seeking to take the premises from the lessee's possession on the ground that the well is not producing oil in paying quantities, but is not applicable where the lessee is required to drill a well when oil shall be found in paying quantities (citing Words and Phrases, vol. 6, p. 5247, Paying Quantities).

**3. MINES AND MINERALS**  $\Rightarrow$ 78(1)—“OIL IN PAYING QUANTITIES.”

“Oil in paying quantities,” as used in a lease obligating the lessee to drill if oil is found in paying quantities, means that additional wells are to be drilled only in case oil be found in such quantities as would, taken in connection with other conditions, induce ordinarily prudent persons in a like business to expect a reasonable profit on the whole sum required to be expended.

**4. TRIAL**  $\Rightarrow$ 323 — VERDICT — SIGNING BY FOREMAN.

It is not essential to the validity of a verdict that it be signed by the foreman.

**5. TRIAL**  $\Rightarrow$ 360—VERDICT—SPECIAL ISSUES—SURPLUSAGE.

Where jury, the case being submitted on special issues, returns a general verdict without any instructions from the court, in addition to answering the questions submitted, and the court copies into its judgment the general verdict and unsigned special verdict, the judgment is not void on the ground that it cannot be determined whether it is on the special or general verdict, as court could ignore general verdict.

**6. APPEAL AND ERROR**  $\Rightarrow$ 1073(1)—HARMLESS ERROR—JUDGMENT.

That court copied into judgment a general verdict, though case was submitted on special issues, is harmless error, where judgment rendered was demanded by the special issues.

Appeal from Hardin County Court; W. S. Parker, Judge.

Suit by B. L. Aycock against the Paraffine Oil Company and another. From judgment for defendants, plaintiff appeals. Affirmed.

A. M. Hill, of Kountze, for appellant.

A. Ludlow Calhoun, of Beaumont, for appellee.

**WALKER, J.** This is a suit for damages by the appellant against the appellees for breach of contract entered into by and between appellant on the one part, and W. W. Dies of the other part, dated the 17th day of May, 1916. The appellees hold under mesne conveyances from Dies. The case was tried before a jury on special issues. The third and sixth paragraphs of the contract are as follows:

“Third. The party of the second part shall develop said land for oil, and other minerals whenever it is necessary to protect said land from being drained by wells on adjacent land,

and within a reasonable time, that is to say, when a well or wells shall have been completed and are producing oil in paying quantities within 200 feet of the boundary lines of the land covered by this lease. Second party is hereby authorized to partition said ten acres with Gulf Production Company. The drilling obligation herein not to be binding until said land is partitioned.”

“Sixth. The party of the first part is to be at no expense or liability whatsoever, connected with, arising from or growing out of the operation or development of said land for oil or other minerals by second party hereunder.”

Question No. 3 submitted to the jury is as follows:

“Was any well producing oil in paying quantities brought in within 200 feet of the land on which the lease in question was located?”

The jury answered “No.”

[1]. The court gave the following definition of “oil in paying quantities”:

“You are instructed that the term oil in paying quantities means that the oil produced can be marketed in such manner as to offset the expense of drilling the wells producing it and the additional expense of operating said well or wells producing the same.”

Under the testimony, it would cost from \$10,000 to \$15,000 to drill a well on the leased premises. A well within 200 feet of the lines of appellant's property was brought in by the Sun Company before the institution of this suit. This well cost between \$10,000 and \$15,000. It produced oil for a short while, and then ceased production. The well by no means produced enough oil to pay for boring the same.

Appellant assigns as error the giving of the above instruction defining the term “oil in paying quantities,” his proposition being as follows:

“The phrase ‘oil in paying quantities,’ used in oil leases does not include, but excludes, the cost of drilling.”

[2] This assignment cannot be sustained. The definition of “oil in paying quantities” as submitted by appellant in his assignment is an approved statement of the law in those cases where the lessee has drilled the well and is operating the same under the contract, and the lessor is seeking to take the premises from the possession of lessee on the ground that the well is not producing oil in paying quantities. However this rule is not applied where the lessee is required to drill a well when oil has been found in paying quantities.

The following general definition of “paying quantities” is given in Words and Phrases, vol. 6, p. 5247:

“The term ‘paying quantities,’ as used in an oil lease for a given term and as much longer as oil can be produced in paying quantities, means paying quantity to the lessee. If the well

pays a profit, even small, over operating expenses, it produces in paying quantity, though it may never repay its cost, and the operation as a whole may result in a loss. The phrase 'paying quantities,' therefore, is to be construed with reference to the operator, and by his judgment, when exercised in good faith."

[3] In construing *Manhattan Oil Co. v. Carrell*, 164 Ind. 526, 78 N. E. 1084, Thornton, in his admirable work, *The Law of Oil and Gas* (8d Ed.) par. 149, p. 239, makes the following statement of the rule, under facts similar to the facts in this case:

"A provision in an oil lease that after the completion of the first well the lessee should drill a specified number of wells, in case oil should be found in paying quantities, does not mean that, if oil was found in the test or first well in a sufficient quantity to pay a profit, however small, in excess of the cost of producing it, excluding the cost of drilling the well, and of equipment, then oil was found in paying quantities, within the meaning of the contract, but means that additional wells are to be drilled only in case oil be found in such quantities as would, taken in connection with other conditions, induce ordinarily prudent persons in a like business to expect a reasonable profit on the whole sum required to be expended; and whether oil was found in paying quantities is to be exclusively determined by the operator, acting in good faith."

[4, 5] The jury in this case returned two verdicts, one answering the special issues submitted by the court, and in addition thereto the following general verdict for the defendant:

"We, the jury, find a verdict in favor of the defendants. L. L. Singleton, Foreman."

Both of these verdicts were copied into the judgment rendered by the court. The special verdict was not signed by the jury, while the general verdict was. On this judgment appellant assigns two propositions: (1) That the special verdict is void because not signed by the foreman; and (2) that the jury having returned a general verdict without any instructions from the court, and the same having been copied by the court into its judgment, the judgment is void because it cannot be determined whether the judgment is rendered on the special verdict or the general verdict.

These assignments are overruled. It is not essential to the validity of a verdict that it be signed by the foreman. *Burton v. Bondies*, 2 Tex. 204; *Banana Co. v. Wolfe*, 22 S. W. 269; *Dunlap v. Raywood Rice Canal & Milling Co.*, 43 Tex. Civ. App. 269, 95 S. W. 43; *Quannah, A. & P. Ry. Co. v. R. D. Jones Lbr. Co.*, 178 S. W. 861; *Crosby v. Stevens*, 184 S. W. 711; *Calvin v. Neel*, 191 S. W. 794; *City of Henderson v. Fields*, 194 S. W. 1004; *Barker v. Ash*, 194 S. W. 467.

The following proposition is taken from

the brief of appellee, and we believe that it states a correct proposition of law:

"When a case is submitted to a jury on special issues, the court from the jury's answers renders judgment. Even though the jury in addition to making answers to the questions submitted should return a general verdict as was done in this case, the judge can ignore same in rendering his judgment." *Hefin v. Burns*, 70 Tex. 347, 8 S. W. 48; *Dunlap v. Raywood Rice & Milling Co.*, 43 Tex. Civ. App. 269, 95 S. W. 43.

[6] The fact that the general verdict was copied into the judgment of the court would not distinguish this case from those cited above. On the answer to question 3 as copied above, no other judgment except one for the defendants could have been rendered by the court, and in receiving and entering of record a general verdict for the defendants, no injury has been done appellant.

In view of the disposition made by us of the above assignments, all other assignments made by appellant become immaterial, and are overruled.

Finding no error in this record, this case is in all things affirmed.

GULF, C. & S. F. RY. CO. v. HELMS BROS.  
(No. 6073.)

(Court of Civil Appeals of Texas. Austin.  
March 26, 1919.)

1. TRIAL ⇐169—DIRECTION OF VERDICT—  
DEFECT IN PARTIES PLAINTIFF.

It was no ground for peremptory instruction to return verdict for defendant that claim sued on in name of firm belonged to members jointly that one was dead, having left an estate, a widow, and two minor children, and that no administration had been had, while neither his heirs nor legal representatives were made parties plaintiff.

2. CARRIERS ⇐229(1)—CARRIAGE OF LIVE  
STOCK—INJURIES IN TRANSIT—ELEMENTS OF  
DAMAGE.

In action against carrier for damages to mules in transit, cost of feed and care after injury, and price afterwards received for them at a point other than destination, had no proper place in applying the true measure of damages.

3. CARRIERS ⇐228(1)—CARRIAGE OF LIVE  
STOCK—DAMAGES—SHOWING OF VALUE AFTER  
INJURIES.

In action against carrier for damages to mules in transit, there having been intrinsic value of the mules at destination after injuries, it should have been shown what the value was before damages could have been legally awarded.

4. CARRIERS ⇐205—CARRIAGE OF LIVE  
STOCK—LIABILITY FOR INJURIES—PROPENSITIES  
OF ANIMALS.

A carrier is not an insurer in the transportation of live stock, and is liable only for in-

juries caused by its negligence, not being legally responsible for injuries resulting from the natural vice or the nature and propensities of the animals carried.

**5. CARRIERS ⇨228(5) — CARRIAGE OF LIVE STOCK — INJURIES — SUFFICIENCY OF EVIDENCE.**

In action against carrier for injuries to mules in transit, evidence, though it did not show the injuries were due to the propensities of the animals, etc., *held* insufficient to sustain verdict for plaintiffs.

**6. CARRIERS ⇨230(9) — CARRIAGE OF LIVE STOCK — ACTION FOR INJURIES — INSTRUCTION.**

In action against carrier for injuries to mules in transit, instruction that common carrier is not an insurer of live stock received by it for transportation, but responsible only if careless and negligent, etc., *held* improper, on account of the use of the word "careless."

**7. CARRIERS ⇨228(5) — CARRIAGE OF LIVE STOCK — NEGLIGENCE — BURDEN OF PROOF.**

In action against carrier for injuries to mules in transit, plaintiffs were not required to prove negligence to the satisfaction of the jury, but only by a preponderance of the evidence.

**8. CARRIERS ⇨230(9) — CARRIAGE OF LIVE STOCK — ACTION FOR INJURIES — INSTRUCTION.**

In action against carrier for injuries to mules in transit, carrier was entitled to charge that a common carrier is not an insurer of live stock received for transportation, but liable only for injuries caused by its own negligence.

**9. CARRIERS ⇨229(2) — CARRIAGE OF LIVE STOCK — INJURIES IN TRANSIT — MEASURE OF DAMAGES.**

Measure of damages for injuries to mules by negligence of carrier in transit is difference between their market value at destination, if transported without negligence, and their real and intrinsic value at destination in the condition in which they were delivered; the evidence being there was no market value for injured stock at destination, but that mules had an intrinsic value.

**10. CARRIERS ⇨230(9) — CARRIAGE OF LIVE STOCK — ACTION FOR INJURIES — INSTRUCTION.**

In action against carrier for injuries to mules in transit, instruction presenting issue of carrier's negligence in not preventing injury to mules caused by proper vice or propensities of animals *held* unsupported by evidence.

Appeal from Bell County Court; M. B. Blair, Judge.

Suit by Helms Bros. against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed, and cause remanded.

W. W. Hair, of Temple, and Terry, Cavin & Mills and Frank J. Wren, all of Galveston, for appellant.

BRADY, J. Appellees sued appellant for damages arising out of a shipment of mules from Temple to Ft. Worth, Tex., alleging delivery of the mules to appellant in good order, and arrival of the mules at destination with certain injuries to some of the live stock, and alleging generally negligence of the carrier. The trial was before a jury, and the case was submitted upon a general charge of the court, resulting in verdict and judgment for appellees for the sum of \$300.

The first assignment of error complains of the refusal of the trial court to give a special charge peremptorily instructing the jury to return a verdict for appellant. The assignment presents several reasons why such peremptory instruction should have been given. The first point is that the claim sued on belonged to S. D. Helms and E. M. Helms jointly, and that S. D. Helms is dead, having left an estate, a widow, and two minor children, and that no administration has been had, nor were his heirs or legal representatives made parties plaintiff.

[1] This claim was urged below by plea in abatement, the facts being admitted by appellees, but the plea was overruled by the trial court. No error is assigned in the briefs to this action of the court, appellant having saved the point only by the objection to the court's refusal to peremptorily instruct for appellant. We are of the opinion that, if there were any merit in the point, it was no ground for a peremptory instruction.

The other points involved in this assignment are to the effect that appellees did not allege or prove negligence by appellant causing the alleged injuries, and further, because of the allegations of the petition in reference to market value at destination, and the want of proof that the injured mules had a market value at Ft. Worth, or any intrinsic value after the injuries.

We think these several grounds are without merit. Appellees alleged negligence generally, and the proof of the nature of the injuries to some of the mules, although slight, was sufficient to raise an issue of fact to go to the jury upon the question as to whether the injuries were caused by the inherent nature or propensities of the animals, or by some character of negligence on the part of appellant. While not sufficient to support a verdict, the state of the proof was not such as to entitle appellant to a peremptory instruction.

[2, 3] The same may be said as to the allegations and proof on the question of market and intrinsic value. The evidence was undisputed that the injured mules had no market value in Ft. Worth, and there was evidence tending to show the intrinsic value of such mules at destination after the injuries. However, it must be conceded that this proof is very unsatisfactory, and in-



volves elements which have no proper place in the application of the true measure of damages, such as the cost of feeding and caring for the mules while injured, and the price afterwards received at Temple. There being an intrinsic value at Ft. Worth after the injuries, it should be shown what that value was before damages could be legally awarded. The first assignment will be overruled.

[4] By the second assignment of error appellant complains that the verdict of the jury is contrary to the law and evidence, and that there is no evidence to sustain it. The doctrine is invoked that a carrier is not an insurer in the transportation of live stock, and is liable only for injuries caused by its negligences, not being legally responsible for injuries resulting from the natural vice or the nature and propensities of the animals themselves. This rule seems to be supported in the following cases: *Ft. W. & D. C. Ry. v. Berry*, 170 S. W. 125; *Freeman v. Cain*, 63 Tex. Civ. App. 403, 133 S. W. 894; *St. L. & S. W. Ry. v. Lewellen*, 116 S. W. 116; *M., K. & T. v. Lewellen*, 111 S. W. 773; *T. & P. v. Stewart*, 52 Tex. Civ. App. 514, 114 S. W. 413; *Ft. W. & D. C. v. Lock*, 30 Tex. Civ. App. 426, 70 S. W. 457; *Ry. Co. v. Smith*, 33 Tex. Civ. App. 520, 77 S. W. 28; *Railroad Co. v. Hunter*, 47 Tex. Civ. App. 180, 104 S. W. 1075; *Railway Co. v. Snyder*, 86 S. W. 1041.

In this case it appears that the shipment was accompanied by a caretaker, the agent and representative of appellees. He was a witness on the trial, and, while testifying to the injuries to some of the stock, he did not testify to any delays in transportation, nor to any rough or improper handling of the stock in transit, nor to anything positively showing the failure of appellant to exercise ordinary care in transporting the shipment. The railway company showed by two witnesses, the conductors who handled the shipment, that the freight was transported with due dispatch, and without any rough handling or switching, in a standard car, in good condition, and of the dimensions and specifications required by appellees; that there was no complaint by the caretaker, and no accident or unusual occurrences on the run from Temple to Ft. Worth.

[5] In view of this state of the evidence, we are of the opinion that the verdict and judgment were against the overwhelming weight of the evidence, and should not be permitted to stand. We cannot say that the nature of the injuries to the live stock was such as to justify the presumption that they were inflicted by reason of the natural propensities and habits of the animals, but the evidence on this point was sufficient to raise an issue of fact for the jury. However, the verdict is so manifestly against the great weight of the evidence that the trial court should have set the same aside and ordered a new trial. For this reason, the second assignment is sustained.

We overrule the third assignment of error, which complains of the court's refusal to give appellant's requested special charge No. 7. In view of the state of the evidence, we do not think the charge as framed should have been given, because, assuming the exercise of care by the carrier in transporting the animals, the proof did not justify an instruction to the jury that the injuries would be attributable solely to the inherent nature or proper vice of the animals, and that the plaintiffs should not recover against appellant.

[6-8] We will next consider the fourth assignment of error, which complains of the refusal of the trial court to give the following special charge requested by appellant:

"You are instructed that a common carrier is not an insurer of live stock received by it for transportation, but is only responsible to the plaintiff for injuries, if any, which may have been occasioned by its own negligence, in the transportation of said stock and in this case you are charged that unless the plaintiff has proved to your satisfaction by a preponderance of the evidence that the defendant was careless and negligent in the handling of said stock and the transportation of same, then you will find for the defendant."

The court nowhere instructed the jury on the issue embodied in this requested instruction. We think appellant was entitled to a charge substantially as requested, but the instruction as framed is improper because of the use of the word "careless," and also for requiring the jury to find that the plaintiffs had proved negligence to its satisfaction.

Appellant's fifth assignment of error involves an attack upon the entire charge of the court in certain particulars, some of which have been disposed of by what has been said above.

[9] We think the objection to the court's charge on the measure of damages, in the light of the evidence, is well taken. The true measure of damages is the difference between the market value of the injured stock at Ft. Worth, had the same been transported without negligence by the carrier, and their real and intrinsic value at Ft. Worth in the condition in which they were delivered; the evidence being to the effect that there was no market value for injured stock at destination, but that they had an intrinsic value. Probably the court intended to submit this standard in paragraph 10 of the charge, but the measure might easily have been more clearly stated in accordance with the rule above announced.

[10] The criticism of paragraph 8 of the court's charge is also justified. There was no evidence to show that the carrier was negligent in not preventing loss or injury to the mules caused by the proper vice or propensities of the animals. It was not shown that the railway company had any notice that the animals would suffer injury because of their

inherent vice or nature, which might have been prevented by the use of ordinary care on the part of its employes, and therefore this was not made an issue by the proof.

For the error of the trial court in refusing to set aside the verdict and grant a new trial, the judgment will be reversed and the cause remanded.

Reversed and remanded.

# **METROPOLITAN CASUALTY INS. CO. v. EDWARDS.** (No. 1500.)

(Court of Civil Appeals of Texas. Amarillo. March 19, 1919. Rehearing Denied April 9, 1919.)

## **1. INSURANCE — 665(5) — ACCIDENT INSURANCE—INJURY—EVIDENCE.**

In action on accident policy, evidence that insured had no hernia previous to his fall while attempting to alight from an automobile, that a hernia developed just after the fall, and a doctor's opinion that in all probability it was due to the fall, justified jury in finding that accident was sole cause of injury, "exclusively and independently of all other causes," within a policy provision.

## **2. INSURANCE — 665(5) — ACCIDENT INSURANCE—DISABILITY.**

In action upon accident policy, evidence held to support jury's finding that insured was wholly disabled and prevented from performing any and every kind of duty pertaining to his occupation for six weeks.

## **3. INSURANCE — 524—ACCIDENT INSURANCE—"TOTAL DISABILITY."**

Total disability does not mean absolute physical inability to transact any kind of business pertaining to insured's occupation; it is sufficient if injury is such that common care and prudence require him to desist from business so long as it is reasonably necessary to effectuate a cure, and that for a few days insured did not discover seriousness of injury would not disprove that he was not wholly disabled within meaning of policy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Total Disability.]

## **4. APPEAL AND ERROR — 1068(2)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

In action upon accident policy exclusion of testimony of insured's physician that injury did not result directly and solely from insured's fall on an automobile door was harmless, where his other testimony gave jury the benefit of physician's opinion that striking the door did not actually produce the hernia.

## **5. EVIDENCE — 181—BEST EVIDENCE—ACCIDENT INSURANCE POLICY.**

In action upon accident policy classifying insured as a traveling salesman, for which the rate was \$20 per year, providing that rates fixed and filed with insurance department should

control, testimony that a witness knew the rate, where it was not shown that proposed rate was so fixed and filed, or that it could not be obtained from insurance department, was properly excluded.

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Action by Fred L. Edwards against Metropolitan Casualty Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

T. L. Camp, J. N. Freeman, and Spence, Haven & Smithdeal, all of Dallas, for appellant.

Seay & Seay, of Dallas, for appellee.

HUFF, C. J. Appellee, Edwards, sued appellant insurance company on an accident policy in the principal sum of \$3,750, which was alleged to be in force when he was injured, directly, solely, and exclusively through accidental means. He alleged about September 21, 1916, in attempting to alight from an automobile, that he slipped, stumbled, or fell on and against said automobile, or curb at or near said automobile, and as a result received bodily injuries directly, solely, and exclusively through accidental means, which tore, lacerated bruised, and mangled his side, together with other parts of his body and limbs, which caused a nervous shock and strain upon his system, producing pain and suffering. That clause 2 of the policy reads:

"If said injuries shall not result as specified in clause 1, but directly, solely, and exclusively and independently of all other causes, shall, within two weeks from the date of the accident, continuously and wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation, the company will pay the insured the weekly indemnity above specified for the entire period of such total disability."

That under the policy he was entitled to indemnity in the sum of \$25 per week, within two weeks of the accident, to wit, immediately thereafter plaintiff was continuously and wholly disabled and was prevented from performing the duties pertaining to his occupation, from the 21st day of September, 1916, to the 1st day of December, 1916, 10 weeks aggregating the sum of \$250. The appellee also set out clause 3, which reads as follows:

"If such injury shall not result as specified in clause 1, but directly, solely, exclusively, and independent of all other causes, shall within two weeks from the date of the accident, or immediately following total disablement, continuously disable and prevent the insured from performing some one or more important daily duty or duties pertaining to his occupation, the company will pay the insured one-half of the week-

ly indemnity above specified for the period of such partial disablement, not exceeding fifty-two weeks."

That immediately following his total disablement that he has been disabled and prevented from performing one or more important duty or duties pertaining to his occupation for a period of 52 weeks, totaling \$650. That clause J, paragraph 4, reads:

"If such injuries shall necessitate the removal of the injured to a regularly incorporated hospital, the weekly indemnity payable for a period not exceeding ten consecutive weeks, during which the insured shall be confined to said hospital, shall be double the amount provided in clause 2, provided that insured shall not make claim under clause 8 on account of the same injuries."

That the injuries necessitated his removal to such hospital October 1, 1916, and that he was there confined for a period of two weeks; that under this clause he was entitled to an additional \$25 per week for the time thus confined, which totaled the sum of \$50. He also sought to recover 12 per cent. penalty and \$500 as attorney's fees. It will not be necessary to set out the appellant's answer or pleadings at this time. The case was submitted to a jury upon special issues. The jury found that appellee's fall, solely, exclusively, and independent of all other causes, produced the injury complained of; that the fall was accidental; that appellee was continuously and wholly disabled and prevented from performing any and every kind of duty pertaining to his occupation for six weeks; that he was prevented from performing some one or more important duty or duties pertaining to his occupation for 46 weeks; that he was confined in a regular incorporated sanitarium two weeks; that he was entitled to reasonable attorney's fees, which would be \$250. The trial court rendered judgment for \$775, the principal due on the policy, 12 per cent. penalty, amounting to \$93, and \$250 attorney's fees, totaling \$1,180.

[1] The first assignment is that the answer to special issue No. 1 is contrary to the evidence, and should be set aside for the reason that the evidence shows that the injury of which the appellee complains could not have been produced and was not produced, directly, solely, exclusively, and independently of all other causes from the fall which appellee alleges he had. The evidence in this case shows that the appellee fell in trying to alight from his car, and in doing so struck the corner of his car door, or the latch which is on a Ford car, which struck him in the groins, where a hernia was shown thereafter to have developed. He complained at that time, but did not call the appellant's agent's attention to it until possibly the next day; whereupon he was referred to the company's physician, Dr. Carroll, who testified that he examined

him and found a hernia and operated on him for it. The testimony will authorize the finding that appellee was a strong, healthy young man, and had engaged, with his brothers previous to the injury, in healthy and vigorous exercise and labor; that he had never had a pain at that place previous to his fall. We find no evidence that he was diseased to any extent which would have caused the injury, and find only theories presented by the expert witnesses as to the probability or possibility of it having been produced in the manner alleged, or whether it was done in some other way. There appeared to be no bruises on the outside of his person found by the doctor at the time he examined him, and the doctor expressed it as his opinion that the corner of the door or latch, striking with sufficient force to cause hernia, would break the tissue or cause a bruise or evidence of such force under the surface of the skin. The following question was asked the doctor:

"Irrespective of this sharp point, in other words, your idea is that the door and the sharp point to the instrument would not have as much to do with it as the slipping and falling in this jerking position? Answer: Yes, sir; that is it. My idea is that the fall against the sharp instrument did not produce the direct hernia; that it was some other factor, else there would have been what I said—a bruise and bleeding condition of the tissues on the inside. The fall, if the hernia came on immediately after this, the type we found, then it is presumptive the fall, and later that the strained condition that occurred afterwards and perhaps in the fall, might have been the factor in bring it down; I rather think that it would. If there had not been any sharp point there, and he got the fall like that, I would place just as much stress on the fall producing the hernia as if the sharp point had been there. If it occurred immediately afterwards, I would naturally attribute it to that as a factor."

At another place he testified:

"In investigating conditions of hernia that come as the result of decay or diseased condition as compared with those that come from violence, I do not know just the percentage of them that occur on the right-hand side, but many more than on the left side. I hardly think it is as high as 97 per cent., according to the best authorities, but I am not sure. I should say offhand, according to my best recollection, at least 75 per cent. At least 75 per cent. of those hernias coming without accident or violence occur on the right side. This one was on the left side; that is correct. This hernia had another peculiar thing about it—it was very small—it is not a rupture at all. That is a mistaken thing; it is a hernia, but most people call it rupture, but it is not a rupture; it is merely parting of the tissues that separate, and let something go through, and laymen frequently call it a rupture. The whole thing means a separation of the issues, which lets a man's intestines or entrails come through; no matter what you call it, it is a separation of

the tissues which permits the inside to stick out. This is a very small one."

He said at another place:

"There was no evidence on his side as to searching for laceration or a red spot, or anything like that; there is none; nothing out of the ordinary except a hernia. If the boy had been hit by this steel clasp against the skin but for the clothes it would have been a very simple matter and a very easy matter for that to jam up there and hurt enough to produce a hernia, without leaving any scar or discoloration on the skin outside; that is possible."

After a lengthy hypothetical question was presented to Dr. Crow, he testified:

"Taking what has been outlined about this case to me, I believe this hernia was caused in an effort to save himself in the act of falling, before striking the door; the transmission of force. He continued until he did strike the door. I should say that this hernia might, and in all probability did, happen prior to the time he hit the door; that the act of falling, and the actual fall, I cannot say that, as no human being can possibly determine just when the hernia occurred."

The fact that the appellee had nothing of the kind previous to the fall, that the hernia developed just after the fall, that he was healthy before, etc., and that in the doctor's opinion in all probability it was due to the fall, we think the jury were authorized to find that the accident was the sole cause of the injury, independent of all other. *North American Accident Insurance Co. v. Miller*, 193 S. W. 750; *Fidelity Casualty v. Joiner*, 178 S. W. 806.

[2, 3] The second assignment assails the finding of the jury that appellee was wholly disabled and prevented from performing any and every kind of duty pertaining to his occupation for six weeks. While the evidence indicates for two or three days after the injury appellee was not aware of the seriousness of the injury, and shows that he did attempt to work around his place, it nevertheless shows that he was disabled at least to some extent. The evidence clearly shows that the injury then received was serious, requiring an operation which confined him to the sanitarium for two weeks, and after leaving the place he was unable to do any work of consequence, unless it was such as making out tickets and the like. The appellant appears to rely upon a report made by appellee of his condition, which the company secured, and in which the appellee denominated his injuries as partial. Dr. Carroll testified with reference to such statement:

"If he ever wrote out a statement that about three or four or five weeks afterwards, as to his thinking, he was well, he is mistaken about it. The hernia has recurred, and he will have to wear a truss or have it fixed; it is right down there now."

We think the facts presented an issue as to how long he was totally disabled, and that the jury were not without evidence supporting their finding. It would serve no useful purpose to quote the testimony at any length on this point. As to the rule for ascertaining the meaning of total disability, the *Joiner Case*, supra, quotes that it—

"does not mean absolute physical inability on the part of the insured to transact any kind of business pertaining to his occupation. It is sufficient if his injuries were of such a character that common care and prudence required him to desist from the transaction of any such business so long as it was reasonably necessary to effectuate a cure. This was a duty he owed to the insurer as well as to himself."

The mere fact that for a few days appellee may not have discovered the seriousness of his injury does not disprove that he was not, within the meaning of the policy, wholly disabled, when the evidence of the doctor indicates that common care required him to desist from the transaction of any such business. This court's views are expressed in the *Miller Case*, supra, 193 S. W. 750, paragraphs 1 and 8, *Fidelity & Casualty Insurance Co. v. Mountcastle*, 200 S. W. 862; *I. T. A. v. Rogers*, 163 S. W. 421.

[4] The third assignment complains at the action of the court in excluding testimony of Dr. Carroll, who had treated the appellee, as follows:

"That in his opinion, as an expert, the injury which the plaintiff claims to have suffered was not the result directly, solely, and exclusively, and independent of all other causes, of the fall on the automobile door."

Objection made at the time is that it was not a question of expert testimony, but that the question involved the very issue which the jury was called upon to try. The court sustained the objection, and doubtless ruled as he did under the holdings and in accordance with the case of *I. T. A. v. Rogers*, 163 S. W. 421. We will not discuss whether the particular evidence offered should have been admitted. We think, however, there was no injury shown by its rejection, as Dr. Carroll testified:

"You want my opinion as to whether this hernia I found in the operation was due to the injury described, due to the fall or blow that he received on the side, or whether it might have been due to some other cause. My opinion would be that it would be more likely to result from some other cause than that from the direct blow, for the reason that there was no bruises or laceration of the tissues; in other words, from other factors, probably more so, than this blow against his side."

He also testified:

"I don't believe a severe blow on the wall [of the stomach] would produce a rupture without leaving some evidence of a bruise, without some other factor attending."

Again:

"My idea is that the fall against the sharp instrument did not produce the direct hernia; that it was some other factor, else there would have been what I said—a bruise and bleeding condition of the tissues on the side."

He further testified:

"I don't believe I have ever seen a case where a sudden blow produced a hernia, but the reports of the men who have seen them, and which I have seen, is that it would incapacitate a man. The accepted view of it is that a sufficient blow to produce hernia would immediately incapacitate him, and usually does just that."

This testimony, it occurs to us, gave the jury the benefit of the doctor's opinion as to whether striking the door actually produced the hernia or whether it was from some other cause.

[5] The fourth and fifth assignments assert error in refusing to permit the witness Weams, the state agent of the company, to testify that he knew of his own personal knowledge that the occupation of running a filling station classified as a more hazardous occupation by defendant company than that of a traveling salesman, and that the premium rate for said occupation was greater than the rate charged for the occupation of traveling salesmen, and would have testified to the rate charged by the company for both classifications. The appellee objected to the testimony on the ground that the policy provided the manner and method by which a change of occupation reduced the liability of the defendant, to wit, according to the company's rates and classification of rates last filed prior to the occurrence of the injury for which indemnity is claimed with the insurance department of the state, wherein the assured resides, etc. It appears from the policy that appellee was insured as a traveling salesman, and at the time of his injury appellee was secretary of the Edwards Gasoline & Service Station; that he did other things around the station necessary to be done when there were no men around to do it, including cranking cars, taking off and putting on tires, etc. The appellant pleaded that the premium paid and required for salesmen in the stationery business was \$20 per annum, and that such business was rated as select; that for ordinary risk it was \$34 per year, which was fixed prior to and existed at the time of the alleged accident; that, if he was entitled to recover at all, he could only recover 20/34 of the benefits stated in the policy. The clause of the policy relied on reads:

"If the insured shall engage in any occupation classed by this company as more hazardous than that stated in this policy (ordinary duties about the residence of the insured or while engaged

in recreation excepted), the company's liability hereunder shall be limited to such proportion of the indemnity as herein provided as the premium paid will purchase at the rate and within the limits fixed by the company for such increased hazard, according to the company's rates and classification risk last filed prior to the occurrence of the injury, for which indemnity is claimed, with the insurance department of the state wherein the insured resides."

It will be seen the company's rates were to be fixed and filed with the insurance department and that the rates last so filed should control. It was sought to show by the witness that he knew the rate and what it was, etc. The contract of insurance made the rate last filed with the insurance department before the accident the controlling rate, and the evidence of the indemnity to be paid under such rate. We believe the court ruled correctly in rejecting the offered evidence. It was sought to prove orally by the witness that he knew the rate when the policy provided the rates should be fixed and filed, and it is not shown that the proposed testimony was the rate so fixed and filed, or that it could not be obtained from the insurance department.

The case will be affirmed.

# AMERICAN NAT. INS. CO. et al. v. WALLACE et al. (No. 5716.)

(Court of Civil Appeals of Texas. Austin. Jan. 10, 1917. On Motion for Rehearing, Oct. 10, 1917. Further Rehearing Denied April 17, 1918.)

## 1. INSURANCE §116(1) — LIFE POLICY — INSURABLE INTEREST — GRANDNIECES.

Where beneficiaries were grandnieces of insured, relationship was too remote to constitute insurable interest, unless they had reasonable ground to expect that she would have contributed to their welfare.

## 2. INSURANCE §116(1) — LIFE POLICY PAYABLE TO GUARDIAN — RIGHT TO PROCEEDS.

In an action on a life policy payable to plaintiff as guardian no recovery can be had unless plaintiff be the guardian of some person who had an insurable interest in the life of the insured or unless she herself had such interest.

## 3. EXECUTORS AND ADMINISTRATORS §46 — LIFE POLICY — PROCEEDS PAYABLE TO ESTATE.

The proceeds of a life policy made payable to one having no insurable interest in the life of the insured belong to the insured's estate.

On Motion for Rehearing.

## 4. INSURANCE §587 — LIFE POLICY — AGENT OF BENEFICIARY — POWERS OF AGENT.

Where the agent of an insurance company has authority to act for the company, he may

waive the provisions of the policy prescribing the mode to be pursued in changing the beneficiary, and bind his principal by verbal contract changing the beneficiaries.

**5. INSURANCE 6-602—LIFE INSURANCE—PENALTIES FOR REFUSAL TO PAY.**

Where the agent of an insurance company has authority to represent the company in respect to payment of claims when demand is made, a demand upon him as representative of the company for payment of policies is such a demand as to entitle beneficiary to recover the penalties and attorney's fees in case of refusal to pay.

Appeal from McLennan County Court; Geo. N. Denton, Judge.

Suit by Annie Wallace and others against the American National Insurance Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed on rehearing.

Williams & Neethe, of Galveston, and J. L. Shelton, J. D. Williamson, M. C. H. Park, and Jas. P. Alexander, all of Waco, for appellants.

KEY, C. J. Annie Wallace brought this suit against the American National Insurance Company, seeking to recover upon two insurance policies. Mrs. Catherine C. Hopkins, Gussie Lowe, and Willie Moore were also made defendants. The insurance company in its answer admitted the issuance of three policies of insurance upon the life of the deceased, Lizzie Barkin, one payable to Gussie Lowe and Willie Moore, one payable to Mrs. Catherine C. Hopkins, guardian, and one payable to Gussie Lowe alone. The plaintiff did not seek to recover upon the policy made payable to Catherine C. Hopkins, but sought recovery upon the other two, upon the theory that an agreement had been entered into between Lizzie Barkin and the insurance company by which the plaintiff was to be substituted for Gussie Lowe and Willie Moore as beneficiary in those two policies.

William Heath and J. W. Wicker filed a petition of intervention, alleging that they are the legal heirs of Lizzie Barkin, deceased, and that neither the plaintiff Annie Wallace nor the defendants Gussie Lowe, Willie Moore, and Catherine C. Hopkins had any insurable interest in the life of Lizzie Barkin, and that, therefore, upon her death, the amount due on the policies became a part of her estate, and was inherited by the interveners. There were other pleas filed, which it is not deemed necessary to refer to, further than to state that the insurance company tendered into court the face value of the several policies, asserted that it was merely a stakeholder, and asked the court to determine who was entitled to collect the policies.

It is also proper to state that the plaintiff

Annie Wallace, in addition to her asserted right to collect two of the policies, sought to recover penalties and attorney's fees from the insurance company upon the statutory ground that it had failed to pay such policies after demand made therefor. The court below rendered judgment for the plaintiff Mrs. Wallace against the insurance company upon the two policies upon which she sought recovery, and also statutory damages and attorney's fees, and rendered judgment to the effect that the other parties recover nothing, and the insurance company and intervener, Heath, have appealed.

In so far as the insurance company is concerned, this case is substantially the same as *American National Insurance Co. v. Hollingsworth*, 189 S. W. 792, decided by this court last October, and not yet officially reported. In that case it was held that proof no stronger than that submitted in this case was not sufficient to show that the agent upon whom the demand for payment was made had authority to represent the insurance company in that respect, and for that reason it was held that the plaintiff in that case was not entitled to recover statutory damages and attorney's fees. The appellant in that case is the appellant in this, the agent referred to in that case is the agent referred to in this case, and the proof in this case in reference to the scope of his agency is not any stronger than in the other. Hence we hold that the insurance company is entitled to have the case reversed and remanded for another trial.

As to the appeal prosecuted by appellant Heath, we sustain his contentions to this extent:

1. That when an insurance policy specifies the method by which the beneficiary therein may be changed, such method must be pursued in order to accomplish that result. *Flowers v. Sovereign Woodmen*, 40 Tex. Civ. App. 593, 90 S. W. 526; *Gray v. Sovereign Woodmen*, 47 Tex. Civ. App. 606, 106 S. W. 176.

[1] 2. If Gussie Lowe and Willie Moore were grandnieces of Lizzie Barkin, their relationship was too remote to show that they had any insurable interest in her life, in the absence of testimony tending to show that they had reasonable ground to expect that if she had remained alive she would have contributed substantially to their welfare, financial or otherwise. *Wilton v. N. Y. Life Ins. Co.*, 34 Tex. Civ. App. 153, 78 S. W. 408.

[2] 3. Unless it be shown that Mrs. Hopkins was the guardian of some person who had an insurable interest in the life of the deceased, or that she herself had such interest, she was not entitled to recover upon the policy made payable to her as guardian.

[3] 4. The proceeds of a policy of insurance made payable to one having no insurable

interest in the life of the insured belongs to the estate of the insured after his or her death; and if, upon another trial, it shall be made to appear that the policies involved in this suit come within that class, then, if the proof shows that the interveners Heath and Wicker are the next of kin to Lizzie Barkin, the deceased, and that there is no administration nor necessity therefor upon her estate, then judgment should be rendered for interveners upon all the policies.

For the reasons stated, the judgment is reversed and the cause remanded for another trial.

Reversed and remanded.

#### On Motion for Rehearing.

After careful reconsideration of this case, we have reached the conclusion that the motion for rehearing by appellee Annie Wallace should be granted, and the judgment of the court below affirmed.

A re-examination of the statement of facts discloses more testimony tending to show that appellant's agent, Russell, acted within the apparent scope of his authority when he made the agreement to change the beneficiaries in two of the policies, and to substitute appellee Annie Wallace for Gussie Lowe and Willie Moore, than was produced in the Hollingsworth Case, referred to in our former opinion. In this case, in answering special issues, the jury found that Russell had such authority, and this court committed error in holding that the finding referred to is not supported by testimony.

[4] In reference to the manner of changing the beneficiary, while it is true that the policies prescribe a mode not pursued in this case, still, if Russell had the authority to act for the insurance company, he had the power to waive that provision, and bind appellant by verbal contract changing the beneficiaries. *Splawn v. Chew*, 60 Tex. 532; *Morrison v. Ins. Co.*, 69 Tex. 363, 6 S. W. 605, 5 Am. St. Rep. 63; *Ins. Co. v. Lee*, 73 Tex. 646, 11 S. W. 1024; *McNiel v. Chinn*, 45 Tex. Civ. App. 551, 101 S. W. 465; *Ins. Co. v. Lyons*, 38 Tex. 253; *Ins. Co. v. Freeman*, 19 Tex. Civ. App. 632, 47 S. W. 1025; *Ins. Co. v. Bell*, 25 Tex. Civ. App. 129, 60 S. W. 282; *Ins. Co. v. Everett*, 18 Tex. Civ. App. 514, 46 S. W. 95.

[5] We also hold that if Russell had the authority, which the jury found he had, a demand upon him, as the representative of the insurance company, for the payment of the policies, constituted such a demand upon appellant as entitled Annie Wallace to recover penalties and attorney's fees. The amount awarded as attorney's fees seems to us quite large, but the finding in that respect is supported by the testimony of several reputable attorneys, and therefore we cannot say that it is contrary to and unsupported by the testimony.

For the reasons stated the motion for re-

hearing is granted, and the judgment of the court below is affirmed.

Motion granted. Judgment affirmed.

#### WELLER v. BURNS. (No. 6168.)

(Court of Civil Appeals of Texas. San Antonio. March 12, 1919. On Motion for Rehearing, April 16, 1919.)

#### 1. COMPROMISE AND SETTLEMENT $\S$ 24—DEMANDS INCLUDED—"ACCOUNTS."

Plaintiff's receipt, reciting that the amount "settles all accounts" between plaintiff and defendant "up to date," did not, as a matter of law, settle a claim based on defendant's check to plaintiff, dated prior to the receipt, and by agreement not to be presented by plaintiff until a certain date, which in fact was after the date of the receipt; for in ordinary parlance a check would not be included in the word "accounts."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Account.]

#### 2. COMPROMISE AND SETTLEMENT $\S$ 23(3)—EVIDENCE.

Evidence held to sustain finding that defendant failed to establish that settlement pleaded covered plaintiff's claim on defendant's check.

#### On Motion for Rehearing.

#### 3. COMPROMISE AND SETTLEMENT $\S$ 23(1)—EVIDENCE—BURDEN OF PROOF.

Defendant had burden of proving his plea of compromise and settlement of the claim evidenced by his check sued on by plaintiff.

Appeal from District Court, Bexar County; J. T. Sluder, Judge.

Suit by J. F. Burns against R. H. Weller. From judgment for plaintiff, defendant appeals. Affirmed.

Ball & Seeligson, of San Antonio, for appellant.

Ingrum & Robinson, of San Antonio, for appellee.

MOURSUND, J. Appellee sued appellant to recover on a check by appellant in favor of appellee for \$6,500, dated February 5, 1917, alleging in substance that it was on account of and in part payment of \$7,000, which appellant had agreed to pay appellee for services rendered involving the sale of certain ranch interests in Mexico, claiming that the amount was \$7,000 and that \$500 had been paid thereon, and that appellant had stopped the payment of the check.

The answer aside from general denial, consisted of two sworn special pleas: First, a failure of consideration to the extent of \$6,000 by reason of alleged failure on the part of appellee to accomplish what appellant alleged he had agreed to do; and, second, that

a controversy arose in Saltillo, Mexico, as to the amount appellant was to pay appellee for his services, and court proceedings were there instituted and an order of detention issued against appellant, as well as J. M. Dobie, a witness therein, and that in settlement of the entire matter and controversy appellee agreed to accept and was paid \$500 on February 16, 1917, in full settlement and satisfaction of all services rendered by him to appellant in the controversy between appellant and his wife, and that appellee had executed and delivered to appellant a written release and receipt in full of all matters and accounts between them, which written release and receipt were set out in full in said plea.

The appellee by supplemental petition joined issue as to the matters of defense alleged by appellant, and in reply to the plea of settlement and compromise pleaded specially as follows:

"And specially answering the third paragraph of the defendant's said answer on his plea of payment, the plaintiff says that on the date of his said agreement with the defendant herein, by which agreement the defendant promised to pay to plaintiff the sum of seven thousand dollars, it was agreed by and between the plaintiff and this defendant that he was to accept the defendant's check for the sum of six thousand five hundred dollars (\$6,500.00), and that the defendant was to pay plaintiff the sum of five hundred dollars (\$500.00) in cash. At the time of said agreement and settlement between this plaintiff and the defendant, J. M. Dobie, who was then purchasing said ranch, was not in the Republic of Mexico, but was in the United States; and it was contemplated that upon the final settlement and transfer of the said ranch that the said Dobie would pay to Weller certain moneys in cash as a part payment for said ranch; and the defendant, Weller, requested the plaintiff to wait upon him for the payment of the said \$500.00 until the said Dobie came to Mexico to finally consummate and receive the transfer of said ranch, to which plaintiff agreed; that when the said J. M. Dobie came to Mexico in response to a notice from this plaintiff that a settlement had been arrived at, and after all the matters and things between the said defendant and J. M. Dobie had been agreed to and settled, and when the defendant was preparing to leave the Republic of Mexico, he then refused to pay to plaintiff the \$500.00 which he had agreed and promised to pay, and in consequence of which refusal the plaintiff had him detained in the Republic of Mexico until he did agree to pay the same, and plaintiff says that upon the payment of said \$500.00 he did execute his receipt in settlement of the matters existing between this plaintiff and R. H. Weller; and which receipt was intended as a final settlement between them. At the time of the execution of said receipt, the plaintiff then had in his possession the said check for \$6,500.00, and had had the same since the 5th day of February; and plaintiff was then demanding \$500.00 only in full settlement of his agreement with the said R. H. Weller; but that thereafter the defendant, Weller, stopped payment of the check herein sued upon; and this plaintiff is now entitled to recover the said \$6,500.00, as agreed

upon between this plaintiff and defendant; and that said receipt when given contemplated the full payment of said check, which said payment would have been the amount of \$7,000.00, as agreed by and between plaintiff and the defendant. And it is not true, as alleged by the defendant, that the plaintiff was only to receive \$500.00 in full settlement of his services; but it is true that the plaintiff was to receive \$7,000.00 as heretofore alleged."

The appeal is from a judgment against appellant for the amount of the check with interest at 6 per cent. from February 20, 1917.

All of the assignments present issues relating to the plea of settlement and compromise, it being contended that the judgment is contrary to the undisputed evidence on the issue whether the instrument pleaded by appellant shows a settlement of the claim evidenced by the check as well as other claims, and also contended that the appellee did not plead any facts sufficient to avoid said instrument.

The instrument in question reads as follows:

"Saltillo, Coah., Mex.

"I received from Sr. Lic Herminio Siller \$500.00 five hundred dollars for fees for settling matters between Mr. R. H. Weller and Mrs. Lettie W. Weller. This amount settles all accounts between me and Mr. R. H. Weller up to date.

J. F. Burns.

"Feb. 16, 1917."

[1] In behalf of appellant it is assumed in the argument in the brief that such instrument recites that the \$500 was accepted by Burns in full of all demands and claims upon his part for services rendered by him in Weller's behalf. As a matter of fact, the instrument only recites that the \$500 was for fees for settling matters between Mr. and Mrs. Weller, and that the amount settles all accounts between Burns and Weller up to date of the instrument. It appears that it was agreed that the check should not be presented for payment until February 20, 1917. If the instrument executed by Burns on its face purports to release the claim existing by virtue of the check, it was certainly incumbent on Burns to plead fraud or mistake in avoidance thereof; but if that instrument by a fair construction does not purport to release the claim evidenced by the check, or if it is ambiguous, it was not necessary for Burns to plead in avoidance thereof for the purpose of setting it aside. It must be conceded, we believe, that in ordinary parlance a check would not be included in the word "accounts," and, if the instrument signed by Burns is construed literally, it does not purport to release any claim existing by virtue of the check. The pleadings of the parties reveal their respective contentions concerning the matters which were considered as a basis for the settlement evidenced by the receipt. If the instrument is viewed as ambiguous, the parties have certainly pleaded their respec-



tive versions as to what the intention of Burns was in executing such instrument and what the intention of Siller, appellant's attorney, was in accepting the same. Weller's testimony was to the effect that he was to pay Burns only \$500 unless the latter settled Mrs. Weller's claim for \$30,000 or \$35,000, and in effect that Burns represented that the money would be divided between the arbitrators and himself, and that the check was desired in order that he might have some assurance that he would be paid provided he carried out the proposed arrangements. Burns testified that he was to be paid \$7,000 for his services; that the check for \$6,500 was given him on the day of its date, but it was understood that it was not to be presented until February 20, 1917; that he was to receive \$500 cash when Doble arrived; that there was nothing further said concerning the compensation until the day after the settlement was made and Weller was ready to leave, whereupon he asked Weller for the \$500, and Weller refused to pay him any more on the ground that he had been "held up by Mrs. Weller"; that he then stopped Weller for the \$500 (meaning that he procured a detention order); and that Weller left the \$500.

It is contended that, as Burns was not asked concerning what took place between himself and Siller, the latter's testimony should be taken as true, and as showing that the claim covered by the check was included in the settlement evidenced by the instrument relied on. There can be no doubt that the detention order related only to the \$500 demanded by Burns. Burns so testified, and Siller had never heard of the \$6,500 check at the time he and Burns made the settlement. In addition, it appears that Siller got the authorities to let Weller leave Mexico before the settlement was made, by promising that he would effect a settlement, which he proposed to do for \$500, and for this purpose he took Weller's check for said amount. Had he understood that the detention order was for \$7,000, he could not have safely made any such promise. Now, as Burns took out the detention order to collect \$500, and Siller took the check for \$500 to release the order, and had never heard of the \$6,500 check, it is obvious that there was no meeting of the minds of the parties to the effect that the claim evidenced by the check was to be settled. It is true that Siller stated his conclusion that all claims and demands were settled, but he bases it on his construction of the language of the instrument, and not on anything said concerning the check. It would indeed be a remarkable thing if Weller intended that Siller should try to settle a controversy concerning the check, and yet failed to mention the check to him. It is pointed out, on behalf of appellant, that, although Burns in his sworn answer denied that he had been asked by Weller to return the check and that he had represented that he would do so except for

the reason that the check was in the United States, his testimony on the trial contained no such denial, although Doble testified that he heard Weller, in Saltillo, demand the return of the check, and he thought Burns replied that it was in Texas, and Weller testified that he demanded the return of the check and Burns told him the check was in the United States and for that reason he could not deliver it. In this connection, it is worthy of notice that both Doble and Weller testified that, in connection with the demand for the return of the check, Weller offered then and there to pay Burns the \$500 which he claimed was all that he owed Burns. If Burns acquiesced in Weller's theory that he was not entitled to \$500, it is indeed strange that he did not then and there accept the \$500 offered him. While they testified that he gave a reason why he could not return the check, and sought to leave the impression that he was willing to return it, the fact remains that if he had been willing to do so he would undoubtedly have accepted the offer of Weller to pay him the \$500.

[2] Although Burns was not asked concerning the incident testified to by Doble and Weller, his statement that he said nothing to Weller about compensation until the latter was ready to leave, and his statement of what was said at that time, necessarily contradicts the testimony of Doble and Weller, and is more consistent with the acts of the parties. While Weller testified he then and there offered Burns \$500, and he sought to leave the impression that it was understood the check was canceled, it appears that he must have refused to pay the \$500, as Burns found it necessary to procure a detention order. The testimony to the effect that he failed to assert his rights when demand was made for the return of the check was not relied on as showing a compromise at that time, but as showing that in fact Weller did not promise to pay Burns \$7,000. No issue is made that the testimony fails to sustain a finding that he did agree to pay such amount, and the only issue is whether there was a compromise made between Siller and Burns to the effect that Burns should accept \$500 in payment of the entire obligation to pay \$7,000. The incident testified to concerning the demand for the check has little probative weight, if any, as to whether the compromise was made as claimed. If taken as true, it showed that, although Burns had once before refused to take \$500, he had not declared at that time that there was due him \$7,000. This might be accepted as a slight circumstance tending to show that he ultimately agreed to accept \$500 in full settlement of check and the claim for \$500 additional. However, when the testimony is considered as a whole, it appears to us that the court was warranted in finding that Weller failed to establish that the \$500 check was received by Burns in full settlement of the claim existing by virtue of the

check sued on as well as the claim for the additional \$500 claimed by Burns to be due him by Weller.

The assignments are overruled, and the judgment is affirmed.

#### On Motion for Rehearing.

It is contended that the testimony of Weller and Dobie is to the effect that the offer of Weller, testified to by them, to pay Burns \$500, was conditioned upon the return by Burns of the \$6,500 check.

[3] We have again examined the testimony of each of the parties, and we do not find any statement that such a condition was attached to Weller's offer. Mr. Dobie testified:

"I heard Mr. Weller, in Saltillo, Mexico, demand or ask from Mr. Burns the return of the \$6,500 check. The reply of Mr. Burns, I think he said it was in Texas. Yes, Mr. Weller at the same time offered to pay Mr. Burns the \$500 he had promised to pay him; I heard him offer to pay him \$500."

Weller testified:

"Yes, sir; after this thing fell down I demanded the return of this \$6,500 check. I went to Mr. Burns and demanded this check in his house, and he told me the check was in the United States was the reason he couldn't deliver the check. And then and there I offered to pay him the \$500 that I had agreed to pay him."

We find no other testimony on the particular point. The impression the testimony makes on our mind is that Weller, notwithstanding the absence of the check, then and there offered to pay Burns \$500. Certainly, the theory that the offer was conditional must rest upon conjecture, for neither witness so testified. Neither undertook to say that Burns promised to return the check, or that he agreed to accept \$500, or even stated that he would consider the matter. As stated before, this testimony could only have a remote bearing on the only issue, namely, whether the settlement involved the claim for \$7,000, or only for \$500. It could only show that at one time he was not averse to such a settlement. It is also argued that we overlooked the further important and vital thought from Burns' standpoint that he had failed in successfully prosecuting and maintaining the order of detention against Weller.

It is also argued that, when the order of detention was vacated, this was a good reason for his subsequently accepting the amount claimed by Weller as being due Burns. These arguments, we believe, are

not justified by the record. They appear to be predicated upon the theory that Burns discovered that Weller had in some way procured the vacation of the order of detention, and left Saltillo, and therefore he (Burns) decided to accept \$500 in satisfaction of a \$7,000 claim. There is no evidence that Burns knew either of these facts. Siller does not testify that he informed him thereof. In fact, Siller's testimony consists of one conclusion after the other. He fails to mention a single word said by him to Burns or Burns to him. He did not mention any difficulty in arranging the settlement, which indicates that Burns must have received what his order of detention called for, or have suddenly changed his mind without any reason for doing so. There is no record evidence to show for what sum Burns procured an order of detention. In deference to the judgment of the trial court, we must find that he believed the testimony favorable to Burns. Burns testified he stopped Weller for the \$500. Siller, the attorney for Weller, does not testify to the contrary. He testified he accompanied Mr. Weller to see Mr. Barragan, the Municipal President of Saltillo, who had issued the order of detention for the purpose of getting the same rescinded; that Mr. Barragan revoked the order as he (Siller) had agreed to arrange a settlement of Mr. Burns' claim on the following day. Weller left his check with Siller for \$500, and Siller, even up to the time he delivered the check and obtained the receipt, had never heard of the \$6,500 check. It appears that Siller procured the vacation of the order by his personal assurance that he would arrange a settlement. If Weller thought he had been detained for \$7,000, he certainly left Siller in a difficult position. If Siller thought Weller had been detained for \$7,000, he certainly took a big risk in assuring Barragan that he would arrange a settlement. It is true that Weller testified he was detained with regard to the \$6,500 check, but the court was warranted in disregarding such statement and finding that the order of detention was for \$500; that Burns contemplated, in making the settlement, that it was of his claim for \$500; and that Siller who made the settlement with Burns had never heard of the \$6,500 check, and did not contemplate settling any claim except the one upon which the order of detention had issued. The burden of proof was on Weller to establish his plea of compromise and settlement of the claim evidenced by the check sued on. The court did not err in holding that Weller failed to establish such plea.

The motion for rehearing is overruled.

(378 Mo. 19)

**DANCIGER et al. v. STONE et al.**  
(No. 19605.)(Supreme Court of Missouri, Division No. 1.  
March 1, 1919. Motion for Rehearing  
Denied April 7, 1919.)**1. WITNESSES** ⇨144(11) — **TRANSACTIONS WITH DECEASED PERSONS—HUSBAND'S DEPOSITION AFTER WIFE'S DEATH.**

Where a husband and wife, owners of undivided halves of a piece of land, executed a deed ambiguous as to whether the interest of the husband or the wife was intended, a deposition by the husband, 44 years after the death of the wife, as to the effect of the conveyance, was inadmissible in a suit to determine title, under Rev. St. 1909, § 6354, making testimony of surviving party incompetent.

**2. LIMITATION OF ACTIONS** ⇨73(10)—**SUITS TO QUIET TITLE—ESTATES BY CURTESY.**

Where land owned by husband and wife in undivided shares was conveyed by a deed which failed to state whether the husband or the wife's share was intended to be conveyed, in an action to try title between the wife's heirs and those claiming under the grantee of the joint deed, limitations did not run against the remaindermen who were the wife's heirs until after the death of the husband who was entitled to an estate by curtesy.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by Fannie Danciger and others against Jennie Stone and another. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

Strother & Campbell, of Kansas City, for appellants.

Harry L. Jacobs and Ringolsky & Friedman, all of Kansas City (Henry Lamm, of Sedalia, of counsel), for respondents.

**BOND, J. I.** Suit for an undivided one-half of a certain 56½ acres of land in Jackson county, Mo.

In 1849 one Archibald Rice conveyed by warranty deed to each of his two daughters, Manerva R. Rice and Mary Ann Franklin, an undivided one-half interest in certain land in Jackson county, including the 56½ acres in dispute. Manerva Rice later became the wife of Andrew J. Stone, who purchased the half interest of Mary Ann Franklin (afterwards Mary Ann Ish) in all the land deeded to her by her father, so that in 1853 Manerva Stone and her husband, Andrew J. Stone, each owned, in their own right, an undivided one-half interest in the 56½ acres in question.

On April 14, 1856, Andrew J. Stone and his wife, Manerva Stone, sold certain lands containing 349½ acres to William S. Stone, including an undivided one-half interest in the

said 56½ acres, describing the latter parcel, to wit:

"Also the undivided one-half of the south end of the east ¼ of the N. E. ¼ of sec. 2, twp. 48, in range 33, containing fifty-six acres and a half, the one-half of which hereby sold is 28¼ acres, and containing in the aggregate hereby sold and conveyed, 349½ acres more or less, and being the same land deeded by Archibald Rice and wife to Mary Ann Franklin (now Mary Ann Ish the wife of John H. Ish) and Manerva R. Rice (now Manerva R. Stone wife of the said Andrew J. Stone and one of the grantees herein) on the 22d day of March, 1849, and the undivided half of said land was deeded by John H. Ish and wife aforesaid to said Andrew J. Stone on the 17th day of May, 1853, both of which deeds are now of record in the recorder's office of Jackson county and state of Missouri, reference to said deeds being hereby had."

The controversy in this case grew out of the construction to be placed on the above deed, the plaintiffs on the one hand claiming it conveyed the half interest of Manerva Stone, while the defendants insist it conveyed the half interest of the husband, Andrew J. Stone.

Manerva Stone died in the year 1857, leaving four children, Juliet, Sallie, William, and Jacob. William Stone died in 1895, leaving as his only heir his widow, Jennie Stone, one of the defendants herein. Jacob Stone died in 1888. His estate was not administered until 1905, when letters testamentary were granted, and in the course of administration the administrator sold Jacob Stone's alleged one-quarter interest in an undivided one-half of the 56½ acres in dispute to defendant Bennett for \$75; said Bennett acting as attorney for Frank H. Cattrell, the real purchaser.

The other two children of Manerva Stone, Juliet and Sallie, each quitclaimed their interests, if any, in the disputed tract to the plaintiff the Park Plaza Realty Company.

It also appears of record that on January 17, 1867, Andrew J. Stone and his second wife, Julia, conveyed to William S. Stone an undivided "one-half of the following tracts or parcels of land," among which was the disputed parcel of "56½ acres off the south end of the east half of the northeast quarter of section 2, township 48, range 33." William S. Stone took possession of the land, and he and his grantees have continued in actual possession thereof until this controversy arose.

In the first instance, three suits were instituted, one by the Kansas Western Co-operative Company against Jennie Stone and others, another a partition suit by Jennie Stone, and the third by Fannie Danciger, who acquired title from the Kansas Western Co-operative Company, against Jennie Stone, Ernest Bennett, and others, all of which

were, by consent, consolidated and tried as one; the Park Plaza Realty Company being substituted as plaintiff in two of the suits and substituted as defendant in the partition suit.

At the trial plaintiff introduced in evidence an affidavit of Andrew J. Stone, which was read, attached to and made a part of his deposition; a pertinent clause to the dispute in hand being as follows:

"That \* \* \* on which date (April 14, 1856) affiant and his wife sold an undivided one-half interest in said land to affiant's brother, William S. Stone (said one-half interest being the one-half interest belonging to said affiant's wife at the time of her marriage)."

A decree was entered in favor of the substituted plaintiff, the Park Plaza Realty Company, in which the court found that it was the intention of both of the grantors by their deed to convey the undivided one-half interest in the 56½ acres in controversy, owned by Manerva R. Stone, individually, and not the intention of the grantors to convey, or of the grantees to accept, the undivided half interest in said land owned by the grantor Andrew J. Stone, individually. The court further found in favor of the Park Plaza Realty Company as substituted defendant in the partition suit wherein Jennie Stone was plaintiff, and dismissed her petition. The court also found that the Park Plaza Realty Company and its predecessors and those through whom it deraigned title had, from April 14, 1856, been in "open, notorious, visible, actual, continuous, adverse possession" of the land in controversy, and that said Park Plaza Realty Company "is the owner in fee simple, and is now in possession of said above-described land," and that none of the defendants, naming them, "have any interest in or right of title to said real estate described heretofore herein or any part of same."

From judgment entered in accordance with this decree, Jennie Stone and Ernest Bennett appealed.

II. It may be conceded that the terms of the deed do not render it absolutely certain whether it was the intention of the grantors therein to convey the undivided half interest of the wife or the undivided half interest which the husband acquired by purchase from her sister in the 56½ acres in dispute, since the operative words of the deed do not specify, in express terms, which of the two undivided half interests were intended to be conveyed. The deed was made by the two co-owners in the form of a warranty, and the grantee therein was the brother of the husband. At the time of its execution (1856), the wife was under common-law disability. The husband was under no disability. In such circumstances, with the view of protecting her rights, the law required that the instrument should show the "performance of every act on her part necessary to convey

her estate." *Peter v. Byrne*, 175 Mo. 233, 75 S. W. 483, 97 Am. St. Rep. 578; *Dooley v. Greening*, 201 Mo. 343, 100 S. W. 43; *Linnville v. Greer*, 165 Mo. loc. cit. 397, 65 S. W. 579. Hence there was no presumption afforded by the language of the deed that it was intended by the wife's joinder therein to convey her undivided one-half interest in the land in dispute, rather than the undivided half interest in the same which her husband then owned and had acquired (as recited in the deed) from her sister. Unless therefore the respondents have shown in the record by evidence alunde that it was the purpose and object and intent of the makers of the deed to convey thereby only the undivided half interest belonging to the wife, or that by some other method title was vested in those under whom respondents claim, defendants should have had a decree in the court below.

The respondents endeavored to show this in two ways: First, by the deposition of the husband, taken after the death of his wife and the death of their grantee, who stated, in substance, that it was the intention of himself and wife to convey only her undivided half interest by the terms of the deed made by them; second, that respondents became vested with the title to the land under the statutes of limitations of 10 and 30 years.

[1] Taking these in the order presented, the testimony of the husband in the form of a deposition given in 1911, 44 years after the death of the wife, as to the effect of their joint contract in making the deed, was clearly inadmissible under the statute. *Rev. St. 1909, § 6354*. The pertinent parts of that statute are, to wit:

"Provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him," etc.

In construing this statute upon an issue presented by claimants to land under title emanating from the husband, against other parties claiming through the wife, on the theory that the husband was the trustee of a resulting trust in her favor, *Faria, J.*, said:

"Is Lutz, under such circumstances, a competent witness by whom to show any fact which goes to dispute the validity of the title conveyed to his wife? We think not, and we think the cases, as well as the statute, so hold, in cases like the present, in no doubtful terms." *Herndon v. Yates*, 194 S. W. loc. cit. 48.

To the same effect: *Smith v. Smith*, 201 Mo. loc. cit. 546, 100 S. W. 579; *Patton v. Fox*, 169 Mo. loc. cit. 107, 69 S. W. 287; *Johnston v. Johnston*, 178 Mo. 121, 73 S. W. 202, 61 L. R. A. 166, 96 Am. St. Rep. 486; *Lins v. Lenhardt*, 127 Mo. loc. cit. 290, 29

S. W. 1025; *Miller v. Slupsky*, 158 Mo. loc. cit. 646, 59 S. W. 990.

Our conclusion is that the testimony of the husband was not competent, in the circumstances shown in this record, to prove that the deed executed by him and his wife was intended only to convey her, and not his, undivided half interest in the land in dispute. Defendants offered no other testimony bearing on the intent of the parties, so that all that is left them in this case is their claim of title under the statutes of limitations.

[2] III. This being an action to try title to the land in question between the heirs of the wife and those representing them, and defendants who claim under the grantee in the joint deed of the husband and wife, upon the theory that said deed carried only the wife's undivided half interest in the 56½ acres, and the record showing beyond dispute that the husband died in 1912, only a few years before the institution of this action, and was entitled to estate for life by the curtesy, in the land in question, it is clear that the parties who obtained that title from him were entitled to possession of the premises until his death, and that prior to that time no statute of limitations ran against the remaindermen. Cases exactly in point are: *Coulson v. La Plant*, 196 S. W. loc. cit. 1147, pars. 4, 5, and 6, where Graves, J., speaking for division 1 of this court, said, in referring to claims of remaindermen or reversioners:

"They would have no right to possession until the death of a life tenant. The grantee of the widow could defeat any possessory action which they brought, showing the life estate. That they had no possessory right of action during the life of the life tenant has long since been determined"—citing and quoting the case law.

To the same effect: *Armor v. Frey*, 253 Mo. loc. cit. 474, 161 S. W. 829; *Hall v. French*, 165 Mo. loc. cit. 442, 65 S. W. 769; *Bradley v. Goff*, 243 Mo. 96, 147 S. W. 1012; *Hauser v. Murray*, 256 Mo. loc. cit. 87, 165 S. W. 376.

It follows that the judgment in this case, quieting the title in the parties who claimed under deeds from the grantee in the joint deed of the husband and wife, was erroneous. It is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

All concur.

# CLEVINGER v. CHICAGO, M. & ST. P. RY. CO. (No. 19980.)

(Supreme Court of Missouri, Division No. 1. March 28, 1919.)

## RAILROADS—669—RIGHT OF WAY—DEED—EASEMENTS.

Deed which conveyed to railroad strip of land 50 feet wide on each side of center line

of road as located, together with necessary width for excavations, embankments, depositing waste earth and borrowing pits to the extent of 100 feet on each side, held to convey title to land for 50 feet on each side of center line of road, and to give easement only in land beyond that on either side.

Appeal from Circuit Court, Caldwell County; A. B. Davis, Judge.

Suit by Charles H. Clevenger against the Chicago, Milwaukee & St. Paul Railway Company. From decree for plaintiff, defendant appeals. Affirmed.

Fred S. Hudson, of Kansas City, for appellant.

D. E. Adams, of Hamilton, for respondent.

BOND, J. I. Suit to quiet the title and recover possession of a strip of ground 1,200 feet long and 100 feet wide south of defendant's right of way, and of a like strip of ground on the north side of the same right of way.

The main facts of the case were agreed to: That the common source of title was William T. McDonald. That said McDonald and wife executed and delivered to defendant a warranty deed of date May 13, 1888, by which they sold to defendant, for \$400, a strip of land 100 feet wide to be used as a right of way. This deed also contained the following statements in referring to such conveyance:

"Hereby conveying a strip of land fifty (50) feet wide on each side of the center line of the railway of said company as now located and established, together with necessary width for excavations, embankments, depositing waste earth and borrowing pits, as follows: One hundred feet (100) on each side of said strip of said railway, from station 406 to station 418."

That the land described in said deed as being from station 406 to 418 is the land involved in this action. That on June 8, 1891, said McDonald and wife conveyed the land in question to Thomas Kelmel. That this deed contained the following clause:

"Except seven acres off the above land which has been heretofore deeded to the Chicago, Milwaukee & St. Paul Railway Company for a right of way across said lands."

That Thomas Kelmel conveyed said lands to Holmes L. Clevenger by a deed containing the same clause. That Holmes L. Clevenger conveyed said lands to P. J. Clevenger by a deed containing the same clause. That on June 5, 1900, P. J. Clevenger conveyed said lands to Charles H. Clevenger (the plaintiff herein) by a deed containing the same clause. That the fence of defendant through said land and between stations 406 to 418, in September, 1911, was moved out from the center line of the railroad, on both sides, to

a distance of 150 feet, and that thereafter it inclosed the land in controversy.

The case was submitted on the agreed facts and oral evidence and without a jury.

The court found that, prior to 1912, defendant erected and maintained fences through said land on both sides of the right of way, except at points where the toe of the slope was outside the 50-foot lines, and at such points fences had been maintained 150 feet from the center line of the right of way. The court further found that plaintiff was the owner in fee simple of said land, subject to an easement of defendant for the purposes mentioned in the deed of May 13, 1886.

The decree states plaintiff is the owner in fee simple of said lands, and then specifically describes the boundaries, concluding:

"That plaintiff's right to the possession of said land is subject to defendant's continuing easement therein for use of excavations, embankments, depositing waste earth, and borrowing pits, and that plaintiff have writ of restitution of said lands," and that plaintiff recover the sum of \$1 damages and the further sum of 50 cents per month from March 18, 1916, to the time of restitution of said lands to plaintiff.

From this decree defendant appealed.

II. The only question presented on this appeal is: What is the effect of the terms of the deed, dated May 13, 1886, of McDonald and wife to the defendant railway company, as to the transferring of title? Beyond all doubt the language of the deed vested a fee in the defendant in and to 50 feet on each side of its railroad track, starting at the center. In addition to the conveyance of so much in fee, the terms of the deed show that a lateral conveyance of 100 feet on either side of the 100-foot right of way was for the purposes stated in the deed, to wit, for excavations, embankments, depositing of waste earth, and borrowing pits. The language used in the deed does not imply that any other and further conveyance of this 100 feet on either side of the right of way was made, or intended to be made, than the vestiture of a user therein for the purposes specified in the deed. In effect, the language of the deed, in referring to this extraneous strip of 100 feet on either side of the right of way, operated to grant an easement therein only for the purposes specified in the deed. It was not the intention nor the effect of the language of the deed to vest a fee in defendant in these outlying strips of 100 feet. Properly interpreted, the deed conveyed a fee to defendant in the right of way proper; that is, 50 feet on either side of the center of its railroad track and an easement only in the 100 feet on either side of the right of way conveyed in fee.

The cases cited by the learned counsel for appellant, to the effect that the power of the corporation under its charter to hold lands

for right of way is not inquirable into by a suit of a private individual, are not in point. The only question in this case relates to the construction of the terms of a deed and a determination therefrom of the kinds of estate conveyed thereby, not to the power of a railroad company to hold lands, when such lands have been actually granted to it.

The learned trial court in decreasing title in plaintiff to the two outlying strips of 100 feet each, bordering on defendant's right of way, expressly adjudged that such title in plaintiff was subject in all respects to the terms, conditions, burdens, and servitudes of the easements described in the deed of the common ancestor. This was a manifestly correct construction of the deed, and the judgment of the learned trial court is therefore affirmed.

All concur.

#### ST. CHARLES SAV. BANK v. THOMPSON & GRAY QUARRY CO. (No. 19932.)

(Supreme Court of Missouri, Division No. 1. March 28, 1919. Motion for Rehearing and Motion to Transfer to Court in Banc Overruled April 7, 1919.)

##### 1. COURTS $\S$ 32—JURISDICTION—PLEADING.

It is unnecessary to plead jurisdictional facts where suit is instituted in a court of general jurisdiction.

##### 2. COURTS $\S$ 35—JURISDICTION—PRESUMPTIONS.

The presumption that defendant corporation resided in county where suit was started, indulged in order to uphold the court's jurisdiction, is not overcome by a return of service in another county stating that defendant's president was served at defendant's business office therein since the recital as to defendant's office is surplusage.

##### 3. CORPORATIONS $\S$ 507(3)—ACTION—SERVICE—OUTSIDE COUNTY.

If defendant corporation cannot be found in the county where suit is started, service may be had upon it in another county, where its chief officer may be found, under the direct provisions of Rev. St. 1909, § 1768.

##### 4. CORPORATIONS $\S$ 503(1)—ACTION—VENUE—PRESUMPTIONS.

In view of Rev. St. 1909, § 8339, requiring articles of agreement in incorporation of business corporations to state place where located, for purpose of suit such corporation is presumed a resident of place named, and where plaintiff is resident of that place and cause of action there accrued, suit is properly instituted there under Rev. St. 1909, § 1754.

##### 5. APPEAL AND ERROR $\S$ 911(3)—PRESUMPTIONS—JURISDICTION.

It will be presumed upon appeal that defendant corporation resided in the county in

which suit was instituted, when necessary to uphold the jurisdiction of a court of general jurisdiction.

**6. VENUE**  $\S$  14—NOTE—CAUSE OF ACTION—ACCRUAL.

A cause of action on notes accrues at the place they were executed and made payable.

**7. CORPORATIONS**  $\S$  503(2)—ACTION—VENUE.

Under the direct provisions of Rev. St. 1909,  $\S$  1754, a corporation may be sued in the county where the cause of action accrued.

Appeal from Circuit Court, St. Charles County; Edgar B. Woolfolk, Judge.

Suit by St. Charles Savings Bank against Thompson & Gray Quarry Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The plaintiff brought this suit in the circuit court of St. Charles county against the defendant on two promissory notes, aggregating about \$23,250 and interest, executed in that county.

The judgment was for plaintiff for the full amount sued for, and the defendant duly appealed the cause to this court.

The petition was in the usual form, alleging that the plaintiff was a banking corporation, and that the defendant was a business corporation, both organized under the laws of this state; that the former was located at St. Charles, Mo., and that the defendant borrowed the money sued for from it and executed the notes sued on to it therefor.

The writ and petition were served upon John W. Thompson in the city of St. Louis.

The defendant did not answer the petition, but appeared specially, and filed a motion to quash the return of the sheriff, and to dismiss the suit because the court had no jurisdiction of the cause. The material parts of this motion are as follows:

On the return day of the writ the defendant, by a limited appearance, filed a plea to the jurisdiction and a motion to quash the service of the summons.

His pleading set up as grounds therefor the following:

First, that the suit was instituted in St. Charles county, and that the duplicate summons to the sheriff of St. Charles county to the sheriff of the city of St. Louis had been returned non est; that the alias summonses which were issued to the sheriff of the city of St. Louis, and served upon John W. Thompson in the city of St. Louis, were and are insufficient to give the circuit court of St. Charles county jurisdiction in the matter or to compel the defendant to appear and defend the case.

Second, because section 1751, R. S. 1909, requires that when a defendant is a resident of this state suits must be brought in

the county in which the defendant resides, or in the county in which the plaintiff resides, or in the county in which the plaintiff resides and the defendant may be found; that the petition alleges that the plaintiff's place of business is in St. Charles county; that there is no allegation in the petition as to where the defendant's principal office or place of business is (note—The petition does allege that the defendant has no place of business or officer upon whom process could be served in St. Charles county); that the return of the sheriff of St. Charles county showed that the defendant could not be found in St. Charles county; that the return of the sheriff of the city of St. Louis showed that service was had upon John W. Thompson, describing him as president of the defendant, and at the time in the defendant's office and in charge thereof, in the city of St. Louis; that for the purposes of this motion the returns must be taken as true, and therefore the suit was improperly brought in St. Charles county, and should have been brought in the city of St. Louis.

Third, that section 1765, R. S. 1909, provides that in all actions against a corporation if shall be sufficient to issue a summons, directed as in this article provided, and returnable in like manner, and subject to the same rules and regulations of like process in case of individuals; that section 1766, R. S. 1909, provides for service on the president or other chief officer of such company, or, in his absence, by leaving a copy thereof with any person having charge thereof, and if the corporation have no business office in the county where the suit is brought, or if no person be found in charge thereof, and the president or chief officer cannot be found in said county, the summons shall be issued directed to the sheriff of any county in this or any other state where the president or chief officer of said company may reside or be found, or where any office or place of business may be kept and the service shall be as above; that under section 1765 the summons against a corporation is made "subject to the same rules and regulations as a like process in case of individuals," and under section 1766 the service "shall be the same as above," and section 1751 provides that suits shall be begun in the county in which the defendant resides or in which the plaintiff resides and the defendant may be found, and section 1765 provides that suits against a corporation shall be "subject" to the same rules and regulations as like process in case of individuals, and as an individual residing in the city of St. Louis could not be sued by a plaintiff residing in St. Charles, and be brought in the St. Charles circuit court by a summons served upon him in the city of St. Louis, it follows that a corporation whose place of

business and officers are in the city of St. Louis could not be sued in St. Charles county, and be brought into court by a summons served in the city of St. Louis; that section 1751 regulates the place for bringing suits against both individuals and corporations, and section 1765 makes suits against a corporation subject to the same rules and regulations as suits against individuals, and section 1766 does not affect the place of bringing suits. It only regulates the manner of service of writs. Therefore this suit could not be brought in St. Charles county, but should have been brought in the city of St. Louis, where the sheriff's return shows the defendant resided.

Fourth. That the circuit court of St. Charles county had no jurisdiction over the person of the defendant.

No evidence whatever was introduced to prove the facts stated in said motion. The motion was taken up by the court and overruled, and the defendant duly excepted.

Thereupon the plaintiff introduced its evidence, the defendant introducing none, and, the cause having been submitted to the court on the pleading and evidence, the court found for the plaintiff, and rendered judgment for it for the sum of \$38,437.89.

None of the evidence introduced was preserved in the bill of exceptions; it simply recites the fact that the plaintiff introduced its evidence.

In due time and in proper form the defendant filed its motion for a new trial, and assigned the two following grounds therefor:

First. Because the court erred in overruling defendant's plea to the jurisdiction of the court and motion to quash the return of the sheriff of the city of St. Louis.

Second. Because the action of the court in overruling defendant's plea to the jurisdiction, and in holding that it had jurisdiction, violates section 10, art. 2, Bill of Rights of Missouri, Constitution 1875, and also violates the Fourteenth Amendment to the Constitution of the United States, and because section 1754, R. S. 1909, is unconstitutional for the same reasons.

This motion was by the court overruled, and the defendant duly excepted, and appealed the cause to this court.

Marshall & Henderson, of St. Louis, for appellant.

Theodore C. Bruere and C. W. Wilson, both of St. Charles, for respondent.

WOODSON, J. (after stating the facts as above). I. Counsel for the defendant seem to stress the fact that the petition does not charge that the defendant had a place of business in St. Charles county, and for that reason that the circuit court of that county acquired no jurisdiction over the person of the defendant.

[1] There is no merit in this position. It

is elementary that where the court trying the cause is one of general jurisdiction, such as our circuit courts, both at law and in equity, nothing shall be intended to be out of its jurisdiction save that which affirmatively appears to be so. *Hamer v. Cook*, 118 Mo. 476, 24 S. W. 180; *Gates v. Tusten*, 89 Mo. 13, 14 S. W. 821; *McClanahan v. West*, 190 Mo. 309, 13 S. W. 674; *Adams v. Cowles*, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74.

In other words, the rules of good pleading do not require jurisdictional facts to be pleaded when suits are instituted in such courts.

The authorities even go further along that line. They uniformly hold that where the record of a court of general jurisdiction shows that it assumed to exercise jurisdiction over a person or subject-matter, in the absence or silence of the record as to any fact showing acquisition of jurisdiction or how it was acquired, the jurisdiction is presumed. *Huxley v. Harrold*, 62 Mo. 516; *Gates v. Tusten*, supra; *Schad v. Sharp*, 95 Mo. 573, loc. cit. 576, 8 S. W. 549; *Pembroke v. Hannibal and St. Joseph Railroad Co.*, 32 Mo. App. 61, loc. cit. 69; *State v. Rogers*, 36 Mo. 138; *Wentzville Tobacco Co. v. Walker*, 123 Mo. 662, 27 S. W. 639.

[2] Counsel for the defendant do not seem to controvert the correctness of the rule of law just announced, but insist, if I correctly understand them, that because of the return of non est of the summons made by the sheriff of St. Charles county, and the return of the sheriff of the city of St. Louis, wherein he stated that he served the same in that city on March 31, 1916, by delivering a copy of the writ and petition "to John W. Thompson, he being the president of the within-named defendant, Thompson & Gray Quarry Company (a corporation), he being at the time in said defendant's usual business office and in charge thereof."

Counsel for the defendant insist that the returns just mentioned conclusively show that the defendant was not a resident of St. Charles county, but was a resident of the city of St. Louis.

This insistence is not tenable for the reason that the quoted part of the return of the sheriff of the city of St. Louis was and is mere surplusage, and is in no sense an essential or proper part of the return. The service was had upon John W. Thompson, the president of the defendant company, and where the service is made upon the president or other chief officer of a corporation, section 1766, R. S. 1909, does not require that the service be made in the office of the company, and as previously stated, where the service is had upon the president or other chief officer, the return need not recite that the service was had in the business office of the company, nor is such a recital



either proper or necessary, but, if made, it is mere surplusage, and may be rejected. *Regent Realty Co. v. Armour Packing Co.*, 112 Mo. App. 271, loc. cit. 279, 280, 86 S. W. 880.

The remainder of said statute, in so far as is here material, provides: And if the corporation has no business office in the county where the suit was brought, or if no person be found in charge thereof, and the president or chief officer cannot be found in such county, a summons shall be issued and directed to the sheriff of any county in the state where he may be found and there served.

[3] The return non est of the sheriff of St. Charles county showed that the defendant could not be served in that county, so, under the express provisions of the statute just mentioned, the writ was properly directed to the sheriff of the city of St. Louis, who, the return shows, served it upon John W. Thompson, the president of the company.

We are therefore of the opinion that that service was good.

[4] II. Moreover, section 3339, R. S. 1909, requires that in the incorporation of business companies the articles of agreement shall state the town or city and county in which the corporation is to be located. This statute was evidently enacted for the purpose of fixing the residences of all such corporations; and, that being true, then we have the record showing that the plaintiff is a resident of St. Charles county, that the cause of action sued on accrued in that county, and a presumption that the defendant was also a resident of St. Charles county.

Under those facts suit was properly brought under section 1754, R. S. 1909, in that county, because plaintiff and defendant both reside or were located there, and the cause of action sued on accrued in that county.

[5] But counsel for defendant insist we have no authority for presuming that the defendant was a resident of St. Charles county. In that we think counsel are mistaken.

Counsel for plaintiff insists that the evidence showed that the defendant was a St. Charles county corporation, and there is no showing to the contrary.

Under the authorities previously cited the court will presume that such was the fact, for they hold that where the record of a court of general jurisdiction shows that it assumed to exercise jurisdiction over a person or the subject-matter of a suit, in the absence or silence of the record, as to any fact showing acquisition of jurisdiction or how it was acquired, the existence of the facts conferring the jurisdiction will be presumed. If that fact was shown, then unquestionably the court acquired jurisdiction

over the defendant; and if we indulge the presumption that it was shown, which we have the right to do under the authorities mentioned, which is consistent with jurisdiction, then the mere omission of the evidence of the fact from the record in the case would not destroy that presumption.

This insistence is decided against the defendant.

[6, 7] III. There is another valid reason why defendant's motion to quash the service and dismiss the suit was properly overruled, and that is the record shows that the notes sued on were executed by the defendant in St. Charles, Mo., and made payable there. In other words, that the cause of action accrued there.

We have recently held that under section 1754, R. S. 1909, a corporation may be sued in the county where the cause of action accrued. *State ex rel. v. Gantt*, 274 Mo. 490, 203 S. W. 964; *Gold Issue Mining-Smelting Co. v. Pennsylvania Fire Insurance Co.*, 267 Mo. 524, 184 S. W. 999.

For the reasons stated, the judgment of the circuit court is affirmed.

All concur, except BOND, C. J., not sitting.

# WALL v. MAYS et al. (No. 19534.)

(Supreme Court of Missouri, Division No. 1.  
March 28, 1919.)

## 1. REFORMATION OF INSTRUMENTS $\S$ 36(3)— MUTUAL MISTAKE—PETITION.

A petition to reform a deed because of mutual mistake held defective, because not alleging that the scrivener, who made the mistake, was acting for both parties, or that the mistake was mutual.

## 2. REFORMATION OF INSTRUMENTS $\S$ 45(4)— MUTUAL MISTAKE — DEGREE OF PROOF — DEEDS.

One seeking to reform a deed, because of mutual mistake, has the burden of showing the real contract, and the mutual mistake, by clear and convincing evidence.

## 3. REFORMATION OF INSTRUMENTS $\S$ 45(4)— MUTUAL MISTAKE — SUFFICIENCY OF EVIDENCE.

Evidence held not to sustain a finding of mutual mistake in a deed, where the failure of the grantor, grantee, and scrivener to testify was not explained.

## 4. EVIDENCE $\S$ 353(4)—ADMISSIBILITY.

In action to reform a deed and quiet title against plaintiff's predecessor in title, a recital in a deed between two intermediate holders of title is inadmissible against defendant.

Appeal from Circuit Court, Shannon County; W. N. Evans, Judge.

Suit by H. W. Wall against George Ann Mays, W. E. Mays, and A. C. Honeycutt. Judgment for plaintiff, and defendants Mays appeal. Reversed and remanded, with directions.

S. A. Cunningham, of Eminence, and J. W. Chilton, of Springfield, for appellants.

BLAIR, P. J. This is a suit to reform a deed and quiet title to 40 acres of land in Shannon county. Judgment for plaintiff on both counts was followed by this appeal. Honeycutt was named as a defendant, but did not appear, answer, or appeal.

It is admitted that appellant "George Ann Mays is the common source of title." On October 8, 1912, George Ann Mays and W. E. Mays, her husband and coappellant, conveyed the land in suit to A. C. Honeycutt. This deed was recorded October 14, 1912. January 21, 1913, George Ann Mays and husband sued to cancel and set aside the deed to Honeycutt of October 8, 1912. Fraud was alleged and proved, and on May 15, 1913, the circuit court duly decreed the cancellation of the deed in question. No appeal was taken. May 21, 1913, there was filed in the office of the recorder of deeds for Shannon county a deed from Honeycutt to M. E. Jackson, in which the described land was "the northwest quarter of the southeast quarter of section 21, Twp. 27, R. 6," in Shannon county. On November 26, 1913, there was filed for record in the same office a deed executed by M. E. Jackson and purporting to convey to respondent the land in suit. This deed was dated May 6, 1913. July 13, 1914, respondent began this suit, which was returnable to the January, 1915, term of the Shannon circuit court. An answer was filed. In addition to the deeds already mentioned respondent offered in evidence a deed from A. C. Honeycutt and wife, executed under date of April 22, 1915, to M. E. Jackson as grantee, and recorded May 11, 1915, which described the land in suit and contained the following recital:

"This deed is made to correct the description in a certain warranty deed made by the parties of the first part to the party of the second part, dated October 24, 1912, and filed for record May 21, 1913, and recorded in Book 62, page 309, in this: That by mistake of the notary in writing the deed the description should have been thirty-one, instead of section twenty-one, this is in section \* \* \* northwest quarter of the southeast quarter, section 21, township 27, range 6, west."

This deed was acknowledged at Iola, Kan., May 6, 1915.

Respondent testified he had lived in Howell county since the spring of 1912; that he was in Kansas City, and bought the land from Jackson, whom he had not previously known more than two months, and whose occupation he did not know; thought he was

a real estate agent; that he had not seen the land before he bought it, and knew nothing of the title until thereafter, and did not know of the suit then pending affecting it; that Honeycutt directed him to Jackson, and he took the word of the two as to the value, paying \$1,200 for this and two other tracts; that he paid in inherited cash, and not by check; that a Mr. Carlyle had told him something about the land; bought the land in Kansas City, without seeing it, or seeing an abstract, though he lived in Willow Springs at the time.

This fairly presents the evidence.

The prayer for reformation is based upon allegations that "by a mistake of the scrivener in the preparation of said deed" land in section 21 was erroneously described instead of the land in section 31; that Honeycutt owned no land in section 21, but owned the land in section 31, and intended to convey it to Jackson.

[1] I. The petition falls to allege that the mistake was mutual. It is alleged the scrivener made a mistake, but it is not alleged he was acting for both parties. The first count states no cause of action. *Dougherty v. Dougherty*, 204 Mo. loc. cit. 240, 102 S. W. 1099; *Robinson v. Korn*, 250 Mo. loc. cit. 674, 157 S. W. 790.

[2-4] II. The burden was upon respondent to make out his proof of the contract and of the mistake, and of its mutuality, by evidence that was clear and convincing. *Dougherty v. Dougherty*, supra; *Robinson v. Korn*, supra; *Parker v. Vanhoozer*, 142 Mo. loc. cit. 627, 44 S. W. 728. Despite the deference due the finding of the learned trial judge, it is our duty in this case to weigh the evidence.

(a) A careful examination of the record shows there is no evidence that the mistake was mutual. There was, in fact, no substantial effort to make proof of that fact. Neither Honeycutt, nor Jackson, nor the scrivener was called to prove either the contract or the mistake. No explanation of the failure to call them was made.

(b) The evidence offered falls short of proving any fact in the requisite manner. Respondent's testimony rather arouses suspicion than engenders belief. The recital in the deed of 1915 is not an admission as against appellants. They are not privy to the transaction between Honeycutt and Jackson. It is inadmissible as a declaration. The record shows a total failure of proof on the first count.

III. The second count depends entirely upon the first. Respondent neither has nor claims any interest in the land in suit, except through the deed from Jackson. The judgment must therefore be reversed.

IV. Appellants, in their answer, set up their title and pray that it be determined and adjudged. The record discloses they are entitled to this relief.

The judgment is reversed, and the cause is remanded, with directions to enter judgment quieting title in George Ann Maya.  
All concur.

### WIARD v. DUNHAM et al.

(Supreme Court of Missouri, Division No. 1.  
March 28, 1919.)

#### 1. CARRIERS ⇐283(3) — COMMON CARRIERS — ASSAULT ON CONDUCTOR — RIGHT OF SELF- DEFENSE.

Though conductors of railway cars, both street and steam, cannot lawfully assault a passenger, their position and employment do not deprive them of the right of self-defense; and, if wrongfully assaulted, they have the same right of self-defense accorded to the ordinary citizen.

#### 2. CARRIERS ⇐321(4) — CARRIAGE OF PAS- SENGERS — INJURIES AT HANDS OF CONDUCTOR — INSTRUCTION.

In action against street railroad for injuries to passenger, in view of evidence, instruction that mere fact the conductor was on duty and in charge of the car did not deprive him of his right to defend his person, and that, if plaintiff attempted to strike him without being first assailed, plaintiff could not recover, *held* proper, though plaintiff's evidence was to the contrary.

Appeal from Circuit Court, Jackson County; Daniel E. Bird, Judge.

Action by O. S. Wiard against R. J. Dunham and Ford F. Harvey, Receivers of the Metropolitan Street Railway Company, resulting in verdict for defendant. From ruling granting plaintiff new trial, defendant appeals. Order granting new trial reversed, and cause reversed and remanded to reinstate verdict for defendant and enter proper judgment thereon.

R. J. Higgins, of Kansas City, for appellants.

Moore & Leacy, of Kansas City, for respondent.

GRAVES, J. Action for damages. Plaintiff avers that he tendered his full fare for passage over the defendant's line of railway, and thereby became a passenger on one of defendant's cars. The petition then proceeds:

"And that plaintiff was, without cause or reason and while a passenger as aforesaid, assaulted, beaten, and bruised by the conductor, the same being a servant, agent, and employé of said defendants, and said conductor, with force and arms, wrongfully, unlawfully, and maliciously made an assault upon this plaintiff, and with an iron bolt of great weight, same being about six inches long and having an iron head or knob on the end, said knob or head being about 2½ inches across, pounded, bruised,

and ill treated this plaintiff, and did then and there use vile and profane language toward this plaintiff. All of said wrongful, unlawful, and malicious acts were done without any cause, justification, or provocation whatever."

The prayer is for actual damages in the sum of \$5,000 and punitive damages in the sum of \$10,000. Answer was a general denial. Trial was had before a jury, which under the instructions of the court found a verdict for the defendant. Plaintiff filed motion for new trial, which was by the trial court overruled. This was on December 11, 1915, and at the regular November term of the court. Later, on December 18th, and at the regular November term of the court, the court of its own motion set aside the order of December 11th, overruling plaintiff's motion for new trial, to which defendant excepted.

Afterward at the regular January term of said court, and on the 29th day of January, 1916, the court sustained the plaintiff's motion for new trial, theretofore filed on December 11th, on the ground that the court had erred in giving instruction D-1, which reads:

"The court instructs the jury that the mere fact that the conductor was on duty and in charge of the car did not deprive him of his rights as a private citizen, and the conductor had a lawful right, while in charge of said car, to defend his person against assaults from violence, offered by any one on the car, whether passengers or not. And if you believe from the evidence that the plaintiff attempted to strike, fight, or assault said conductor on said car, without being first assailed or assaulted by said conductor, then the plaintiff cannot recover in this case, even though the conductor did thereafter strike the plaintiff, provided the conductor was acting in self-defense and used no more force than was necessary for the proper protection of his person against assault or violence by the plaintiff."

From this ruling granting a new trial the defendant has appealed. Further details can best be stated in the course of the opinion. Respondent does not favor us with a brief.

I. No one contests the proposition of the duty of the railway company and its servants to safely carry a passenger. That question, however, is not really in this case. We can take only the record here. The court gave the reasons for setting aside the unanimous verdict of the jury in this case. Evidence was fully presented upon both sides. The reason assigned by the court, which is the only reason assigned to us, is that there was error in giving this instruction for the defendant. It does not appear to be seriously contended that the plaintiff was not a passenger at the time. We shall proceed upon the theory that he was, and that there was thereby charged the imposed duty of safe carriage, and especially the duty of seeing that there were no unwarranted assaults up-

on him by the servants of this carrier. But these general doctrines do not reach the meat of this case. The real issue we take next.

[1] II. For the defendant there is ample and positive testimony that this plaintiff, without just provocation, began an assault upon the conductor of the defendant, and that in self-defense the conductor inflicted whatever, if any, injuries there were inflicted upon the plaintiff. Nor is there proof that his acts were more than necessary to repel the assault. Whilst conductors of railway cars, both street and steam, cannot wrongfully assault a passenger, yet their position and employment do not rob them of the God-given right of self-defense. If wrongfully assaulted, they have the same right of self-defense, which is accorded to the ordinary citizen. To otherwise write the law would be a travesty.

[2] The sole question in this case, as we have it presented, is the propriety of this instruction D-1 for defendant. With the evidence in the record indicated above, this instruction was proper. That plaintiff's evidence was to the contrary does not change the situation. The defendant was entitled to an instruction presenting the theory sustained by its evidence. This evidence tended to show an uncalled-for assault by the plaintiff upon the conductor, and that the conductor used no more force than was necessary to repel the assault.

This court has fully recognized the principle announced in this instruction. In *O'Brien v. Transit Co.*, 185 Mo. loc. cit. 269, 84 S. W. 941, 105 Am. St. Rep. 592, Valliant, J., said:

"But whilst care on the part of the carrier for the safety and kind treatment of the passenger are required, yet so also are required care on the part of the passenger for his own safety and decent behavior. If the passenger assaults the conductor, the latter has a right to defend himself, and if in a personal combat between the passenger and the conductor, brought on by the passenger's wrongful assault, the latter is injured, the carrier is not liable. If, as the defendant's evidence tended to prove, *O'Brien* struck the conductor and then seized him and dragged him off the car to the sidewalk, it was then an affair between man and man, and the defendant was not liable for what happened on the sidewalk."

Citation of further cases is not called upon this point. The doctrine is so consonant with reason that precedents are not required. The trial court erred in setting aside the verdict for defendant, for the reason assigned by the court. No other reason is assigned to us. The order granting a new trial is reversed, and the cause reversed and remanded, with directions to the trial court to reinstate the verdict for defendant, and enter a proper judgment thereon.

All concur.

**FRANKLIN COUNTY v. MISSOURI PAC. RY. CO. (No. 19920.)**

(Supreme Court of Missouri, Division No. 1. March 28, 1919.)

**EMINENT DOMAIN — \$95 — DAMAGES — RAILROAD RIGHT OF WAY TAKEN FOR HIGHWAY.**

Railroad over whose right of way a public road has been condemned is entitled to receive compensation for all damages that may be reasonably anticipated and ascertained, but is not entitled to the expense of installing and the cost of maintaining electric bell at the crossing; such bell being necessary as a safeguard against accidents.

Appeal from Circuit Court, Franklin County; R. A. Breuer, Judge.

Suit by the County of Franklin against the Missouri Pacific Railway Company for purpose of condemning right of way and opening public road over right of way of defendant. From judgment awarding defendant less than claimed by it, defendant appeals. Affirmed.

The plaintiff instituted this suit in the county court of Franklin county against the defendant for the purpose of condemning a right of way and opening a public road over the right of way of the defendant company. The county court awarded the defendant \$100 damages, and in due time the defendant appealed the cause to the circuit court, where the trial resulted in a judgment for the defendant for the sum of \$57.82, and the defendant appealed the cause to the St. Louis Court of Appeals, which, upon motion, transferred the cause to this court (183 S. W. 1099), because Franklin county was a party to the suit, and because the title to real estate was involved.

The cause is submitted to this court upon the following agreed statement of facts, in lieu of the bill of exceptions:

It is hereby stipulated between attorneys for appellant and respondent that the following is a correct statement of facts and synopsis of the evidence in this case, and may be considered by the appellate court in lieu of the bill of exceptions.

This was an appeal from the county court of Franklin county, Mo., in a condemnation proceeding instituted by the county whereby a public road was opened across the Missouri Pacific right of way near Little Berger Creek Bridge in Franklin county. Appellant was allowed \$100 damages. It claimed more, and the appeal to the circuit court was from an order of the county court assessing said damages. The sufficiency of the proceedings in the county court was not questioned.

Appellant constructed the crossing and likewise erected a crossing bell.

At the trial of this case in the circuit court the damages claimed by appellant were: (1) For the amount expended in constructing the crossing proper, which, by stipulation, was fixed

at \$57.82. (2) The amount expended in constructing the crossing bell, which, by stipulation, was fixed at \$240.20. (3) For such amount as appellant would in the future be required to expend in maintaining the crossing proper. (4) And for such amount as appellant would in the future be required to expend in maintaining the crossing bell.

Appellant made no claim for damages on account of the land taken and covered by said public road.

The county court did not order the construction of the crossing bell and denied any liability for the expense thereof. It likewise denied liability for future expenditures necessary for maintaining the crossing and crossing bell.

The board of railroad and warehouse commissioners did not order an electric bell to be installed, but appellant placed it there of its own volition and on its own motion.

These were the issues presented in this case.

The evidence tended to show that there had previously been a public road under the Missouri Pacific track near the location of the present crossing. A bridge was recently built by the county over Little Berger creek, and to facilitate the approach to this bridge the county surveyor recommended a change in the location of the public road, with the result that the crossing in question was opened across appellant's right of way.

The crossing in question is a grade crossing, and is at a point where the railroad track is curved and where the bluffs on one side of the track to a certain extent obstruct the view. Appellant introduced evidence tending to show that this was a dangerous crossing and that the construction of an alarm bell was a reasonably necessary precaution. Respondent introduced evidence to the contrary.

Expert testimony as to the probable cost of maintaining the crossing and crossing bell was likewise introduced.

The law in this case is the only point at issue and is fully covered by the instructions. If the appellate court holds that any or all of appellant's refused instructions correctly state the law which they purport to cover, then this case should be remanded. If appellant's instructions were, as a matter of law, properly refused notwithstanding the facts, then this case should be affirmed.

The court, sitting as a jury, found appellant entitled to damages for the construction of the crossing (excluding alarm bell) and assessed its damages at the sum of \$57.82.

All objections to any and all irregularities of the record in the county court and the record on which this appeal rests are hereby waived, and it is agreed that the only issue before this court relates to the instructions hereinafter set forth.

[Signatures omitted.]

The following instructions requested by plaintiff were refused by the court, to which action of the court exceptions were duly served:

(A) The court assesses defendant's damages for the construction of the crossing and crossing bell mentioned in the evidence at \$298.02, and the court shall allow defendant such additional damages as it may believe from the evidence will compensate defendant for its fu-

ture expenditures in keeping said crossing and crossing bell in repair.

(B) The court declares the law that the court sitting as a jury shall assess defendant's damages as follows:

First. Such amount as defendant has expended in constructing the crossing in question, which the court declares is admitted by the parties to be the sum of \$57.82.

Second. Such amount, if any, as the court sitting as a jury may believe defendant entitled to, under the other instructions herein, for expenditure by it in the construction of the crossing bell in question.

Third. Such amount as the court sitting as a jury may believe from the evidence defendant will be required to expend in maintaining and repairing the crossing in question aside from the alarm bell.

Fourth. Such amount as the court may believe from the evidence defendant will be required to expend in maintaining and repairing the alarm bell in question provided the court sitting as a jury shall find defendant entitled to damages on account of the construction of said alarm bell.

(C) The damages, if any, due the defendant for future expenditures in maintaining and repairing the crossing and crossing bell, or either, shall be ascertained as follows, to wit:

(1) Determine such amount as the court sitting as a jury may believe from the evidence defendant will be required to expend per annum in maintaining and repairing same; (2) divide this amount by 6; and (3) multiply the result by 100.

(D) If the court believes from the evidence that the crossing in question is dangerous to the traveling public, due to the topographical surroundings, and that the installation of the alarm bell in question is not an unreasonable precaution upon the part of the railroad company, then the court sitting as a jury shall allow said company as an item of damages herein such amount as it shall have expended for the installation of said alarm bell, which is the sum of \$240.20.

(E) The court sitting as a jury shall assess as an item of defendant's damages such amount, if any, as the court may believe from the evidence will be required to expend for future maintenance of and repairs to the crossing (excluding the electric signal bell) mentioned in evidence.

The following instructions were given by the court at the instance of plaintiff, to which action of the court the defendant duly excepted:

(1) The court declares the law to be that the defendant is not entitled to any damages in this case on account of putting in an electric crossing bell, nor for the expense of maintaining said bell.

(2) The court declares the law to be that if he, sitting as a jury, find from the evidence that said electric bell is merely a precaution exercised by the railway company to lessen the liability for accident, and that said bell was not required by the county court or the railroad and warehouse commissioners of Missouri, then said railway company cannot recover for erecting or maintaining said bell.

C. D. Corum, of St. Louis, for appellant.  
Jesse M. Owen, of Union, for respondent.

WOODSON, J. (after stating the facts as above). I. The instructions given, and refused in this case present but a single legal proposition for determination, and that is: Is the county liable to the railroad company for the expense of installing and maintaining an electric alarm bell, which it is contended is reasonably a necessary precaution for the safety of the traveling public in crossing the railroad upon said public road.

Generally speaking, the rule of law in this state is unlike what it is in many of the other states in the Union, in that a railroad company over whose right of way a public road has been condemned is entitled to receive compensation for all damages that may be reasonably anticipated and ascertained. *Kansas City v. Kansas City Belt Railway Co.*, 102 Mo. 633, loc. cit. 641, 14 S. W. 808, 10 L. R. A. 851; *Kansas City Suburban Belt Railway Co. v. Kansas City, St. Louis & Chicago Railway Co.*, 118 Mo. 599, loc. cit. 621, 24 S. W. 478; *St. Louis & San Francisco Railway Co. v. Gordon*, 157 Mo. 71, loc. cit. 79, 57 S. W. 742; *Grand Avenue Railway Co. v. People's Railway Co.*, 132 Mo. 34, loc. cit. 45, 33 S. W. 472.

But the cases throughout the country draw a distinction between the class of damages mentioned in the cases just cited, which consist of compensation for the land taken, the cost of constructing the crossings, gates, cattle guards, fencing, etc., and those to be incurred on account of company being compelled to obey the police regulations of the state and the municipal corporations thereof.

We have been cited to no case holding that the county is liable for the expense of installing and maintaining the electric bell and cost of maintaining it, but there are numerous cases holding to the contrary. *Kansas City Suburban Belt Ry. Co. v. Kansas City, St. Louis & Chicago Ry. Co.*, supra, 118 Mo. loc. cit. 622, 24 S. W. 478; *Plymouth v. Pere Marquette Ry. Co.*, 139 Mich. 347, loc. cit. 349, 102 N. W. 947; *Peoria & Pekin Union Railway Co. v. Peoria & Farmington Railway Co.*, 105 Ill. 110; *Chicago & Alton Railway Co. v. Joliet, Lockport & Aurora Railway Co.*, 105 Ill. 388, 44 Am. Rep. 799; *Massachusetts Central Railway Co. v. Boston, Clinton & Fitchburg Railway Co.*, 121 Mass. 124; *Lake Shore & Michigan Southern Railway Co. v. Cincinnati, Sandusky & Cleveland Railway Co.*, 30 Ohio St. 604, and cases cited; *Boston & Albany Railroad Co. v. City of Cambridge*, 159 Mass. 283, 34 N. E. 382.

The true rule as announced by all the authorities is correctly stated by Mills, in his excellent work on Eminent Domain, in section 44a, p. 140 (2d Ed.), in this language:

"\* \* \* The railroad corporation, across whose road another railroad or a highway is laid out, has the like right as all individuals or bodies corporate, owning lands or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures on the land, or changes in its surface, absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accommodate its own land to the new condition. But it is not entitled to damages for the interruption and inconvenience occasioned to its business; nor for the increased liability to damages from accidents; nor for increased expense for ringing the bell; nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travelers crossing the railroad; nor for the expenses of maintaining a flagman, alleged to be necessary to guard against the greater liability to accidents occasioned by the obstruction of the view along its railroad, at the crossing of a highway, by means of the abutments of the new railroad of the other corporation."

We are of the opinion that the expense of installing and the cost of maintaining the electric bell mentioned clearly fall within the rule just announced, and, for that reason, the action of the court in refusing the instructions asked by the defendant were properly refused, and that those asked for by plaintiff were properly given.

This ruling applies to and disposes of all the other questions in the case.

For the reasons stated, the judgment of the circuit court is affirmed.

All concur.

TUNNICLIFF et al. v. WATTS et al.  
(No. 19797.)

(Supreme Court of Missouri, Division No. 1.  
March 28, 1919.)

1. APPEAL AND ERROR  $\S$  590—AMENDMENT OF ABSTRACT OF RECORD.

Where the abstract of the record proper does not substantially conform to the rules of the Supreme Court, a request to amend comes too late after motion to dismiss or affirm has been filed.

2. APPEAL AND ERROR  $\S$  689(1)—FAILURE TO COMPLY WITH RULES AS TO ABSTRACT OF RECORD.

Failure to conform to the rules of the Supreme Court in the preparation of the abstract of the record proper held not excused by fact that appellant's counsel was a member of a legal advisory board, and, devoting most of his time to such duties, was necessarily greatly hurried in his preparation; nor by the fact that he was inexperienced in appellate practice.

**3. APPEAL AND ERROR §-591—DISMISSAL—  
ABSTRACT OF RECORD—MOTION FOR NEW  
TRIAL.**

Although abstract of record proper fails to show motion for new trial was filed, the appeal will not be dismissed, when the petition, answer, and reply are properly abstracted, for then the court will look to the certified copy of the judgment and the order allowing the appeal on file in the office of the clerk.

Appeal from St. Louis Circuit Court;  
George H. Shields, Judge.

Suit by Nelson H. Tunnicliff and others against Thomas J. Watts, Jr., and others. From a judgment for defendants, plaintiffs appeal. Respondents move to dismiss the appeal, or affirm the judgment, because of failure to comply with rules of the Supreme Court. Motion sustained, and judgment affirmed.

This suit was brought in the circuit court of the city of St. Louis by the plaintiffs against the defendants to partition certain real estate described in the petition. The judgment of the trial court was for the defendants, and the plaintiffs timely appealed the cause to this court.

At the threshold of this case we are confronted with a motion to dismiss the appeal, or affirm the judgment, because the appellants failed to comply with the rules of this court relative to the preparation and printing the abstract of the record.

First. Because the abstract of the record proper fails to show that a judgment was rendered by the trial court.

Second. Because the printed abstract of the record proper fails to show that a motion for a new trial was filed and overruled by the trial court.

Third. Because the printed abstract of the record proper fails to show that an affidavit for appeal was filed, or that the appeal was duly allowed.

Fourth. Because the printed abstract of the record proper fails to show that a bill of exceptions was filed.

Fifth. Because the printed abstract of the record proper fails to show where the abstract of the record proper ends and the bill of exceptions begins, and nothing in said abstract to distinguish matters of record proper and matters of exception.

The facts stated in the motion are true, and counsel for the appellants ask leave to amend the abstract by inserting the omitted parts, and files the following affidavit in support of his request, viz:

"Francis X. Geraghty, being duly sworn, on his oath states that during the year 1918 he was member of legal advisory board, division 26, St. Louis, Mo., and as such member devoted most of his time to the duties of said office, so that he was necessarily greatly hurried in

preparation of abstract of record and argument and brief in this cause, and, being inexperienced in appellate practice, unintentionally omitted a formal statement of the record proper separate and apart from the bill of exceptions.

"Your petitioner asks leave to insert two pages recounting these statements."

Counsel for appellants have printed the omitted matters mentioned in the motion to dismiss, and tender them in this court with a request that the abstract of the record be amended by inserting them therein.

F. X. Geraghty, James Copran, and Frank Landwehr, all of St. Louis, for appellants.  
Aug. Wals, Jr., and W. G. Carpenter, both of St. Louis, for respondent Hennessey.

WOODSON, J. (after stating the facts as above). [1] I. We have uniformly held that, where the abstract of the record does not substantially conform to the rules of this court, the request to amend comes too late after the motion to dismiss or affirm has been filed.

[2] Two excuses for the failure are stated in the affidavit: First, that counsel in the case was a member of legal advisory board, division 26, St. Louis, Mo., and as such member devoted most of his time to the duties of said office, and that he was necessarily greatly hurried in the preparation of the abstract of the record, argument, and brief; and, second, because he was inexperienced in appellate practice and unintentionally omitted the record proper.

The omitted matter covers but two pages of printed matter, and common experience teaches us that it would have taken but a few minutes, an hour at the most, for counsel to have prepared this portion of the abstract, and the affidavit by no means satisfies us that he did not have ample time in which to have done so. The second excuse offered is equally devoid of merit; inexperience in appellate practice certainly is not a legal excuse for failure to comply with the rules. If we should lay that bar down, then there would be no end to excuses for failure to comply with the rules.

[3] Notwithstanding the fact that the abstract of the record fails to show a motion for a new trial was filed, yet we have uniformly held that the appeal will not be dismissed when the petition, answer, and reply are properly abstracted, for then we will look to the certified copy of the judgment and the order allowing the appeal which are on file in the office of the clerk of this court.

The parts of the record proper just mentioned are properly before us, and may be reviewed by this court on appeal. *Coleman v. Roberts*, 214 Mo. 684, 114 S. W. 39; *State ex rel. v. Drainage District*, 271 Mo. 429, 196 S. W. 1115. We have examined those portions of the record proper, and in our opinion

nothing appears therefrom which shows that the judgment is erroneous.

For the reasons stated, the motion is sustained, and the judgment is affirmed.

All concur.

(277 Mo. 556)

**REID v. GEES et al.**

(Supreme Court of Missouri, Division No. 1.  
March 28, 1919.)

**1. LANDLORD AND TENANT §25(1)—LEASE—MUTUALITY.**

A 999-year lease, indicating the payment of one year's rental by the lessee, but without promise by the lessee to do more toward the payment of rent, or to perform any of the things which would be required of a lessee, held void for lack of mutuality.

**2. LANDLORD AND TENANT §25(1), 74, 118(3)—SIGNATURE TO LEASE.**

Under Rev. St. 1909, § 2781, a 999-year lease, signed by lessor only, creates a tenancy at will only, and not an estate for a term of years which can be assigned or granted by the lessee.

**3. EVIDENCE §83(2)—PRESUMPTIONS—RIGHT OFFICIAL CONDUCT.**

The presumption of right official conduct will not effect a presumption that a lessee from a municipality, the ordinance of which authorized the city authorities to sign one copy of a lease and the lessee to sign another, did in fact execute the duplicate contemplated by the ordinance.

Appeal from Circuit Court, St. Charles County; Edgar B. Woolfolk, Judge.

Action by Harry N. Reid against Anton G. Gees and another. From judgment for defendants, plaintiff appeals. Affirmed.

Theo. C. Bruere, of St. Charles, and Montgomery & Montgomery, of Sedalia, for appellant.

M. P. Murray, Carter, Collins & Jones, and Chas. Edmunds Kimball, Jr., all of St. Louis, for respondents.

**GRAVES, J.** Action to determine title and partition certain real estate in St. Charles county, at one time the commons of the city of St. Charles, Mo. In the petition plaintiff alleges that he and Anton G. Gees owned in equal parts a 999-year lease on the property, and that defendants Hagemeler and Gees claim interest in such real estate adverse to him.

The second count is the ordinary one in partition. The leasehold is alleged to have begun July 1, 1838.

By answer defendant Gees avers that defendant Hagemeler is his tenant, and has no further interest therein; that he is the owner in fee thereof; and that there is no valid

lease on the premises commencing July 1, 1838.

The answer then thus proceeds for a space:

"And defendants state: That if there ever was a lease upon said premises, or what purported to be a lease for 999 years, it was a lease purporting to have been made by the trustees of the town of St. Charles, county of St. Charles, state of Missouri, dated (as stated in said petition), and that the date and delivery of such instruments was upon Sunday, for which reason said instrument was void, as a lease, for 999 years; and that, at the time, the town of St. Charles and its trustees did not have any authority from the Legislature of this state to make any lease whatever. That the only authority they then had was to sell the fee of said land and to give the owner of any lease, then existing, peremptory right and priority in the purchase of said real estate, in fee. That these defendants are informed and believe that on Sunday, July 1, 1838, one Alexander T. Douglas, purported to be the clerk of the trustees of the village of said St. Charles or clerk of the town of St. Charles, made a certain writing, in the nature of a lease, to one James Lindsay, which purported to be for a term of 999 years, which paper was afterwards, on the 25th day of May, 1853, improperly spread upon the records of said county, and is a cloud for the title of the defendant Anton G. Gees. That said lease purports to be of commons then belonging to the inhabitants of the town of St. Charles. That, at the time of the execution of said lease, the Legislature of the state of Missouri had not authorized the making of the same. That the title to said commons, including the premises described in the petition, was originally derived from the king of Spain; and the right, title, and interest (being title in fee) was acquired by the government of the United States. That the equitable title to such real estate was conveyed from the government of the United States, subject to the private grants made by the said king which overlapped said territory, to the inhabitants of said town of St. Charles, by an act of Congress approved June 13, A. D. 1812; and that afterwards the legal title to said premises was conveyed to said inhabitants of said St. Charles, by an act of Congress of the United States approved January 27, A. D. 1881, which act of Congress provided, among other things, that the title should so vest, to be sold or disposed of, or regulated, in such manner as might be directed by the Legislature of the state of Missouri. That, pursuant to said acts of Congress, the Legislature of this state did not provide for the leasing of said property, but did provide for the sale of said property, by an act of the Legislature of this state approved December 28, A. D. 1832, and by subsequent acts. That in and by said act of the Legislature it was provided that:

"Section 1. The trustees of the town of St. Charles be, and they are hereby authorized, to sell in fee simple forever, all, or any part, of the town lots, out lots, commonfield lots, or commons, belonging to said town. The said trustees shall, by ordinance, fix upon such time, place, terms and manner of sale, as they shall consider most advantageous to the town.

"Sec. 2. The said board of trustees be, and



they are hereby authorized, to execute deed in fee simple, to any person who may have leased any part of the town lots, out lots, common-field lots or commons for the part by him leased; providing the person holding such lease shall first pay the amount at which his part of the land is estimated in his said lease and surrender the lease to the corporation of said town.

"Sec. 3. The said board of trustees, whenever they sell, or convey any part of said lots or commons, shall execute to the purchaser a deed, with special warranty against the claims of the said town, and all persons claiming under it; which deed shall run in the name of 'the inhabitants of the town of St. Charles' shall be signed and acknowledged by the president of the board of trustees of said town, and shall be effectual to convey to the purchaser, all legal and equitable claim which accrued to the inhabitants of said town, by grant from the Spanish government, or the several acts of Congress, confirming title to said lands."

"That the plaintiff is neither the purchaser, the creditor, nor an heir, capable of inheriting any interest in said lease or leasehold estate; and that the right under which he asserts his claim to an half interest in said leasehold is dark in his petition, so dark that these defendants are unable to ascertain from the petition in what manner or from whom he claims to derive title. That said petition, does not in any of the counts thereof, or in all of the counts thereof, taken as a whole, state facts constituting a cause of action in favor of the plaintiff."

Then follows a plea of the several statutes of limitations. It is then further averred that the alleged and purported lease was surrendered by the then claimants thereof to the city of St. Charles on May 6, 1871, since which time there has never been even a purported lease. That Nathaniel Reid and Isabella Reid (who were the claimants of said lease and who surrendered it) purchased the property from the city of St. Charles as they had the right to do; that they borrowed \$6,000 on the property; that their mortgage or deed of trust was foreclosed, and at the sale John H. Rankin bought the lands; that by ejectment suit Rankin recovered the possession of the land; and that this defendant Anton Gees, by mesne conveyances, acquired the Rankin title. The answer then further proceeds:

"That no right, title, or interest remained in said Nathaniel Reid or Isabella Reid, in and to any part of the real estate, described in the petition, at any time after the recovery from them in said action of ejectment. That no heir of either of them has, or can claim, any interest in or to said real estate, or said leasehold; and that the plaintiff has no inheritable blood, from either said Nathaniel Reid or Isabella Reid, or James Lindsay, Sr. That said James Lindsay, Sr., by an instrument dated the 5th day of April, A. D. 1843, conveyed said real estate (that is to say, his leasehold interest and said lease), one-half to Nathaniel Reid and one-half to Isabella Reid; and afterwards, it being supposed that there was a defect in the conveyance to said Isabella Reid, said

James Lindsay, on the 2d day of February, A. D. 1849, executed his further deed, by which he granted one-half interest in said lease to said Isabella Reid, the language of the grant being: 'I have this day, granted, bargained and sold, and by these presents do bargain, grant and sell, unto her, the said Isabella Reid, and to her heirs and assigns forever, the one undivided half part of the following lots or parcels of ground situated in St. Charles county, state aforesaid, on the commons attached to and belonging to the town of St. Charles, in said county, being the same land leased to me by the board of trustees of said town of St. Charles, by lease dated the 1st day of July, A. D. 1838, for the term of 999 years, from and after that date, and designated on the plat of Evans survey of block No. 4 of said commons, as lots 1, 2, 3, 9, and 10' (the boundary being here omitted for the sake of brevity). That at the time of making of said deeds, the said Isabella Reid was still living and so continued to live until the 24th day of April, A. D. 1914; and that, at the time said undivided half interest in said leasehold was so vested in the said Isabella Reid, this plaintiff had no existence whatever; and that she, the said Isabella Reid, had no heirs whatever; and the said James Lindsay, Sr., was also living, though he died many years ago. That, at the time he made these grants, he had no heirs, for the reason that he was living; and that, by virtue of said conveyance, said Nathaniel Reid and Isabella Reid, each, became the absolute owner of an undivided half of said lease and leasehold interest, which interest was attached to the reversion held and owned by the said city of St. Charles; and afterwards, when said city of St. Charles conveyed its reversionary interests to said Nathaniel Reid and Isabella Reid, as stated aforesaid, said lease became, and was, as a matter of law, absorbed in the higher and larger estates, and the lease thereby ceased to exist; and they held said real estate, in fee, stripped of said lease, by reason of the premises. And, having fully answered, defendants pray they may be discharged."

The reply was a general denial. No question was raised as to the numerous defenses contained in the single count of the answer, which answer is extremely verbose, and covers both counts of the petition.

Finding and judgment for the defendant, and the plaintiff has appealed.

I. I think this case can be determined upon one or two questions which go to the vitals of the case. Plaintiff claims a half interest in an alleged 999-year lease averred to have been made between the town authorities with one James Lindsay. He claims as a belated adopted son of Isabella (Lindsay) Reid, who was the daughter of James Lindsay. We say "belated adopted son" because he was not adopted until he had reached the age of 45 years, and the adopting parent had reached the age of about 70 years. The husband, Mr. Reid, was dead, and the wife, Isabella Reid (at an advanced age), did the adopting. Nor was this long before the institution of the present suit. But for the views which we have, a discussion of this adoption, or other

adoptions hinted at in the briefs, would be aside the question.

The alleged 999-year lease under which the plaintiff claims is as follows:

"This indenture, made and concluded this 1st day of July, 1888, between Ludwig E. Powell (and others), trustees of the town of St. Charles, and their successors in office, of the first part, and James Lindsay, Sr., of the second part, witnesseth:

"The parties of the first part, for and in consideration of the sum of \$6.58%, having by the said party of the second part before the sealing and delivery of these presents been paid into the treasury of the corporation of the town of St. Charles, receipt of which is hereby acknowledged, have granted, bargained, leased and to farm let, and by these presents do grant, bargain, lease and to farm let unto James Lindsay, Sr., his heirs and assigns, five certain lots (then follows a description of the lots) for the term of 999 years and then to be renewed upon payment of half of the aforesaid amount, which said sum of \$6.58% said James Lindsay, Sr., or his assigns shall continue paying therefor during the continuance of this lease, etc., over and above all taxes, etc.

"To have and to hold said lot to the only proper use of the said James Lindsay, Sr., his heirs and assigns for and during the full and end term of 999 years next ensuing. \* \* \* The aforesaid sum for which the above lot is leased is four per cent. per annum upon the estimated value of said lot as fixed by the board of trustees.

"In witness whereof, by order of the board of trustees, the clerk has hereunto signed his name and affixed the seal of the aforesaid corporation.  
Alex T. Douglas, Clerk."

[1, 2] It should be noted that there is not a word in this paper purporting to come from Lindsay, the grantee therein. He does not sign it. There is no agreement upon his part to assume the payment of the rent charge therein named. In fact, there is, not only an absence of his signature, but an absence of any words in the lease which would make an obligation on his part to do and perform any of the things which would be required of a lessee. The very language lacks in mutuality of obligations. It indicates the payment of one year's rental, and further indicates that farm lands were under consideration. There is, however, a total absence of a promise by Lindsay to do more toward the payment of rent. In other words, there is an utter absence of mutuality in this purported lease. But beyond this we had a statute in Missouri at that time which covered the situation. It is now section 2781, Rev. St. 1909, and reads:

"All leases, estates, interests of freehold or term of years, or any uncertain interest of, in, to or out of any messuages, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, ei-

ther in law or equity, be deemed or taken to have any other or greater force."

Under this statute cases of different kinds have been before the courts of this state. In some cases we have an instrument signed by the proposed lessor and not by the lessee (as here), and in others we have an instrument signed by the lessee and not by the lessor. In both classes the courts hold that there has not been a compliance with the statute, and as a consequence no creation of an estate for a fixed term longer than a year. *Clemens v. Broomfield*, 19 Mo. 118; *Combs v. Midland Transfer Co.*, 58 Mo. App. 112; *Versteeg v. Longo Fruit Co.*, 158 Mo. App. loc. cit. 131, 138 S. W. 901; *Welsh v. Fred Helm Brewing Co.*, 47 Mo. App. 608; *Valle v. Kramer*, 4 Mo. App. 570.

So that we conclude that the alleged lease is not only void for want of mutuality, apparent upon the face, but void under the statute supra, which requires the signature of the lessee. When we say "void," we mean ineffective in the creation of a right to hold the premises for the long fixed period of 999 years. If Lindsay, the original alleged lessee, did not acquire an estate for a term of years, his grantee (which includes the party through whom the plaintiff claims) could not acquire one by any conveyance from Lindsay. This is elemental. The alleged title of plaintiff is dependent upon this original lease. With it out of the way, he has no standing. It must fall for the two reasons assigned, supra, unless saved by another point urged, which point we take next.

II. It is urged that the ordinance of the city authorized the signing of such lease in duplicate parts. By this we mean that the ordinance authorized the city authorities to sign one copy, and the lessee to sign another, and that the two should constitute the lease. Had this been done, and had the evidence in this case so shown, there would be less question of a lease, so far as the points made in paragraph I are concerned. There might remain the question of mutuality of promises, but none as to signature under the statute.

However, the trouble here is that there is no proof that Lindsay ever signed a duplicate. So far as the record shows, he might have been content with possession and a tenancy at will, or from year to year. It devolved upon plaintiff to show a lease for a term. He plants himself upon this in his petition, but fails to show that Lindsay ever executed and delivered his copy of the contract.

[3] For this gap in the evidence we are asked to presume that Lindsay did execute the duplicate contemplated by the ordinance. This we cannot do. It goes to the very vitals of plaintiff's case. We may presume that the officers of the city complied with the law, but that does not reach it. The signing of the lease was for the independent action of Lindsay. We might presume that the clerk pre-

pared two copies of the lease (one to be signed by him as the city authority, and one to be signed by Lindsay), but this is as far as the presumption of duty well performed upon the part of the city official will go. The act of signing the copy by Lindsay was a matter for Lindsay to determine. It was he who would complete the contract by his signature. No presumption as to rightful official conduct will show that he obligated himself under this contract. We cannot show that individuals have signed given contracts by a presumption of right action. This, because it is up to individual determination whether or not they want to be bound by such contract.

It is up to plaintiff in this case to show a valid 999-year lease. This was not shown by the document he introduced. He had to go further and show that Lindsay executed it, and that there was mutuality in the contract. There is no legal presumption that Lindsay executed the contract of lease, by signing a duplicate copy thereof, even if we could hold that there would be mutuality in the agreement when so signed. This absence of proof is fatal to the alleged lease.

Other interesting questions discussed in the briefs become immaterial.

The judgment nisi is for the right parties, and should be, and is, affirmed.

All concur; BOND, J., in result.

(278 Mo. 42)

STATE ex rel. McNULTY v. ELLISON et al.  
(No. 20687.)

(Supreme Court of Missouri, in Banc. March 15, 1919. Rehearing Denied April 7, 1919.)

# 1. CERTIORARI §64(1)—COURT OF APPEALS—CONFLICT OF DECISION.

On certiorari to review decision of Court of Appeals on ground that it conflicts with decisions of the Supreme Court, the Supreme Court will not go beyond the opinion to ascertain the facts.

# 2. CERTIORARI §64(1)—COURT OF APPEALS—CONFLICT OF DECISION.

On certiorari to review the opinion of the Court of Appeals on ground that it conflicts with previous decisions of the Supreme Court, the Supreme Court will not accept the facts stated in motion for rehearing as true, inasmuch as the truth of such facts can only be proven by the record, which the court will not examine.

# 3. COURTS §82—OPINIONS—OBITER DICTUM.

Court's holding in distinguishing a case on the authority of which one of the parties was insisting upon a result different from that reached in the opinion is a part of the actual decision, and not merely obiter dictum.

Woodson, J., dissents.

Certiorari by the State, on relation of Owen H. McNulty, against James Ellison and others, Judges of the Kansas City Court of Appeals, and the City of Kansas City. Writ quashed.

Numa F. Heitman, of Kansas City, for relator.

E. M. Harber, A. F. Smith, and Benjamin M. Powers, all of Kansas City, for respondent Kansas City.

BLAIR, J. Certiorari. The writ brings before us the record in McNulty v. Kansas City, decided by the Kansas City Court of Appeals, 198 S. W. 185.

[1] I. (a) Counsel contends that the statement of facts in the opinion of the Court of Appeals is out of accord with the record in that case, and urges that an examination of that record will establish this: In State ex rel. v. Ellison, 278 Mo. 218, 200 S. W. 1042, this court adopted the doctrine that it would "not go beyond the opinion to ascertain the facts." It thus appears that harmony of written opinions, not harmony of decisions, is the thing which this court holds was intended by the framers of the Constitution. As the writer of this has done, so must counsel in this case do—submit to the application of this rule as announced in the case cited.

[2] (b) It is urged that we must accept the facts stated in the motion for rehearing as true, else there is no use for our requiring such motion to be filed before our writ will issue. Such a motion does not prove itself, and can be proved only by the record. The record we do not examine, as pointed out, supra. The point must be ruled against relator.

II. Secondly, counsel contends the facts stated in the opinion of the Court of Appeals do not justify the conclusion reached, and that the decision conflicts with decisions of this court. This question requires that we set out the facts as stated by the Court of Appeals. They are as follows:

"When city taxes on real estate in Kansas City become delinquent, payment thereof is enforced by a sale of each delinquent tract to a purchaser who pays to the city the unpaid tax, with interest, penalties, and costs, and receives from the city treasurer a certificate of purchase acknowledged by him before one of the clerks in his office who holds a notary public's commission for this purpose. For this acknowledgment the sum of 50 cents is included in the amount paid to the city by the purchaser, that being the fee allowed by statute to a notary for taking and certifying to an acknowledgment. These delinquent sales, and the consequent execution of the certificate of purchase, cover a period of about two weeks in November or December of each year; and at the close of said sales many certificates are acknowledged.

"Plaintiff was a clerk in the treasurer's office

from and including the year 1904 down to June, 1910, and was the notary before whom the treasurer acknowledged the certificates of purchase at the end of the two weeks of delinquent sales in each year, and also the tax deeds to such tracts as were never redeemed. On August 12, 1912, he brought this suit to recover from the city the sum of \$2,850.50 as due him for acknowledgments taken, as above indicated, during the years 1908 and 1909. He recovered judgment in the trial court for the full amount sued for, and the city has appealed.

"It is admitted that the above sum represents the total amount of notary fees for such acknowledgments taken by plaintiff while in the treasurer's office during those two years, and that the same were collected by the treasurer and paid into the general fund of the city treasurer. It is the contention of the city that plaintiff waived the right to receive payment of these fees, and that he is now estopped from claiming them.

"In 1885 the Supreme Court of this state held, in *Leach v. Hannibal & St. Joseph R. Co.*, 86 Mo. 27, 66 Am. Rep. 408, that a notary public in the service of a railway company could waive his right to compensation for notarial services; that, having entered into a contract of service to the railway company for a fixed salary, he prima facie agreed to give the latter his entire time, and the notarial work having been done in that time, then, in the absence of any agreement, or understanding, or line of conduct between the parties' showing that such employé was to receive the statutory fees for the notarial service rendered his employer in addition to his stipulated salary, he could not recover of his employer for such notarial service, and in the absence of any such showing he would be deemed to have waived the right to claim such fees.

"Following this rule thus laid down, the city, in February, 1892, passed an ordinance known as Ordinance No. 3910, which provided that one of the clerks in the treasurer's office should be a notary public; that the salary paid by the city to him as a clerk should be payment in full for all services rendered by him, including those of a notarial character, and that all fees paid for such notarial work should be turned into the city treasury.

"Under this ordinance, in April, 1892, one Wood became a clerk in the treasurer's office, and was the notary who took the acknowledgments during his stay therein, which was until February, 1893. He sued for his fees, and in *Wood v. Kansas City*, 162 Mo. 303, 62 S. W. 433, the Supreme Court held the above-mentioned ordinance void, and that since it was void it was the same as if it had never existed, and Wood was not estopped from recovering his fees by reason of having accepted his salary for his services as clerk, for the reason that the ordinance was nothing, and he had done nothing to waive his fees or to create an estoppel. On page 310 of 162 Mo., on page 434 of 62 S. W., of the *Wood Case*, the court say: 'It is not claimed that he entered into any express contract, aside from the ordinance, by which his fees as notary were to be received and retained by defendant, and, the ordinance being void, there was no express contract at all with respect thereto; hence nothing to estop plaintiff from claiming them by reason of said ordinance.'

"And on page 311 of 162 Mo., on page 435 of 62 S. W., in said *Wood Case*, the court, in distinguishing it from the *Leach Case*, say that *Leach* may have 'entered into a contract, express or implied, by which in consideration of his employment at a fixed salary he was to have no fee for such services. And after having thus rendered the services he could not, of course, recover the fees allowed him by law therefor. In the case at bar (the *Wood Case*) there was no such contract.' (Italics ours.)

"In other words, the Supreme Court held that in the *Wood Case* there was no agreement or line of conduct on Wood's part by which he consented that he would allow the city to have the notary fees and accept in full of his services the fixed salary paid him, and hence he could not be denied his fees, but was entitled to them in addition to his salary.

"(1) We are of the opinion that the case we are now called upon to decide differs in this respect from the *Wood Case*. In the case at bar, not only did plaintiff make an express agreement to waive his notary fees and accept a stipulated salary in full for all his services, including those of a notarial character, but he thereafter continued on in the service of the city without change of terms, and under circumstances that necessarily imply that he waived the right to the notarial fees and accepted in lieu thereof a certain fixed monthly sum paid to him as salary in full of all his services, including those of a notarial character. If he did this, he is not entitled to now turn around, after his relations with the city have terminated, and, nearly three years after the notarial services were performed, demand the fees therefor in addition to the money he received from the city, with the manifest intention on his part, and the understanding implied from the circumstances, that he was not charging for his notarial services, but was accepting his monthly stipend in full of all services. The facts which we think manifest that agreement, intention, and course of conduct on his part are as follows: It is conceded that the certificates of purchase for each year were executed and acknowledged by the treasurer at one time, and the work of the notary in filling out and attesting the certificates of acknowledgments was done during his office hours as clerk in the treasurer's office. If in doing this at any time he had to work overtime, he was paid for such overtime in accordance with the regular rates prescribed for overtime work as a clerk.

"After the decision in the *Wood Case* the city, in 1901, repealed Ordinance No. 3910, hereinabove mentioned, which required the notary clerk to accept only his salary as clerk, and directed the turning of the notary fees into the city treasury, and enacted an ordinance, No. 18581, which provided that the notary clerk in the treasurer's office should enter into a contract, agreeing to accept as compensation for his services as clerk the sum of \$5 per month, and that he should receive, in addition thereto, the notarial fees accruing in said office. Under this ordinance the notary clerk in the treasurer's office got \$5 per month and the notary fees. In this way such clerk's compensation, instead of running from \$75 to \$90 per month, as the other clerks in the office, ran up to a very large sum depending upon the number of tracts sold for delinquent taxes.

"In 1904 a certain city treasurer selected the plaintiff as 'a young man that he could trust' and who would 'keep his word with him' and 'do the square thing by him,' and made a private agreement with plaintiff to appoint and make him the notary clerk if he (plaintiff) would agree to accept the \$5 per month paid by the city, and \$60 per month paid by the treasurer out of his own pocket, and allow the notary fees to be kept by the treasurer. This 'gentleman's agreement' continued through 1904 and 1906, the plaintiff getting \$5 per month from the city and \$60 per month from the treasurer individually, and the treasurer getting the fund arising from the notary fees.

"In 1906, owing to some public complaint or discussion about advertising the delinquent lists in a paper of very limited circulation, the treasurer advertised said list in one of the great dailies of the city, where every property owner had an opportunity to see their property was being advertised for taxes. The result was that a great rush was made by many to pay their delinquent taxes before their property was sold, and consequently there were few certificates of purchase to be acknowledged. The treasurer, in paying \$60 per month to the plaintiff and keeping the notary fees, was losing money on his 'gentleman's agreement.' Hence he proposed to the plaintiff that thereafter he would pay the plaintiff \$75 per month out of the city's funds and let the city keep the notary fees, and to this the plaintiff agreed. No ordinance was passed authorizing him to be paid more than \$5 per month. So that during 1906 plaintiff received \$75 per month from the city, \$70 of which was wholly without authority or justification, except upon the theory that the plaintiff was allowing the city to keep the notary fees in return for which he was receiving the said monthly stipend regularly out of the funds of the city. No new terms or agreement were entered into by plaintiff. He continued on in the treasurer's office the same as from the first, the only difference being that, whereas he first got \$5 from the city and \$60 from the treasurer and allowed the treasurer to keep the fees, now he got \$75 from the city and allowed the city to keep the fees. Thus there was a voluntary agreement on the part of plaintiff to waive his fees and take in lieu thereof the money paid him by the treasurer, and this agreement was carried on into effect between plaintiff and the city, whereby it took the place of the treasurer in paying plaintiff's monthly salary and in retaining the fees for the notary work. So that, thus far, plaintiff is in a vastly different situation from that of Wood in his case. He is in the position of having voluntarily agreed to waive his notary fees and to accept in lieu thereof money for which he gave no equivalent whatever except the fees he waived. This waiver was first to the treasurer and afterwards to the city, and during 1906 he got from the city \$70 per month to which he was in no way entitled, and for which he gave no equivalent except the fees he allowed the city to take. And under that situation the city was giving him a sure thing as to the \$70 and taking the chances on receiving enough fees to pay for or reimburse it for said amounts. Plaintiff did not ask, and has not asked, any one for those fees.

"In April, 1907, the city passed a general

omnibus ordinance, fixing the compensation of all officers and employees in the city service. This ordinance said nothing about a notary clerk in said treasurer's office, but did provide that five clerks therein should each receive \$900 per year, and repealed all ordinances in conflict therewith. The effect of this ordinance was merely to authorize and validate the hitherto unauthorized payment of \$70 each month to the plaintiff; and, while it does not say it is pursuant to and in accordance with the arrangement theretofore existing between plaintiff and the city, yet there can be no question but that such was the case. Nothing was said by plaintiff to indicate that any other or different terms were required or expected. The plaintiff kept on in his clerkship as before, drawing his \$75 per month, and the city retained the notary fees, and no claim was made for them, nor any intimation that the old arrangement was not continuing the same as it had been.

"In 1908 a new treasurer went into office, but the plaintiff continued on in his clerkship, and the record discloses no change in the arrangement, nor any intimation that there would be any change whereby plaintiff would claim the fees. At the beginning of 1909 the city passed an ordinance the effect of which was to raise the salary of 14 clerks in the treasurer's office to \$90 a month each. Nothing was said therein about a notary in the office, nor as to what should be done about the fees, but under it plaintiff's salary was raised to \$90 per month, and he continued to receive it from then until in June, 1910, when he resigned. Still no change had been mentioned or intimated as to the fees, and it is manifest no change was thought of or contemplated, and it is also manifest that the city would not have paid the \$70 per month, nor added an increase to that sum, had there been a suggestion that plaintiff would afterwards demand, in addition to the salary of the clerkship, a sum which at the minimum was more than the amount he was getting. He continued as before to draw his salary and allow the fees to be retained by the city, in the same manner and under the same arrangement as had theretofore existed. His conduct throughout indicated that he had no intention of charging for the fees; the city had every right to believe that the old arrangement existed, and, if plaintiff had any intention of claiming said fees, he deliberately concealed it, and made no move to disclose it for more than two years after he left the city's employ. It is true the fees were not due the city in the first place, but his notarial service was rendered the city treasurer; and, while it was paid for the treasurer by the purchasers, and said fees originally were the plaintiff's as a perquisite to his office of notary, yet he voluntarily agreed to allow them to go first to the treasurer and afterwards to the city in return for the fixed and certain monthly sums he received. And by this arrangement, expressly entered into at first and later continued without notice of any change, he obtained money from the city which it otherwise would not have paid him, and to which he had no claim whatever, except upon the theory and understanding that the fees for the notarial service which he rendered during his time, which belonged to the city, should go to it. Under these circumstances we do not think plaintiff is entitled to recover."

This is followed by a citation and discussion of authorities.

The decisions of this court with which this part of the decision are said to conflict are *State v. Williamson*, 118 Mo. 146, 23 S. W. 1054, 21 L. R. A. 827, 40 Am. St. Rep. 358; *Mullins v. Kansas City*, 268 Mo. 444, 188 S. W. 193; *Sprague v. Rooney*, 104 Mo. 356, 260, 10 S. W. 505; *In re Lankford's Estate*, 272 Mo. 1, 197 S. W. 147; *State ex rel. v. St. Louis*, 241 Mo. 231, 145 S. W. 801; *Wood v. Kansas City*, 162 Mo. 303, 62 S. W. 433; *Parke, Davis Co. v. Mullett*, 245 Mo. loc. cit. 175, 149 S. W. 461, and numerous others of like character.

The opinion of the Court of Appeals shows that the court held as a matter of law that the record in the case before them showed that the notarial fees for which McNulty sued were turned into the city treasury under an agreement whereby McNulty was to accept a fixed salary of \$75 to \$90 per month and turn in the notarial fees; that the salary was paid to McNulty, and the notarial fees paid into the city treasury in accordance with this agreement.

(a) There is nothing in the facts stated in the opinion to invalidate this holding. Whether the record supports it is not a question we can examine in this kind of a proceeding, as pointed out in paragraph I hereof. This disposes of the contention that the opinion conflicts with cases holding that an appellate court, in an action at law, is not authorized to pass on the weight of the evidence.

(b) In *State v. Williamson*, 118 Mo. 150, 23 S. W. 1055, 21 L. R. A. 827, 40 Am. St. Rep. 358, it was held that a contract for the "sale of unearned salary of defendant as a mail clerk in the United States post office at Kansas City" was "absolutely null and void, as being against public policy." The court stated that the "reason of the rule is that the public service may not be so good and efficient when the unearned salary has been assigned as when it has not been."  
\* \* \*

[3] In *Wood v. Kansas City*, 162 Mo. 303, 62 S. W. 433, the opinion was written by the same judge who wrote the opinion in *State v. Williamson*. In the *Wood Case* the action was brought to recover notarial fees arising from the same sort of notarial work as those in this case. *Wood* was a clerk in the office of the treasurer of Kansas City. By ordinance he was required to turn the notarial fees into the city treasury and accept a fixed salary. It was held the ordinance was void, and he might recover the fees. In that case it was pointed out that *Wood* had entered into no contract whereby the city was to pay a fixed salary and take whatever notarial fees he might earn in taking acknowledgments of sale certificates.

This was one of the grounds upon which the court in the *Wood Case* distinguished the case of *Leach v. Railway*, 86 Mo. 27, 56 Am. Rep. 406. It is suggested this part of the opinion is obiter dictum. It seems to us to be a part of the actual decision. The holding was made in distinguishing a case on the authority of which one of the parties was insisting upon a result different from that reached in the opinion.

The *Wood Case*, therefore, gives recognition to the idea that a contract, whereunder a notary accepts a fixed salary in lieu of uncertain notarial fees and agrees these may be paid to another, might constitute a valid agreement, or might amount to a waiver or estoppel against the notary in case he later attempted to recover the fees. It is not necessary for us to attempt to determine whether this ruling is right or wrong. At the most it left the question open, and we have found no other decision which counter-voids it in a case presenting the question as it was presented to the Court of Appeals in this case.

Relator earnestly contends that a rule permitting waiver in circumstances like those in this case (and the *Wood Case*) conflicts with the principle laid down in *State v. Williamson* and like cases. In that case the contract had not been executed, and *Williamson* was indicted on the theory that he had collected salary belonging to his assignee and was guilty of embezzlement. It was not unlike cases in which an effort is made to enforce executory contracts for assignments of unearned official salary. In this case the relator had accepted the salary he procured by agreement to turn notarial fees into the city treasury in consideration thereof (so the Court of Appeals held), and now seeks to recover the fees the city took under that agreement. Whether his carrying out such an agreement and accepting the salary constitutes such a waiver as to preclude his recovery of the notarial fees from the city, even though it be conceded the agreement was originally void as against public policy, is a question this court has not passed upon, except in the *Wood Case*, and in that case the holding is certainly not out of accord with the holding of the Court of Appeals in the case at bar. The question not having been decided by this court in a manner contrary to the ruling of the Court of Appeals, the record cannot be quashed on the ground of conflict on this question. There is authority elsewhere tending to support the view of the law taken by the Court of Appeals. The writ is quashed.

All concur, except WOODSON, J., who dissents.

BOND, C. J., concurs for conformity to existing rule.

**BINGHAM v. EDMONDS et al. (No. 19923.)**

(Supreme Court of Missouri, Division No. 1.  
March 28, 1919.)

**1. APPEAL AND ERROR ¶1008(2) — MATTERS OF FACT—REVIEW.**

In ejectment, where a jury is waived and case tried by court without instructions asked upon either side, finding and judgment of court below, if there is substantial evidence on which to base the same, is conclusive upon the Supreme Court, unless error has been committed in the admission or rejection of testimony.

**2. ADVERSE POSSESSION ¶114(1) — SUFFICIENCY OF EVIDENCE.**

In an action of ejectment involving a strip of land, evidence held sufficient to support defendant's claim of title by adverse possession.

**3. ADVERSE POSSESSION ¶66(1)—POSSESSION TO LINE.**

Where a landowner for more than a quarter of a century had been in the actual possession of a strip of land, claiming possession up to such line, regardless of where the true line might be located, he gained title to such strip by adverse possession.

Appeal from Circuit Court, Ripley County; J. P. Foard, Judge.

Action by Ben Bingham against Robert M. Edmonds and others. From judgment in favor of defendants, plaintiff appeals. Affirmed.

This is an ordinary action of ejectment, commenced on April 23, 1915, in the circuit court of Ripley county, Mo., and tried on an amended petition filed May 13, 1915, in which plaintiff sought to recover possession of the northwest quarter of the southeast quarter of section 24, in township 24, north of range 2 east, located in above county. The petition charges that on March 28, 1914, plaintiff was the owner in fee and entitled to the possession of above-described real estate; that on April 1, 1914, defendants entered into possession of said land, and unlawfully withholds from plaintiff the possession thereof, to his damage in the sum of \$100; that the monthly rents and profits of said real estate are \$2.50, etc.

Defendants, in their answer, deny all the allegations of said petition. They allege that they have been in the open, notorious, hostile, adverse, peaceable, and continuous possession of a part of the lands described in plaintiff's petition for the space of 10 years and more next before the filing of this suit, claiming to own the same; that the land claimed by defendants, which has been in their possession as aforesaid, is a strip off the east side of the northwest quarter of the southeast quarter aforesaid; that defendants disclaim any right or title in the remainder of said land described in petition.

The evidence in the case tends to show that at the commencement of this action, on April 23, 1915, plaintiff was the apparent record owner of the northwest quarter of the southeast quarter of section 24, township 24 north, range 2 east, in Ripley county, Mo.; that defendants were the apparent owners, and in possession of the northeast quarter of the southeast quarter of said section 24, lying east of plaintiff's land; that defendants are in possession of a strip of land, containing between three and four acres, running from north to south across the east side of said northwest quarter of the southeast quarter of section 24; that said strip, as shown by one of the surveys, is about 66 feet wide at the north end and about 171 feet wide at the south end; that said strip is fenced, has been inclosed and in possession of defendants and those under whom they claim title, for more than 25 years before the commencement of this action. Defendants claim title to this strip by 10 years and more of adverse possession, and deny that they were in possession of the remainder of said northwest quarter of the southeast quarter of section 24.

The trial court found all the issues in favor of defendants, and entered judgment accordingly, leaving the only question open before us for consideration as to whether or not there was substantial testimony offered by defendants as to their title by adverse possession.

Plaintiff filed his motions for a new trial and in arrest of judgment, both of which were overruled, and an appeal was granted him, through error, to the Springfield Court of Appeals, but the case was duly transferred to this court.

Chas B. Butler, of Doniphan, for appellant.

James F. Fulbright, of Doniphan, and Shepard & Sheppard, of Poplar Bluff, for respondents.

RAILEY, C. (after stating the facts as above). [1] 1. In an ordinary action of ejectment, where a jury is waived, and the case tried by the court without instructions asked upon either side, the finding and judgment of the court below, if there is substantial evidence upon which to base the same, is conclusive upon this court, unless error has been committed in the admission or rejection of testimony. *Boas v. Branch*, 208 S. W. loc. cit. 86; *Walker v. Roberts et al.*, 204 S. W. loc. cit. 18; *Roloson v. Riggs*, 274 Mo. loc. cit. 528, 203 S. W. loc. cit. 975; *January v. Harrison*, 199 S. W. loc. cit. 937; *In re Lankford Estate*, 272 Mo. loc. cit. 8, 197 S. W. 147; *St. Louis, to Use, v. Parker-Washington Co.*, 271 Mo. loc. cit. 242, 196 S. W. 769; *Nicholson v. Wright et al.*, 196 S. W. loc. cit. 1118; *Truitt v. Bender*, 193 S. W. loc. cit. 839; *Kille v. Gooch et al.*, 184 S. W.

loc. cit. 1160; Laclede Land & Improvement Co. v. Goodno, 181 S. W. loc. cit. 412; Buford v. Moore, 177 S. W. loc. cit. 872; Hatton v. St. Louis, 264 Mo. loc. cit. 646, 175 S. W. 888; Abeles v. Pillman, 261 Mo. loc. cit. 376, 168 S. W. 1180; Heynbrock v. Hormann, 256 Mo. loc. cit. 37, 164 S. W. 547; Slicer v. Owens, 241 Mo. 319, 145 S. W. 428; Minor v. Burton, 228 Mo. 558, 128 S. W. 964; Bond & Stock Co. v. Houck, 213 Mo. loc. cit. 426, 112 S. W. 242; Vincent v. Means, 207 Mo. loc. cit. 713, 106 S. W. 8; Hunter v. Wethington, 205 Mo. loc. cit. 292, 293, 103 S. W. 543, 12 Ann. Cas. 529; Hamilton v. Boggess, 63 Mo. loc. cit. 251, 252. The issue as to whether defendants, or either of them, were in the unlawful possession of any portion of the northwest quarter of the southeast quarter of section 24 supra, outside of the inclosed strip heretofore mentioned, was decided upon substantial testimony in favor of respondents by the trial court, and its action, in respect to this matter, is hereby sustained.

[2] 2. Did defendants produce substantial testimony tending to support their claim of title by adverse possession as to that portion of the northwest quarter of the southeast quarter of section 24 aforesaid which they held by virtue of their inclosure? In referring to the evidence of defendants upon this subject, plaintiff, in his brief, at pages 2 and 3, said:

"The testimony shows that defendants acquired their land, the northeast quarter of the southeast quarter of said section 24, by inheritance from their father; that at the time he bought the land from one Crook, the said Crook showed him the line which ran through this field; that defendants' ancestor had always claimed to this line, which was west of the true line as shown by the surveys, and that they claimed through him to this line, and that these defendants and their ancestor had had more than 10 years' peaceable and continuous possession of this strip to the line shown by Crook and to which defendants claim."

Mrs. L. B. Edmonds, one of the defendants, testified that she is the mother of R. M. Edmonds; that it was her husband who bought the northeast quarter of the southeast quarter of section 24, supra, from Crook; that her husband died 19 years before the trial, in November, 1915; that she had lived there on this strip ever since they got the land above mentioned from Crook. She further testified:

"Q. What land do you claim and have you claimed to there, with reference to this land in dispute? A. We always claimed to the line that the man showed us was the line; the corner rock was there where it's always been.

"Q. He showed you that line? A. Yes, sir.

"Q. And you bought to that line? A. We claimed to that line, and we've had peaceable possession for 26 years past, and nobody never

meddled with it until Bingham started this thing.

"Q. You never have lived anywhere else at all, since you moved on the place? A. Always been my home.

"Q. I believe you said you claimed up to this line? A. I did.

"Q. Regardless of where the true line might be? A. Yes, sir. \* \* \*

"Q. This other that you claimed is over in the northwest of the southeast? A. Yes, sir.

"Q. They claim this line runs over in there? A. Yes, sir.

"Q. If it is over there, you claim it anyhow? A. Yes, sir; I still claim my old line."

B. S. Edmonds testified as follows:

"Q. Now, has your mother always claimed to own to that line? A. Yes, sir.

"Q. How long has she claimed to own it? A. She's claimed to own it for 26 years.

"Q. How about possession of it, has she been in possession of it? A. She's lived on it; made it her home.

"Q. Been cultivating it, and had it under fence? A. Yes, sir.

"Q. She has been on it all the time? A. Never lived anywhere else.

"Q. This land has been occupied all of the time? A. Yes, sir.

"Q. And under fence all of that time? A. Yes, sir."

The foregoing testimony sustains the finding and judgment of the court below, in favor of defendants, as to the question of adverse possession, and we are concluded thereby.

[3] 3. The evidence heretofore quoted, as well as other testimony offered by respondents, tends to show that for more than a quarter of a century before the trial they had been in the actual possession of the strip in controversy, claiming title thereto; and likewise claiming possession up to the line pointed out by Crook, regardless of where the true line might be located. The trial court was therefore within the law in sustaining defendants' plea of title to the strip aforesaid, by adverse possession. Vogt et al. v. Bergmann, 189 S. W. loc. cit. 1167; Mangold v. Phillips et al., 186 S. W. loc. cit. 989; Bartlett v. Boyd, 175 S. W. loc. cit. 949; Milligan v. Fritts, 226 Mo. loc. cit. 197, 125 S. W. 1101; Mather v. Walsh, 107 Mo. 121, 17 S. W. 755; Cole v. Parker, 70 Mo. 372; Hamilton et al. v. West et al., 63 Mo. 93.

4. We have considered all the matters presented in the case, and find no errors in the record before us. The judgment below is accordingly affirmed.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of RAILBY, C., is adopted as the opinion of the court.

All concur.



BUCKNER v. BUCKNER et al. (No. 19901.)

(Supreme Court of Missouri, Division No. 1.  
March 28, 1919.)

**1. JUDGMENT**  $\S$ 743(1)—**RES ADJUDICATA.**

A final decree, in an action by a beneficiary under a will against all other beneficiaries in the will to obtain a judicial construction of its terms, is binding thereafter upon all parties claiming under the will.

**2. PARTITION**  $\S$ 21—**EFFECT OF WILL.**

Where a testator left property to his widow for life, then to the children of a son, the children of testator's son were entitled to the several enjoyment and to partition of the property at the death of testator's widow, although the possibility existed that some person might thereafter come into existence, or would take by executory devise an interest in the property, unless the will indicated that testator's intention was to the contrary?

**3. PARTITION**  $\S$ 12(4)—**TITLE OF PARTIES—**  
**POSSIBILITY—UNBORN CLAIMANTS TO LAND.**

Where a testator left land to his widow for life, then to children of a son, the children of testator's son on death of the widow held entitled to partition, under Rev. St. 1909,  $\S$  2559, 2563, notwithstanding the possibility that some person may come into existence who will take by executory devise.

Appeal from Circuit Court, Madison County; Peter H. Huck, Judge.

Suit for partition by Maude A. Buckner against Price Buckner and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Ed. D. Anthony and Jos. F. Chilton, both of Fredericktown, for appellant.

David M. Tesreau and Anthony & Davis, all of Fredericktown, for respondents.

**BROWN, C.** This is a suit for the partition of certain lands in Madison county, Mo., of which one Aylette Buckner died seized on May 24, 1876, leaving a will which is the subject of this controversy. The plaintiff is the widow of Thomas L. Buckner, son of defendant Robert A. Buckner, Sr., and grandson of the testator. He died in 1911, leaving three children, the defendants Price Buckner, Carl Buckner, and Earl Buckner. The plaintiff duly elected to be endowed with a child's share of his lands absolutely. The defendant Robert A. Buckner, Sr., is the only son of the testator. All the other defendants are children and grandchildren of Robert A. Buckner, Sr., and persons claiming some interest through or under them respectively.

The will of Aylette A. Buckner, so far as it affects the issues in this case, after bequeathing a legacy of \$5 to his only son, Robert A. Buckner, devises and bequeaths his entire estate to his wife, Martha Ann

Buckner, for life, with full power of disposition, and proceeds as follows:

"Third. It is my will and I do hereby give, devise and bequeath the residue of my estate remaining in her hands at the death of my beloved wife of whatever nature or kind, to the heirs of my said son, Robert Alfred Buckner, which are born unto him in lawful wedlock, or to the descendants of such heirs so born in lawful wedlock, share and share alike therein, but in case and in the event my beloved wife should outlive the child or children and issue born unto my said son Robert Alfred in lawful wedlock or their descendants, then the whole of my property of whatever character, nature or kind shall be my wife's absolutely and in fee simple, thereby giving and granting unto her full power and authority to dispose of the same by gift, deed or will as she in her wisdom may then see proper to do.

"And it is my will that in the event my said son Robert Alfred Buckner should die without any other issue born unto him in lawful wedlock than his present son, Quarles A. Buckner (my little grandson who now lives with me), and he the said Quarles A. Buckner should outlive my beloved wife, Martha Ann, and he the only lawful heir of my said son Robert Alfred, then I will bequeath and devise unto him the said Quarles A. Buckner, all the balance of the property hereinbefore devised to my wife or the proceeds thereof, which she may have at the time of her death."

The widow died October 22, 1892, leaving these lands undisposed of. At the time of the execution of his father's will in 1875, and also at the time of the latter's death in the following year, the defendant Robert A. Buckner, Sr., was a widower having one child, Quarles A. Buckner, who lived with his grandfather. After the death of the testator the son remarried, after which he had seven other children, who were living at the death of Martha Ann Buckner. After her death three others were born who are still living. Several others were born to him and his wife and died in infancy.

The answer pleads the construction of the will in a suit brought by the defendant Robert A. Buckner, Jr., and Thomas A. Buckner, sons of Robert A. Buckner, Sr., in the Madison circuit court September 27, 1909, against all other beneficiaries in the will, to obtain a judicial construction of its terms, in which the facts were, as now, admitted, and a final decree entered by direction of this court. *Buckner v. Buckner*, 255 Mo. 371, 164 S. W. 513. After reciting the facts, the opinion of this court, and the terms of the will, said decree is as follows:

"The court therefore determines, decrees, and construes the aforesaid will to be valid and lawful; that the defendant Robert A. Buckner, Sr., took nothing by the terms of said will except the sum of \$5, and that he took no interest in the foregoing described real estate; and that Martha Ann Buckner, the widow of Aylette Buckner, took a life estate in said land,

and that at the death of the said Martha Ann Buckner, to wit, on the 22d day of October, 1892, the above-described land became vested in the children of said Robert A. Buckner, Sr., who had theretofore been born in lawful wedlock or to their direct descendants, subject, however, to the birth of other children to said Robert A. Buckner, Sr., in lawful wedlock, after the death of said Martha Ann Buckner, said after-born children to become vested immediately upon their birth with a share in said property equal to that of their brothers and sisters.

"And the court further finds, decrees, and adjudges that at the time of the death of said Martha Ann Buckner, the title to said real estate then vested, share and share alike, in the following children of Robert A. Buckner, Sr., born in lawful wedlock, and who were then living, to wit: Quarles A. Buckner, Martha Buckner Hamlett, Robert A. Buckner, Jr., Thomas L. Buckner, Lillie B. Buckner, Lula P. Buckner, Elizabeth V. Buckner, and Harry F. Buckner.

"And that the said children of Robert A. Buckner, Sr., born in lawful wedlock, born after the death of Martha Ann Buckner, became immediately upon their birth by the provisions of said will vested each with a share in and to said property equal to that of their said brothers and sisters born before the death of said Martha Ann Buckner.

"It is further ordered by the court that the clerk of this court make a certified copy of this decree and deliver the same to the recorder within and for said county."

All these matters being before the court in this case upon an agreed statement of facts the court held as a conclusion of law therefrom that the action of partition would not lie until the death of Robert Alfred Buckner, and adjudged accordingly. From that judgment this appeal is prosecuted by plaintiff.

[1] I. This case stands upon the final judgment in the suit to construe the will of Aylette Buckner, under which all parties in this case claim, and are equally estopped by that record. The construction of the will being the thing adjudicated, we must accept the conclusion therein announced as to its meaning and effect.

[2, 3] II. It follows that all the parties to this suit, consisting as they do, of children born in lawful wedlock of Robert A. Buckner, Sr., their heirs and assigns, are owners as tenants in common of the land described in the petition, the undivided whole of their title being subject to possible diminution by the birth of another such child or other children. Their possessory right to the entire tract as tenants in common is perfect and complete. There is no other person in existence having any interest therein.

Although, as we have said, the law recognizes the possibility that some person may hereafter come into existence who will take by executory devise an interest in this property, and that all the present owners of the fee jointly stand with respect to their titles in the position of trustees to that extent, the

will of the testator must be consulted to ascertain whether it was his intention that their right to the several enjoyment of the property which he gave them must be postponed until the possibility has become extinct. We see nothing in the will to indicate this intention. Nor do the authorities cited by the respondent supply it. *Lilly v. Menke*, 126 Mo. 190, 28 S. W. 643, 994; *Hill v. Hill*, 261 Mo. 55, 168 S. W. 1165; *Stockwell v. Stockwell*, 262 Mo. 671, 172 S. W. 23; *Gullick v. Huntley*, 144 Mo. loc. cit. 246, 46 S. W. 154; *Stewart v. Jones*, 219 Mo. 614, 118 S. W. 1, 181 Am. St. Rep. 595. In *Stockwell v. Stockwell*, supra, referring to section 2559, we said:

"The controlling feature of the provision is that there must be an existing undivided tenancy or holding in land by two or more owners, susceptible of being so parceled between them as to become a several holding by each." 262 Mo. 679, 172 S. W. 25.

These conditions are all present in this case. We also said (262 Mo. 683, 172 S. W. 26):

"In case of judicial partition the same principle was applied. If those in being were made parties to the proceedings and properly notified, the result bound them, for the judgment of the court was conclusively presumed to be right. Those not in being were supposed to be represented by those upon whose title their expectancy was founded. This principle has been recognized and acted upon by the English courts for more than 100 years (*Wills v. Slade*, 6 Ves. Ch. 498; *Gaskell v. Gaskell*, 6 Sim. Ch. 643), and was followed and recognized in our own statute. R. S. 1909, §§ 2561-2564. In all these cases the estate in expectancy was lifted from the undivided interest to which it attached and settled upon the divided share into which it had been changed by the partition."

This principle so stated is applicable to this case. The owners of the entire fee, including all possessory rights, are present and represent the executory possibilities. The right of partition is therefore complete under the terms of sections 2559 and 2563, and there is nothing in the will which indicates a purpose to forbid its exercise. The judgment of the circuit court is accordingly reversed, and the cause remanded for further proceedings in accordance herewith.

BAILEY, C., in doubt.

PER CURIAM. The foregoing opinion by BROWN, C., is adopted as the opinion of the court. All concur; BLAIR, P. J., in separate opinion, in which WOODSON, J., concurs.

BLAIR, P. J. In this case the doctrine of virtual representation is invoked to bind the interests of possible after-born children of Robert A. Buckner, Sr. A partition in kind will be subject to such interests. A sale will convey full title, and these interests will be

transferred to the fund realized, which the trial court must preserve in such way as to safeguard such possible interests. In order to assure such action section 2563, R. S. 1909, requires designated allegations to appear in the petition in a case of this kind. The petition contains no such allegations. This defect is cured by the answer which contains averments bringing the whole matter into the case and before the court. The pleadings thus accomplished the statutory purpose and call into action the protective discretion of the trial court. I concur in the result reached.

WOODSON, J., concurs.

ROBINSON et al. v. WIESE et al.  
(No. 19817.)

(Supreme Court of Missouri, Division No. 1.  
March 28, 1919.)

1. ELECTIONS ¶51 — ELECTION OFFICERS—  
APPOINTMENT—SCHOOL DISTRICTS.

Laws 1913, p. 326, providing for appointment by county courts of judges and clerks for special elections and the making by county courts of special precincts, does not apply to a special school district election for voting upon the issue of bonds, where the judges and clerks were appointed by the board of directors; such an election being governed by Rev. St. 1909, § 10879. (Per Woodson, J.)

2. SCHOOLS AND SCHOOL DISTRICTS ¶97(4)—  
BONDS—SUBMISSION OF QUESTION TO VOTERS.

A school district, under Rev. St. 1909, § 10869, having power to erect more than one school building, and under section 10777 to borrow money therefor, repair, build additions, etc., submission to the voters at the same election of two propositions to borrow money and issue bonds for building a new schoolhouse and for addition and repairs to the old schoolhouse, was reasonable and legally permissible; the court having no authority to revise, in this respect, the determination of the board, conferred by statute. (Per Woodson, J.)

3. SCHOOLS AND SCHOOL DISTRICTS ¶97(4)—  
BONDS—ELECTION—DOUBLE PROPOSITION.

The separate submission at the same election of propositions to incur indebtedness of the school district for building a new schoolhouse and adding to and repairing the old one did not combine the two propositions, so as to have one expression of the vote answer both propositions. (Per Woodson, J.)

4. SCHOOLS AND SCHOOL DISTRICTS ¶111—  
BONDS—RIGHTS AND REMEDIES.

Equity will not grant relief to taxpayers of a school district, seeking to invalidate bonds regularly issued and prima facie valid, on the ground of fraud in the count of votes at the election, where the suit was not instituted within

20 days after completion of the count as required in election contests, and the bonds have already been registered and sold, and their proceeds expended. (Per Woodson, J.)

5. SCHOOLS AND SCHOOL DISTRICTS ¶111—  
BONDS—TAXPAYER'S ACTION—PLEADING.

A petition by taxpayers to have bonds issued by a school district declared invalid on account of fraud in the election, not filed until after the bonds had been issued and sold and the proceeds expended, which failed to plead facts showing plaintiff's prior ignorance of the fraud, was fatally defective. (Per Woodson, J.)

6. PLEADING ¶8(15) — CONCLUSIONS—ALLEGATIONS OF FRAUD.

In suits for relief for fraud, it is not sufficient to allege the fraud in general terms, without facts from which the court can draw its conclusions. (Per Woodson, J.)

7. PLEADING ¶8(21) — CONCLUSIONS—ALLEGATIONS OF KNOWLEDGE OF FRAUD.

In suit by taxpayers seeking to have bonds issued by a school district declared invalid on account of fraud in the election, averment in their petition that the purchaser of the bonds had knowledge of facts sufficient to put him on inquiry did not state facts charging either actual or constructive notice. (Per Woodson, J.)

8. SCHOOLS AND SCHOOL DISTRICTS ¶97(4)—  
BONDS—ELECTION—VALIDITY—DOUBLENESSE OF SUBMISSION.

A bond issue by a school district, after negotiation, cannot be attacked on the ground of doubleness in the proposition submitted to the voters. (Per Blair, P. J., and Graves, J.)

Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

Suit by W. S. Robinson and others, taxpayers of Ritenour Consolidated School District, in St. Louis County, against A. H. Wiese and others, Directors of such District, and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Arthur V. Lashly, of Clayton, for appellants.

Charles & Rutherford, of St. Louis, for respondent Cahill.

A. E. L. Gardner, of Clayton, for other respondents.

BROWN, C. The plaintiffs are 24 assessed taxpaying residents of Ritenour consolidated school district, in St. Louis county. The defendants consist of the 6 members of the board of directors of said consolidated school district, the county clerk and collector of said county, and J. G. Cahill, the purchaser and holder of the bonds herein-after mentioned. The original petition was filed October 15, 1915. All of the defendants entered their voluntary appearance on the 27th and 28th days of the following month.

On January 8, 1916, the original petition having been held insufficient on demurrer,

an amended petition was filed, which, after the foregoing formal statements, is as follows:

"Plaintiffs state that the board of directors of said district did, on the 8th day of April, 1915, at a special meeting of said board, resolve to call a special election in said district, to be held on the 1st day of May, 1915, for the following purposes, to wit: To vote upon a proposition to borrow the sum of \$14,000 for the purpose of constructing a modern fireproof building, with sanitation and equipment, at Home Heights, and developing the grounds, and to issue bonds of the district in payment of same; to vote upon a proposition to borrow \$7,500 for the purpose of constructing a two-room addition to Ritenour School, with sanitation in the basement thereof, and to issue bonds in payment of same; to vote upon a proposition to borrow \$1,500 for the purpose of improving the grounds at Ritenour School, and to issue bonds of the district in payment of same.

"Plaintiffs state: That on the same date, to wit, the 8th day of April, 1915, said board caused notices to be printed and posted in five places in said district, announcing that a special election would be held on the 1st day of May, 1915, for the purposes above set forth, and caused 1,000 circulars to be printed and distributed broadcast throughout the said district, calling attention of the residents of said district to the fact that an election would be held on the said date, and urging the voters of said district to support the propositions above referred to at said election. That said board did, on the 17th day of April, 1915, after said notices and circulars had been posted and distributed, hold a special meeting, and resolved that a special election be held at the Ritenour schoolhouse, in said district, on the 8th day of May, 1915, for the following purpose, to wit: To test the sense of the legal voters of said district upon a proposition to authorize the board of directors to borrow \$14,000, and to issue bonds therefor, for the purpose of erecting a four-room schoolhouse at Home Heights, and to furnish and equip the same. That a proposition be submitted to the voters of Ritenour consolidated school district, St. Louis county, Mo., for the purpose of testing the sense of the legal voters of said school district upon a proposition to authorize the board of directors to borrow \$9,000, and to issue bonds therefor, for the purpose of erecting a two-room addition and making repairs at Ritenour School, and to furnish and equip the same.

"Plaintiffs state that the said board caused notices of the said election to be held on the 8th day of May, 1915, to be posted in five places in said district, but state that the said notices were posted in other and different places than the notices of the election to be held on the 1st day of May, 1915, were posted, and that said notices for the election to be held on the 1st day of May, 1915, were permitted by said board to remain posted after the notices for the election to be held on the 8th day of May, 1915, were posted.

"Plaintiffs state that an election was held in said district on the 8th day of May, 1915, and that no election was held on the 1st day of May, 1915, in said district.

"Plaintiffs state that Clarence Campbell, C.

O. Motten, and R. F. Gibling acted as judges of said election, and that J. H. Perdue and Frank Spellbrink acted as clerks of said election; that immediately after the polls were closed on the said 8th day of May, 1915, the board of directors of said district held a special meeting, and the judges of election as aforesaid reported to said board at the said meeting that the result of the election was as follows, to wit: That 167 ballots were cast in favor of the loan of \$14,000 to erect a schoolhouse at Home Heights and to furnish and equip the same, and that 68 ballots were cast against the said loan at the said election; that 165 ballots were cast in favor of the loan of \$9,000 for the purpose of erecting a two-room addition and making repairs at Ritenour School, and to furnish and equip the same, and that 70 ballots were cast against said loan at said election.

"Plaintiffs state that at the said meeting of said board, and before the bonds had been printed or registered, said bonds of said district were sold to J. G. Cahill, one of the defendants herein, for the sum of \$23,085.

"Plaintiffs state that thereafter, on, to wit, the 27th day of May, 1915, defendants A. H. Weise and George Ringen, president and secretary, respectively, of said board of directors of said district, pursuant to a resolution adopted by said board on the said date, executed 23 bonds of the said Ritenour consolidated school district, numbered from 1 to 23, both inclusive, each of the denomination of \$1,000; that said bonds were dated May 15, 1915, and mature and become due and payable May 15, 1915, and that said bonds bear interest at the rate of 5 per centum per annum; that said bonds were thereafter delivered to the said J. G. Cahill, and that said J. G. Cahill is now the holder thereof.

"Plaintiffs state that on the same date, to wit, the 27th day of May, 1915, the said board of directors of said district caused to be levied upon all the taxable property within the Ritenour consolidated school district of St. Louis county, Mo., including the property of plaintiffs, a tax sufficient to provide a yearly income of \$2,300, to provide for the payment of the interest on, and a sinking fund for the redemption of, said bonds at maturity; that said tax, when extended upon the books of the collector of the revenue of St. Louis county, Mo., will constitute a first lien upon the property of plaintiffs; that said tax will be a cloud upon the title to real estate owned by plaintiffs, and, if left to stand, will hinder, embarrass, and prevent plaintiffs in the sale and disposition of said real estate.

"Plaintiffs state that the said election so held on the 8th day of May, 1915, as hereinbefore set forth, was illegally and unlawfully held, and that the bonds hereinbefore referred to were illegally and unlawfully executed and issued, and are illegal and void, for the following reason, to wit: That although the judges of said election have reported to the board of directors of said district that both of said propositions submitted to the voters at said election received a majority of more than two-thirds of the ballots cast at said election, and although the said board have caused to be spread upon the minutes of the meeting of said board held on the 8th day of May, 1915, as aforesaid, a dec-

laration of the result of said election in accordance with the said report of the judges of said election, such action of the said board is erroneous and wrong, and that the true and correct result of said election was otherwise, in this, to wit: That two-thirds of the votes cast at said election were not for the loans, and that neither of said propositions so submitted to the voters of said district at said election carried.

"Plaintiffs state that the erroneous finding of the result of said election was brought about by the fraudulent and wrongful acts of the judges and clerks aforesaid of said election; that said judges and clerks, while canvassing the result of said election, fraudulently and wrongfully counted more than 50 ballots as having been cast in favor of each of the said propositions, which, in truth and fact, were cast against said propositions, and that said judges and clerks fraudulently and wrongfully failed to count and return more than 50 ballots which had been cast against the said propositions.

"And plaintiffs further state that on or about, to wit, the 12th day of September, 1915, while the ballots were in the custody of G. M. Ringen, clerk of said school district, one of the defendants herein, the ballots which were cast at said election were removed from the ballot boxes and destroyed or concealed, and that the said ballots were so removed from said ballot boxes and destroyed or concealed in pursuance of a fraudulent design, for the purpose of concealing the fraudulent acts of said judges and clerks of election as herein complained of.

"Plaintiffs further state that the said election was illegally and unlawfully held, and that the bonds hereinbefore referred to were illegally and unlawfully issued, and are void, for the following further reasons, to wit: That the voters of said district were misled and deceived by the notices of a special election to be held on the 1st day of May, 1915, posted as hereinbefore set out, and by the circulars issued and caused to be distributed by said board as hereinbefore set out, and by reason thereof many of the voters of said district were prevented from voting at the election held on the 8th day of May, 1915; that the judges and clerks of said election were not appointed according to law, in this, to wit: That said judges and clerks were appointed by the board of directors of said school district, in violation of the provisions of the Laws of the State of Missouri for 1913, page 327.

"Plaintiffs state that the bonds hereinbefore referred to are void in the hands of defendant J. G. Cahill, for the reason that said Cahill knew, or by the exercise of ordinary diligence could have known, that the said election was illegally and unlawfully held, and that the said bonds had no validity at the time he purchased the same; that said Cahill, at the time he purchased the said bonds, was possessed of sufficient facts concerning the said election, and of the acts and things herein specified as rendering the said election illegal and void, to have put a person of ordinary prudence upon his inquiry concerning the validity of said bonds.

"Plaintiffs further state that said bonds are illegal and void, for the reason that the records of the proceedings of said consolidated district show that bids for both issues of said bonds were taken together, and that both issues of said bonds were lumped and sold to defendant

Cahill for one price; and plaintiffs state that the effect of selling said bonds in the manner aforesaid is that one issue of said bonds may have been sold for such an amount that the net proceeds, after deducting expenses and commissions from the same, is less than 90 cents on the dollar of the face value thereof, in violation of the laws of the state of Missouri relating to the method of disposing of school bonds and the amendments thereto.

"Plaintiffs state that they have no adequate remedy at law for the wrongs and things of which they complain herein.

"Wherefore, the promises considered, plaintiffs pray the court to decree said bonds null and void, and that the defendant J. G. Cahill be ordered to bring said bonds into court and surrender the same, that said bonds may be canceled; that the defendant William Seibel, county clerk of St. Louis county, be restrained and enjoined from extending the tax heretofore levied against the property of plaintiffs by the board of directors of said district on the books of the collector of revenues of St. Louis county, and that Albert A. Wilmas, collector as aforesaid, be restrained and enjoined from collecting or attempting to collect any of such taxes so levied from the plaintiffs herein; that defendants, members of and comprising the board of directors of the Ritenour consolidated school district, be restrained and enjoined from disbursing any of the funds of said district for the payment of principal or interest of said bonds; and that plaintiffs have such other and further relief as to the court may seem proper."

Cahill answered separately; the other defendants jointly. They admitted the proceeding for the holding of an election on May 1, 1915, as pleaded in the petition, and alleged that the resolution was recanted at the subsequent meeting of the board at which the order for the election of May 8th was made, and pleaded laches, with knowledge of the facts, and want of jurisdiction in the court. There was no replication.

When the cause was called for trial, plaintiff called a witness, who, after identifying himself as secretary of the district, was asked by plaintiff's counsel:

"Were you secretary of that board on the 17th day of April, 1915?"

Defendant's counsel said:

"We object to the introduction of any evidence under the pleadings in this case. Your honor has sustained a demurrer to the original petition, and the present amended petition states no new facts, and raises no new issues."

The court sustained the objection, to which ruling of the court the plaintiffs, by counsel, then and there duly excepted. The plaintiffs then presented a list of 65 names, and offered to prove:

"That they, and each of them, voted against each of the propositions referred to in plaintiffs' petition, and that, had their votes been counted as cast, neither of these propositions would have received a two-thirds majority of the votes cast;

\* \* \* that all of the ballots which were cast upon this proposition, being inclosed in the ballot boxes, which were in the custody of the secretary of the school board of the Ritenour school district, were removed on the 18th day of September, 1915, after the election on May 8th, and either destroyed or concealed, so that it would be impossible to have them in court and produce them in evidence; \* \* \* that all of the plaintiffs are resident, assessed, tax-paying citizens of the Ritenour consolidated school district, and that the defendant Cahill, the purchaser of the bonds, had knowledge of the unlawful acts alleged in the petition, at the time of the purchase of the bonds; that he is at present the holder of the bonds, and that the notices posted by the board of school directors of the Ritenour consolidated school district for the election of May 1, 1915, were permitted to remain posted after the notices for the election of May 8, 1915, were posted, and that a number of the voters of the school district were misled thereby, and had no actual notice of the election of May 8th."

Mr. Charles, defendants' counsel, said.

"We renew our objection, and make the further objection that the matters offered to be established by the plaintiffs are incompetent and immaterial for any purpose or upon any issue joined by the pleadings."

The court sustained the objection, to which ruling of the court the plaintiffs, by counsel, then and there duly excepted.

The court thereupon entered its decree dismissing the petition, from which, after motion for a new trial overruled, the appeal is prosecuted.

[1] I. The question is squarely presented whether the defendants were entitled to judgment upon the pleadings as they stood at the time the ruling of the court upon the admission of evidence was made. This was evidently the theory of the parties adopted by the court in its ruling, and is sufficiently presented by the record.

The appellants contend that the election which authorized the issue of the bonds in question was not lawfully held, because the judges and clerks were appointed by the board of directors of the district, while the law required their appointment by the county court, under the provisions of the act "providing for the appointment by county courts of judges and clerks for special elections, and for the making by county courts of special election precincts, and further providing for the repeal of inconsistent acts, with an emergency clause." Laws 1913, p. 326.

We see nothing in the act which tends to sustain this view. Its title implies that it is applicable to those municipalities in which elections are held in precincts established by the county courts. This first section indicates plainly that it is intended to apply to special elections where regular primary elections or general elections are held, while section 4 states its object to be to avoid the

expense of six judges and six clerks at each precinct. It has no reference whatever to any part of the machinery for holding general or special school meetings by section 10879 of the Revised Statutes of 1909. The board was right in their exact compliance with the terms of that section.

[2] II. It is contended by the appellants that the bonds issued in this case are invalid, because the proposition submitted to the voters for their assent to the indebtedness which they represent was "double," in that it authorized the creation of indebtedness for two separate purposes by a single vote. It is not contended that there is any express provision of either statute or Constitution which forbids this, but that, as was said by Graves, J., in a dissenting opinion in *State ex rel. v. Gordon*, 223 Mo. loc. cit. 36, 122 S.W. 1018, it "rests upon the sound discretion of the courts in the administration of justice to prevent a fraudulent exercise of the taxing power of the state, a power closely scrutinized by the courts," and that in the exercise of this discretion the rule has been established that "two propositions cannot be united in the submission, so as to have one expression of the vote answer both propositions, as voters might be thereby induced to vote for both propositions who would not have done so, if the questions had been submitted singly." This question has been often before this court in cases to which we shall presently have occasion to refer in connection with the facts presented in this case.

It is not questioned that this school district had the power, under the provisions of section 10869 of the Revised Statutes of 1909, to erect more than one public school building in the district, and (section 10777) to borrow money therefor, and also for repairing the same and building additions thereto, and to issue bonds in payment therefor. Nor is any question raised as to the necessity for these buildings, which we will treat, to save words in illustration, as two distinct school-houses. By these statutes the law imposed upon the board of directors the duty of determining tentatively their necessity, and submitting the question of borrowing money for their erection to the voters of the entire district, and not to the voters of any particular portion to be specially benefited thereby, to be ultimately repaid by taxation upon all the property of the district. In determining whether money should be borrowed, the voters necessarily determined whether the buildings should be constructed. In determining whether the question of expenditure for both should be submitted at a single meeting, in order to obtain a valid and honest expression of the will of the voters, unaffected by what is called jugglery and log-rolling in the opinion to which we have already referred, required of the directors

something more than the narrow and technical vision that sees a fly on the house without seeing the house. It required a broad-view of the needs of the entire district. Should they determine to submit one at a time at different elections, jugglery would begin at the start to gain the advantage of the first submission, so that voters might be fed with promises of future help to obtain their support for a proposition in which they could have no immediate beneficial interest, but only a burden of taxation for others. It may be said that honesty should be presumed, but that is not the theory of the Constitution. It was not made to protect the property of the district against honesty. If we were bound to presume that in the struggle between honesty and avarice in the minds of officers and voters, the victory would always come to the right side; there would be no place in our laws for those technical rules of construction for our protection against jugglery and log-rolling.

We have come to the conclusion that in the case we are now considering reason required and the law permitted the submission of both these propositions at the same election, and that this court has no authority to write into the Constitution or statutes any provision making it our duty to revise, in this respect, the action of those upon whom the statute has conferred the jurisdiction to determine the question whether both branches of this proposition should be submitted at the same election.

[3] III. The order of the board of directors calling the meeting at which the bonds were voted indicated its purpose as follows:

"To test the sense of the legal voters of said district upon a proposition to authorize the board of directors to borrow \$14,000, and to issue bonds therefor, for the purpose of erecting a four-room schoolhouse at Home Heights, and to furnish and equip the same."

Also:

"For the purpose of testing the sense of the legal voters of said school district upon a proposition to authorize the board of directors to borrow \$9,000, and to issue bonds therefor, for the purpose of erecting a two-room addition and making repairs at Ritenour School, and to furnish and equip the same."

That these propositions were separately submitted to the voters at the meeting called and held for that purpose is admitted. If, as we have already held, it was lawful to submit each of these propositions to incur indebtedness separately at the same meeting, there is nothing in the record to indicate that it was done in such a way as to violate the rule stated in the dissenting opinion of Graves, J., in *State ex rel. v. Gordon*, supra, that the proposition should not be so united as to have one expression of the vote answer both propo-

sitions. The rule in this respect has been before us in numerous cases. *State ex rel. v. Allen*, 188 Mo. 288, 82 S. W. 103; *State ex rel. v. Allen*, 186 Mo. 678, 85 S. W. 531; *State ex rel. v. Wilder*, 200 Mo. 97, 98 S. W. 465; *State ex rel. v. Wilder*, 217 Mo. 261, 116 S. W. 1067; *State ex rel. v. Gordon*, supra; *State ex rel. v. Gordon*, 268 Mo. 321, 188 S. W. 88. We are unable to find in any of these cases anything inconsistent with the views we have expressed. The last case cited combines a proposition for building a county courthouse at Bowling Green, in Pike county, with a proposition to build a courthouse at Louisiana, for the occupancy of the Louisiana court of common pleas. In that case this court said:

"The submission combined the two. The voters could vote for both courthouses or against both courthouses. No opportunity was given to vote for one and against the other. This appears from the face of the question submitted."

In that case this court, quoting from *Lewis v. Commissioners*, 12 Kan. loc. cit. 213, said:

"Two or more questions may be submitted at a single election, provided each question may be voted on separately, so that each may stand or fall upon its own merits. But that is a very different matter from tacking two questions together, to stand or fall upon a single vote. It needs no argument to show the rank injustice of such a mode of submission."

In the *Memphis Case* (*State v. Gordon*, 223 Mo. loc. cit. 11, 122 S. W. 1010), the single proposition submitted was:

"To incur an indebtedness for said school district in the sum of \$22,500 for the purpose of using \$20,000 of said amount in building a schoolhouse in the first school ward of said school district and furnishing the same, and \$2,500 of said amount to be used in building an addition to and improving the schoolhouse in the second school ward of said district."

No opportunity was offered for a separate vote on either proposition. In *State ex rel. v. Allen*, 186 Mo. 674, 85 S. W. 531, the proposition voted on was to create an indebtedness of—

"\$4,500 to be used for the purpose of purchasing a site and the erection and construction of a public building thereon, or the purchase of a site and building to be used for a city hall, city prison, and hose house, and for furnishing the same, and the further sum of \$7,500 to be used in making repairs and improvements in water-works and electric light plant and extension of water mains and electric lines belonging to said city."

No instance is cited, nor do we find any case holding that two distinct propositions connected with the same subject-matter may not be separately submitted at the same election and separately voted upon in a case of this character as was done in this instance. The problem which confronted the district

was adequate and convenient school facilities to be furnished for all and at the expense of all alike. Neither the Constitution nor the statutes required that the question whether this shall be done in one house or two be submitted to the voters. It is the duty of the directors tentatively to determine this, and then submit the question of indebtedness their determination involves to the voters, who may then turn it down if they choose. In this case they might, with equal ease, turn down the entire proposition, or either end of it, and cast upon the directors the full responsibility of the situation. In the printed briefs before us we find no suggestion of any method of ascertaining the will of the voters with respect to the existing situation other than the one adopted, and, in the light of the information they have vouchsafed as in this record, we confess that we are unable to suggest a better plan ourselves. We think the proceedings were regular, and the bonds in question are consequently regular, and valid upon the face of the record.

[4] IV. All the proceedings leading to the issue of the bonds being regular, they have become, by their registry, *prima facie* valid. The question remains whether these plaintiffs may show, under the pleadings as they stand, that the proposition to create the underlying indebtedness was not in fact carried by the votes of two-thirds of all the electors of the district. In passing to this question we note the appellants have wisely omitted to insist on the point urged in their petition that the abandonment of the first resolution for the submission in three distinct questions is either an irregularity in the proceedings or some evidence of fraud. We think the reason for this course appears plainly on the face of the record, and that the board of directors acted in that respect clearly within its power. Nor do they favor us with any argument to sustain the position that we have the inherent right, without express legislative authority, to revise the count of those expressly authorized by law to make it and to declare the result. They rely exclusively upon our general jurisdiction as a court of equity to grant relief on the ground of fraud, which may, under proper circumstances, when properly and timely invoked, avoid all transactions including our own judgments.

We think this general proposition is true in those cases involving the private property of individuals, and is therefore applicable in this case. The question is whether, upon this record, they have properly invoked this extraordinary power. In considering it, we must not forget that it is, in effect, the contest of an election, the result of which has been ascertained and announced by those clothed by the Legislature with that statutory power, and is therefore analogous, in so far as it affects public interests, to those con-

tests of the election of county, municipal, and school district officers expressly authorized by statute and required to be instituted within 20 days after the completion of the official count. The same courts have jurisdiction, and the private interest upon which this controversy rests is inseparately mingled with the interest of the public at large, which has already received and used for the general good the proceeds of the bonds. Every taxpayer of the district, including the plaintiffs, is now sharing in the benefit. The proceeds of the bonds cannot now be returned. The only remedy which we can afford is to deny the power of the district to pay, and the right of him who has advanced the money to receive back, the amount appropriated to the public use.

Under these circumstances, the maxim is particularly applicable that those seeking such a remedy must come to a court of equity with clean hands; that they should have done everything that common honesty dictates to protect themselves against what they now claim to be an illegal exaction, without subjecting the innocent to unnecessary and irreparable loss.

The plaintiffs were, from the beginning, members of the political community which perpetrated the alleged wrong. Seven of them voted against it at the election. The record is silent as to how many, if any, of the 24 voted the other way. The officers who ordered the election and held it, who counted the votes and announced the result, were their officers, elected as their agents for the very purpose, and it is right in equity, as administered by the courts, that their negligence should be fairly measured with the negligence of the defendant purchaser in determining where the loss should fall.

[5] V. We have before us in the record the petition, which sets forth the facts relied on by the plaintiffs, and the answer of the defendants, which sets out as new matter other facts relating to the issue of the bonds which are not denied. The petition states that the 24 plaintiffs are and were at all times mentioned in it resident, assessed, taxpaying citizens of the school district, some of whom, as we have already said, appear from the record to have voted in the election. It is fair to assume that they were on the ground, with every opportunity to investigate the circumstances which they now allege, and we must assume that they knew that in due course the record then made must be submitted, with the bonds, to the state auditor for registration; that, if registered by him, his certificate would be *prima facie* evidence of their validity; and that, in the absence of any objection, they would then be negotiated and the money received by the district and used for the purposes stated in the resolution which authorized the vote. If they knew of



the fraud in the count which they have made the foundation of this suit it was their duty then to disclose it, and they themselves would be guilty of a fraud, should they wait until the money had been received and used for their benefit.

[6] It is one of the fundamental rules of equity pleading that in suits for relief for fraud it is not sufficient to allege the fraud in general terms. The facts which constitute it must be clearly alleged, so that the court may draw its conclusions from them and not from the naked statement of the pleader. *Bigelow on Fraud*, 114; 12 R. C. L. p. 416, and cases cited. It is not sufficient to set out facts which show that either the pleader or his adversary has been guilty of fraud, and leave the court to draw its inference between them. The particular fraud charged in this case is the miscount of the vote and the sale of the bonds thereon. Assuming that the purchaser had no knowledge of any fraudulent element in their issue and sale, then the plaintiffs, for whose benefit they were sold, were, if they knew the facts in time, and failed to interfere, participants in the fraud against him, and he was innocent. If the purchaser shared their knowledge, both were equally guilty. It was necessary, therefore, that the plaintiffs should plead the facts concerning their knowledge of the fraud to state a cause of action. This they have failed to do.

On the other hand, one of the objects of the law requiring the registration of the bonds and the preservation of the record upon which they stand in the office of the state auditor is to give them value in the market and facilitate their sale. Knowing this, the plaintiffs waited until after their registration and the completion of the sale by the payment of the money by the purchaser into the treasury on June 19, 1915. Then to make assurance doubly sure they waited until September 12, 1915, when the ballots were removed from the boxes and destroyed. To make trebly sure of their profit from the transaction, they waited another month, and until the money had all been used for the purpose for which it was borrowed, before beginning their suit. We think, that, for failure to state facts concerning the acquisition of their knowledge with reference to the fraud charged, the petition was fatally defective.

[7] VI. The same rule of pleading applies to the statement in the petition of knowledge by the purchaser of facts sufficient to put him upon inquiry with reference to the truth of the auditor's certificate accompanying the bonds. It is as follows:

"Plaintiffs state that the bonds hereinbefore referred to are void in the hands of defendant J. G. Cahill, for the reason that said Cahill

knew, or by the exercise of ordinary diligence could have known, that the said election was illegally and unlawfully held, and that the said bonds had no validity at the time he purchased the same; that said Cahill, at the time he purchased the said bonds, was possessed of sufficient facts concerning the said election, and of the acts and things herein specified as rendering the said election illegal and void, to have put a person of ordinary prudence upon his inquiry concerning the validity of said bonds."

As we have already shown, the only question for our determination is one of fraud, arising upon the charges that the votes were falsely counted. The alternative averment of actual or constructive notice charges neither the one nor the other; but, although it implies the intention of the pleader to stand upon constructive notice, that is to say a knowledge of facts sufficient to put a prudent person upon inquiry as to their meaning, no such facts are stated. The averment amounts simply to a general allegation that the purchaser was careless, and is not sufficient to charge him with notice of any fact discrediting the truth of the auditor's certificate. It is not necessary for us to inquire whether such an averment would sustain a verdict for the plaintiffs after trial of the issue. It was attacked in due time at the trial, and the court was right in sustaining the objection to the evidence, in so far as that allegation was in issue.

We think the judgment of the circuit court for St. Louis county was right, and it is accordingly affirmed.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court.

WOODSON, J., concurs.

BLAIR, P. J., concurs in separate opinion, in which GRAVES, J., concurs.

BOND, J., concurs in result.

BLAIR, P. J. (concurring). [8] The bonds had been negotiated when this action was begun. In *State ex rel. v. Gordon*, 268 Mo. 321, 188 S. W. 88, it was held by court en banc that a bond issue, after negotiation, could not be attacked on the ground of doubleness in the proposition submitted to the voters. The question whether the proposition reviewed in this case was or was not double is not presented by this record. Some expressions in the opinion seem to be in accord with the majority opinion in *State ex rel. v. Gordon*, 223 Mo. 1, 122 S. W. 1008. That case was expressly overruled in *State ex rel. v. Gordon*, 268 Mo. 321, 188 S. W. 88.

I concur in the result reached by the Commissioner.

GRAVES, J., concurs.

(278 Mo. 57)

**DESSAUER v. SUPREME TENT,  
KNIGHTS OF THE MACCABEES  
OF THE WORLD. (No. 13650.)**

(Supreme Court of Missouri, in Banc. March 15, 1919. Rehearing Denied April 7, 1919.)

**INSURANCE — 719(6) — FRATERNAL BENEFIT  
INSURANCE — CHANGE IN BY-LAWS — SUICIDE.**

Where fraternal policy was issued when by-laws provided that in case of suicide within five years all assessments paid should be repaid the beneficiary, a subsequently adopted by-law that beneficiary in such case should receive only amount equal to twice amount contributed to life benefit fund by member during his lifetime did not control rights of beneficiary, though policy provided member was to be bound by all by-laws in force and subsequently enacted.

Bond, O. J., and Woodson and Walker, JJ., dissenting in part.

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Suit by Hannah Dessauer against the Supreme Tent, Knights of the Maccabees of the World. From a judgment for plaintiff, defendant appealed to the St. Louis Court of Appeals, which reversed (191 Mo. App. 76, 176 S. W. 461), and directed the circuit court to render judgment for plaintiff for the amount tendered by defendant before suit, and the cause was certified to the Supreme Court. Judgment of the circuit court affirmed, and opinion of the St. Louis Court of Appeals overruled.

The plaintiff brought this suit in the circuit court of the city of St. Louis against the defendant on a fraternal benefit policy, to recover the sum of \$3,000 alleged to be due her thereon. Judgment was rendered on the pleadings in her favor for the sum sued for and interest. In due time and in proper form the defendant appealed the cause to the St. Louis Court of Appeals, which reversed the judgment and directed the circuit court to render judgment for the plaintiff for \$744, the amount tendered by the defendant before the suit was instituted. One of the judges of the Court of Appeals dissented from the opinion therein rendered, and the cause was duly certified to this court.

The policy is dated August 14, 1900, and the material parts thereof are as follows:

"This certifies that Sir Knight Emanuel Dessauer has been regularly admitted as a member of Hall Tent No. 8, located at St. Louis, state of Missouri, and that in accordance with and under the provisions of the laws of the order he is entitled to all the rights, benefits, and privileges of membership therein, and that at his death one assessment on the membership, not exceeding in amount the sum of three thou-

sand dollars, will be paid as a benefit to Hannah Dessauer, bearing relation to him of wife, upon satisfactory proof of his death, together with the surrender of this certificate, provided he shall have in every particular complied with the laws of the order now in force, or that may hereafter be adopted, and has not obtained his membership by fraud or misrepresentation as to his age, family history, physical condition, or occupation, when admitted to membership, as shown by his application, which is hereby made a part of this certificate."

At the time of the issue of the policy the following by-law of the company was in force:

"Section 173. No benefit shall be paid \* \* \* when death was the result of suicide within five years after admission, whether the member taking his own life was sane or insane at the time, or when the death of the member was intentionally caused by the beneficiary or beneficiaries of such member: Provided, that in case of suicide within five years after admission, all assessments paid to the Supreme Tent by such member shall be paid back to the beneficiary named in the certificate and such amount shall be the full amount that can be claimed in any such case."

On July 20, 1904, about four years after the issuance of the policy, the following by-law was adopted by the company and remained in force until after the death of the insured:

"No benefits shall be paid on account of the death of a member who shall die by his own hand, whether sane or insane: Provided, however, that the beneficiary named in life benefit certificate, or the person legally entitled to the benefit, shall receive an amount equal to twice the amount contributed to the life benefit fund by the member during his lifetime."

The insured knew of this by-law, and continued to pay his assessments and dues up to the 19th day of January, 1911, when he took his own life by shooting himself in the head.

D. D. Aitken, of Flint, Mich., and R. P. & C. B. Williams, of St. Louis, for appellant. William S. Campbell, of St. Louis, for respondent.

WOODSON, J. (after stating the facts as above). I. There is but a single legal proposition presented by this record for determination, and that is whether or not the by-law adopted July 20, 1904, is controlling in this case. Counsel for defendant contends that it is, while those for the plaintiff deny that proposition, and assert that the by-law of August 14, 1900, in force at the date of the issuance of the policy, controls.

In the light of the decisions of the courts of this state, this can no longer be considered an open question. They are unanimous in holding that the contract rights between the parties regarding the benefits the member

is to receive under the terms of the policy cannot be destroyed, impaired, or taken away from him by a subsequently enacted by-law by the association, even though the application for the policy, and the policy itself, contains a provision to the effect that the member is to be bound by and must conform to all the laws then in force, as well as such as may thereafter be enacted by the association; the provisions regarding such subsequently enacted by-laws have been construed, and must be construed, to mean such by-laws and rules as may be thereafter enacted for the government and regulation of the conduct and management of the affairs of the association, and prescribing the duties of the members, and not for the purpose of changing or nullifying contracts entered into with its members. Among the cases so holding are the following:

In *Smith v. Supreme Lodge, K. of P.*, 83 Mo. App. 512, loc. cit. 528, the court said:

"The fact that it reserved the right, by the assent of the member, to make future laws obligatory on him, could not justly be deemed to comprehend the right to abate its debt, for that would pro tanto destroy the contract between the parties, and to permit one person to accept the consideration of a debt, and subsequently to deny a material part or all of such debt, would authorize a patent fraud, which the law does not deem to have been within the intent of a mere general agreement for changes in the contract."

In *Morton v. Supreme Council Royal League*, 100 Mo. App. 78, loc. cit. 92, 73 S. W. 259, 264, the court said:

"Whatever the rule may be in other jurisdictions, in this one it is that by-laws of the kind involved in this controversy do not materially alter or impair prior contracts of insurance, whatever the proviso of the certificate may be in regard to future by-laws, on the theory above stated, that the intention of such a provision is to bind the insured simply by administrative or regulative enactments; not such as go to the reduction or withdrawal of the consideration for which assessments are charged."

In the case of *Campbell v. American Benefit Club*, 100 Mo. App. 249, loc. cit. 256, 73 S. W. 342, 344, the court said:

"Yet the proper interpretation of the contract, and the true intent of the recital in the application, were to render obligatory upon the insured only after-adopted laws for the conduct of the order, duties of the members, and the like, but not such as sought to impair or affect the existing contract of insurance, in our judgment, is supported by the weight of authority, and is controlling and herein approved."

In *Slisson v. Supreme Court of Honor*, 104 Mo. App. 54, loc. cit. 61, 78 S. W. 297, 299, the court, in discussing this question, said:

"But do not mean that the society may interfere with the essential provisions of the con-

tract of insurance, and that it is powerless, by by-laws or otherwise, to change or modify the essentials of the contract of insurance without the express consent of the member."

So in the case of *Pearson v. Knight Templars' Indemnity Company*, 114 Mo. App. 283, loc. cit. 290, 89 S. W. 588, 590, the court, in discussing the question of the effect of a subsequently enacted by-law on previous contracts, said:

"I think it may be safely asserted that the doctrine of this court is that beneficiary associations, doing an insurance business on the assessment plan, are without authority to change or modify their contracts of insurance without the express assent of the members, and that this doctrine is supported by the great weight of authority elsewhere, as shown by the cases cited in the opinion in *Morton v. Supreme Council*, supra."

In the case of *Zimmermann v. Supreme Tent, K. O. T. M.*, 122 Mo. App. 591, loc. cit. 601, 99 S. W. 817, 819, the identical question that is involved in this case was there presented, and the court, after reviewing the decisions to which we have referred above, said:

"This court, however, has been consistent in holding that the benefit contracted for cannot be destroyed or impaired by a subsequently enacted by-law, though the member agree in advance that his contract should be governed by subsequently enacted by-laws, on the ground that a by-law which impairs the indemnity secured is unreasonable, and could not have been in the mind of the member when he entered into the agreement. It seems most unreasonable that the member would agree in advance that the very thing he was contracting for, to wit, the benefit to accrue to his beneficiary, might be destroyed or impaired by the opposite party to the contract at any time in the future it might choose to do so, by passing a by-law."

In the case of *Lewine v. Supreme Lodge*, 122 Mo. App. 547, loc. cit. 558, 99 S. W. 821, 825, the court said:

"And so it has held that the contract to conform to and abide by, or submit to the penalties of, future by-laws, did not authorize the subsequent modification of the contract of insurance by an after-enacted law reducing the amount to be paid in event of suicide; that such was an unreasonable exercise of the power reserved under the language quoted, and that to hold such subsequent law valid would be an unreasonable interpretation of the language employed in the contract."

In the case of *Young v. Railway Mail Association*, 126 Mo. App. 325, loc. cit. 333, 108 S. W. 557, 559, the court said:

"But conceding, for the sake of argument, that plaintiff was bound to comply with the by-laws of defendant, it is well-settled law in this state that such an agreement does not bind the member to comply with by-laws adopted after the issuance of his certificate of insurance, if the subsequent by-laws in any way impair his

contract of insurance, or impose upon him an additional burden."

In the case of *Wilcox v. Court of Honor*, 184 Mo. App. 547, loc. cit. 557, 114 S. W. 1155, 1158, the court said:

"The suicide by-law in force at the time the certificate was issued entered into and formed a part of the contract of insurance, and we hold that the amended by-law on the subject of suicide did not in the least alter or change the contract in respect to suicide, and that the amendment was not intended to affect contracts of insurance then in force. Neither was the power reserved to the order, by the application or certificate, or the by-laws, to substitute at any time an amended by-law on the question of suicide which would change in the least the provisions of the contract of insurance."

In the case of *Small v. Court of Honor*, 136 Mo. App. 434, loc. cit. 442, 117 S. W. 116, 118, the court said:

"We think it would be most harsh and unreasonable to hold that the language employed in the certificate and application gave license to defendant to destroy or impair its obligation under the contract without the consent of the other party to that contract."

In *Kavanaugh v. Royal League*, 158 Mo. App. 234, loc. cit. 243, 138 S. W. 359, 362, upon this point the court, after referring to the decisions of Illinois, which sustained after-enacted by-laws, said:

"Though such be the rule in that state, the courts of Missouri decline to give effect to these \* \* \* provisions in the contract as sufficient to authorize the society to either reduce, impair, or destroy the indemnity vouchsafed in the insurance certificate. Indeed, the doctrine with us is that it is an unreasonable interpretation or construction of such general language contained in the application and certificate to declare it sufficient to signify an intention upon the part of the insured that the indemnity might be either impaired or swept away by a future by-law on the subject of suicide."

In the case of *Dieterich v. Modern Woodmen*, 161 Mo. App. 97, loc. cit. 101, 142 S. W. 460, 461, the court said:

"The association, from the very nature of its organization, has the inherent right to change its by-laws. In doing so, however, it is subject to certain restrictions. The change must be reasonable, and in harmony with the general purposes of the organization, and must not interfere with the contract rights of its members."

In the case of *Mathews v. Modern Woodmen*, 236 Mo. 326, 139 S. W. 151, Ann. Cas. 1912D, 483, this court, in referring to the effect of an after-enacted by-law on previous contracts, in an opinion written by Judge Lamm, said:

"If it impaired the substantive property rights of the member in his insurance contract as that contract existed before its passage, then, by the law of the land, it becomes inoperative

in so far as it impairs the obligation of a contract previously entered into between the company and Mathews. Such is the rationale of *Schmidt v. Supreme Lodge*, 228 Mo. 676 [129 S. W. 653], supra. The question is there so exhaustively considered that no new or further exposition is necessary. Our conclusion is, in any view of it, that said by-law should not control our disposition of this case."

In *Hysinger v. Supreme Lodge*, 42 Mo. App. 627, loc. cit. 635, where the question of an after-enacted by-law regarding the question of beneficiaries was considered, the court said:

"Levin made a valid and binding contract of insurance, which the defendant was not at liberty to repudiate, so long as he paid his dues and assessments, and otherwise observed the rules and regulations of the order."

In *Grand Lodge v. Sater*, 44 Mo. App. 445, loc. cit. 452, the question before the court was with reference to making the application a part of the contract by an after-enacted by-law, which was not a part of it at the time the certificate was issued. The court said:

"At the time Sater became a member, there was no such law. Hence we are of the opinion that the one subsequently adopted in no way affected Sater's contract with the order. As to other amendments to the constitution and by-laws, Sater was bound, but not so as to changes directly affecting his contract of insurance. An insurance contract, such as we have here, is as sacred as any other contract, and it cannot be modified or changed by the society, except by the express consent of the member."

In the case of *Knights Templar v. Jarman*, 104 Fed. 638, 44 C. C. A. 93, affirmed in 187 U. S. 197, 23 Sup. Ct. 106, 47 L. Ed. 139, which was a case from the Western district of Missouri, the question of the effect of an after-enacted by-law with reference to suicide was being considered, and the court said:

"In the second place, we observe that it is not a reasonable interpretation of the clause above quoted from the application that the applicant intended to assent in advance to any changes in its constitution and by-laws which the company saw fit to make, even if they reduced the amount of indemnity which the company had promised to pay in the event of his death, and thereby lessened the value of his policy. \* \* \* It is not reasonable, however, to suppose that he intended to agree in advance that the company might at any time reduce the promised indemnity to any sum which it found convenient to pay."

In the case of *Smyth v. Supreme Lodge*, 220 Fed. 438, 137 C. C. A. 32, affirming the same case in (D. C.) 198 Fed. 969, the court says:

"I think courts should and will hold that by-laws are made primarily for governmental purposes, and the proper regulation and conduct and management of the affairs of the corpora-

tion or association, and not for the purpose of either making contracts or unmaking or changing or impairing the obligation of contracts already existing."

In *Supreme Council, Legion of Honor, v. Getz*, 112 Fed. 119, 50 C. C. A. 153, the court said:

"These were to be binding upon Getz, as upon all other members of the association, and, inasmuch as experience might show that for the accomplishment of these purposes changes in the by-laws might be expedient, it was provided that Getz should agree to such amendments as might seem to the members to be necessary to further those ends. To this extent, and no further, we think the agreement goes. The contract with the Supreme Council had not yet been made, and we cannot conceive that it was in the mind of either party that the defendant by this agreement should be free to abrogate any contract into which it might enter with the member, or that the benefits which he might seek to obtain could be swept away at the will of the defendant, and without his consent."

In the case of *Iowa State Traveling Men's Association v. Ruge*, 242 Fed. 762, 155 C. C. A. 350, a case from Missouri, decided in 1917, the question of an after-enacted by-law was before the court, and the court said:

"The clause, however, was not a part of the constitution of the association, nor any of its by-laws, when the certificate in question was issued, and appears only in an amendment to one of the company's by-laws, made some time after the issuance of the certificate. Admitting that by his application for membership in the defendant company the insured agreed to such amendment of the by-laws, such an agreement at most would permit only an amendment germane to the original contract of the parties, and would not authorize an amendment that would impair or substantially disturb vested contract rights."

In the case of *Ayers v. Order of United Workmen*, 188 N. Y. 280, 80 N. E. 1020, as to the effect of an after-enacted by-law, with reference to a member engaging in the liquor business, the court said:

"While the defendant may doubtless so amend its by-laws, for instance, as to make reasonable changes in the methods of administration, the manner of conducting its business, and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is beyond the power of the Legislature, as well as the association, for the obligation of every contract is protected from state interference by the federal Constitution."

In the case of *Weber v. Supreme Tent of Maccabees*, 172 N. Y. 490, 65 N. E. 258, 92 Am. St. Rep. 753, where a by-law of the defendant association similar to the one in question was discussed, the court said:

"Unintentional self-destruction, whether due to insanity or accident, after the lapse of a year from the making of the contract, was as much insured against as death from typhoid

fever or consumption, and an amendment to its by-laws, providing that the death of an existing member from any of these causes should render the policy void, would deprive the party of vested contract rights. An amendment which effects such a result, we have recently held, may not be made, because it is an unreasonable amendment destroying contract rights, instead of regulating the administration of the corporation and its membership within reasonable bounds."

In the case of *Olson v. Modern Woodmen of America (Iowa)* 164 N. W. 346, L. R. A. 1918F, 1164, upon the point of the effect of an after-enacted by-law, the court said, in referring to the effect of the assent upon the part of the assured to be bound by subsequent by-laws, that it only meant that the member assented to the making of such by-laws as were reasonable, and said:

"It does not confer upon the society the power to destroy the contractual rights of a member created by the certificate, or to unreasonably impair that obligation, or unreasonably reduce the indemnity which it has promised to pay, or unreasonably embarrass the assured's beneficiary in recovering the amount stipulated to be paid in the certificate upon the happening of the event therein insured against. \* \* \* It cannot be a reasonable interpretation of the reserved power to say that, after the issuance of the certificate, the society, by virtue of the reserved power, was therefore permitted to make any amendments to its by-laws which in fact created a new and different contract than that entered into, or in a material way unreasonably changed the contract as to indemnity theretofore entered into, or one which rendered it impossible, under certain circumstances, for the beneficiary to recover on the certificate the amount stipulated in the certificate. Such interpretation would be unreasonable, and such a by-law would be unreasonable so interpreted, since it would give to the society the power to make any by-law, even to the extent of destroying the contract which it had with the assured."

In the case of *Sheetz v. Protected Circle*, 256 Pa. 172, 100 Atl. 749, an after-enacted by-law was being construed by the court, and it was argued that, as the member through his accredited representatives from the local body of which he was a member had participated in the enactment of the amendments to the constitution, he was bound by those changes. The court said:

"This is unavailing, for the universally recognized rule is that, though a member of an association may know that certain amendments to the by-laws have been passed, and he may even have voted for them, it does not follow from this that he consents that they may have retroactive force, modifying the contract which he holds with the society."

In Massachusetts, in the case of *Newhall v. American Legion of Honor*, 181 Mass. 111, loc. cit. 117, 63 N. E. 1, the court said:

"Stating our opinion in a different form, whatever compliance with by-laws may be construed to mean, it does not mean absolute sub-

mission to whatever may be enacted in good faith, and it does not extend to permitting a direct deduction from the sum which, on the face of the certificate, any ordinary man would be led to suppose secure."

There is no conflict between the doctrine announced in the foregoing cases and that stated in the case of *Claudy v. Royal League*, 259 Mo. 92, 168 S. W. 593, and like cases. A most casual reading of the facts of that case will clearly distinguish it from the case at bar, and the rule of law underlying each is as different as are the facts of each. In my opinion, the *Claudy* Case was correctly decided, and I have no doubt but that the judgment of the circuit court in this case was proper.

I am therefore of the opinion that the opinion of the Court of Appeals in this case, reported in 191 Mo. App. 95, 176 S. W. 461, should be overruled; and it is so ordered.

For the reasons stated, the judgment of the circuit court is affirmed.

BOND, C. J., and WALKER, J., concur.

GRAVES, J., concurs in separate opinion, in which BLAIR, FARIS, and WILLIAMS, JJ., concur.

GRAVES, J. (concurring). I concur fully in all that is said in the majority opinion, except the sentence which reads:

"There is no conflict between the doctrine announced in the foregoing cases and that stated in the case of *Claudy v. Royal League*, 259 Mo. 92, 168 S. W. 593, and like cases."

Paragraph 2 of the *Claudy* Case, *supra* (259 Mo. loc. cit. 105, 168 S. W. 593), is in direct conflict with the general law of this state, and in direct conflict with the doctrine announced by my Brother in this case. The effect of the ruling in the *Claudy* Case is to permit these insurance companies to change the contract of insurance by a by-law passed after the issuance of the contract. All the courts of this state have set their face against this doctrine. The rule in other states is not material, in view of our long-fixed rule. That portion of the opinion in *Claudy's* Case should be overruled.

BLAIR, FARIS, and WILLIAMS, JJ., concur in these views.

STATE ex rel. SANITARY STREET FLUSHING MACHINE CO. et al. v. GARESCHÉ, Judge, et al. (No. 20983.)

(Supreme Court of Missouri, Division No. 2. March 28, 1919.)

1. APPEAL AND ERROR ¶488(2)—SUPERSEDEAS—EFFECT—INJUNCTION.

A supersedeas bond, on appeal from a decree appointing a receiver of a corporation and

restraining its officers from in any manner dealing with the corporate property, entered under the authority of Rev. St. 1909, §§ 3364, 3365, does not dissolve the injunction.

2. PROHIBITION ¶26—RIGHT TO RELIEF—ENFORCING APPEALED JUDGMENT.

A return of a receiver, appointed by a decree from which an appeal was taken, to a preliminary rule for prohibition that the only property of the corporation in his hands had been turned back to the clerk of the court, and that since the appeal he had taken no steps in suits instituted by him, shows that there is no attempt or threat to execute the decree appealed from, and prohibition will not issue.

3. PROHIBITION ¶26—MOTION FOR JUDGMENT ON PLEADINGS—EFFECT AS ADMISSION.

Motion, by relators applying for prohibition, for judgment on the pleadings admits the truth of the allegations in the return.

Petition for prohibition by the State, on relation of the Sanitary Street Flushing Machine Company and another, against Vital W. Garesche, Judge of the Circuit Court, and another. Prohibition denied, and preliminary rule discharged.

Jeptha D. Howe and Morton Jourdan, both of St. Louis, for relators.

Leahy, Saunders & Barth, of St. Louis, for respondents.

WHITE, C. This is an original proceeding in prohibition. The relators filed their petition praying for the writ, and this court issued a preliminary rule, to which the respondents filed a return on July 12, 1918. Thereupon the relators have filed their motion for a judgment upon the pleadings notwithstanding the return, praying for a permanent writ of prohibition.

The relators are the Sanitary Street Flushing Machine Company and Charles Sutter; the respondents are Vital W. Garesche, judge of the circuit court of the city of St. Louis presiding in division No. 14, and Thomas C. Fauntleroy, receiver.

The purpose of the writ is to restrain the said circuit judge and said receiver from enforcing a judgment entered by said judge, by which judgment the relators were restrained from doing certain things and the property of the Sanitary Street Flushing Machine Company was placed in the hands of the receiver, Fauntleroy.

The petition for the writ filed herein sets forth the pleadings and the record of the proceedings in the circuit court on which the judgment was entered. The petition in that case, in which Gertrude Shaw and others were plaintiffs and the relators here were defendants, set out that the plaintiffs were stockholders in the Sanitary Street Flushing Machine Company, and were prosecuting the action on their behalf and on behalf of

all stockholders in said corporation who may be joined as parties plaintiff. It alleged that the defendant Sutter, former president of the Sanitary Street Flushing Machine Company, attempted to sell the assets of the corporation, and set forth a number of deals and attempted deals with other persons and corporations whereby the assets of the corporation were in danger of being dissipated, and were in fact dissipated, and prayed that the defendant corporation and defendant Charles Sutter, relators here, and the officers and agents of said corporation be restrained from dealing with, adjusting, releasing, or discharging any claims or rights of action of any description belonging to said corporation, and from selling or transferring or disposing in any way whatever of any of the assets of said corporation, and that a receiver be appointed to take charge of the business, property, and effects of said corporation and to collect such assets by proper proceeding.

The relators here, defendants in that proceeding, answered. A judgment was rendered by Judge Garesche on the 23d day of July, 1917, in favor of the plaintiffs in accordance with the prayer of the petition, and the defendants, relators, here, were enjoined from in any wise dealing with, directly or indirectly compromising, adjusting, releasing, or discharging any of the claims of any kind belonging to said corporation, or in which the said corporation formerly had or now has any interest, and from selling, transferring, or disposing of any of the assets of said corporation, and from appropriating or using the same, or any part thereof to their own use for any purpose whatsoever.

It was further ordered and adjudged that Thomas C. Fauntleroy be appointed receiver of said Sanitary Street Flushing Machine Company, and that he be empowered and directed to take charge of all business, property, effects, and causes of action of defendant corporation, and to manage, collect, and recover, by any proceedings in law or equity under the orders of the court, all assets or property belonging to said corporation and wrongfully or unlawfully transferred to any other person.

The record recites that the defendants, relators here, filed their separate motions for new trial, which were overruled, and also filed their separate motions to dissolve the injunction and vacate the order appointing receiver, and each of said motions was overruled.

The defendants thereupon filed their affidavit for appeal, an appeal bond was fixed at \$50,000, and the same was filed with proper security and appeal granted to this court. None of the motions for new trial or to dissolve injunctions or set aside the order appointing a receiver are set out.

The order of court granting the appeal,

however, after reciting the appeal and the fixing of the supersedeas bond, contains the following:

"It is further ordered that the defendants have until and including December 13, 1917, within which to file such bond, and that the injunction heretofore granted in this cause be continued in full force and effect, but that the receiver's powers be suspended pending the appeal, and that all suits heretofore instituted by the receiver remain in statu quo pending the appeal. Thereupon it is further ordered that an appeal be, and is hereby, allowed the defendants to the Supreme Court of the state of Missouri from the judgment or decision of the court heretofore rendered herein."

The petition of the relators alleges that, notwithstanding the supersedeas bond, the receiver continues in actual possession of the property of the relators, and refuses to return said property to the possession of said defendants. They aver that the supersedeas bond was a full supersedeas of all orders and judgments of said court, and that the said circuit court had no further jurisdiction in the premises to exercise any authority whatsoever. The prayer of the petition for the writ asks this court to prohibit Judge Garesche and Mr. Fauntleroy, the receiver, from attempting any further cognizance of said suit before them, and that the order entered by said Judge Garesche "appointing said receiver and enjoining relators, be set aside and held for nought, and that respondents be prohibited from attempting to take or hold further possession of said property and assets by virtue of said order appointing said receiver, and that they show cause why said receiver should not be ordered to restore forthwith any and all of said property and assets of relators that may be in his possession by reason of said order."

The respondents, Judge Garesche and Mr. Fauntleroy, filed in this court their return to the preliminary rule, in which return the pleadings, judgment, and proceedings set out in the petition are admitted. The return sets forth further the finding by the circuit court, in the proceeding sought to be prohibited, of certain fraudulent deals on the part of the relator Sutter, and the attempt to sell and dispose of the assets of the Sanitary Street Flushing Machine Company to a great advantage to himself, but disadvantage to the corporation, and also the actual transfer of the assets of the corporation by Sutter. The return further states that the only assets which came into the hands of the receiver was \$3,589.69 which had been recovered in a suit by the sanitary company and paid into court and thereafter paid the receiver, and that since the supersedeas bond for appeal was filed in this case the receiver, Fauntleroy, had paid all the money in his hands to the clerk of the circuit court of the city of St. Louis, from whom he had receiv-

ed the same; and that the receiver, Fauntleroy, had taken no further steps whatever in actions brought by him to recover assets; that the assets of the corporation consisted of patents and good will of the business and the money aforesaid. On this answer the relators filed their motion for judgment as stated above asking a perpetual writ of prohibition.

[1] I. The filing of a supersedeas bond under section 2042, R. S. 1909, on appeal from a judgment of the court granting or refusing to grant injunctive relief, does not disturb the operative force of the restraining order; it does not destroy the injunction. *State ex rel. Busch v. Dillon*, 96 Mo. 56, 8 S. W. 781; *Willow Springs Creamery Co. et al. v. Mt. Grove, etc., Co.*, 197 S. W. 916; *Teasdale v. Jones*, 40 Mo. App. 243; *Commission Co. v. Spencer*, 236 Mo. 608, loc. cit. 628, 139 S. W. 321, Ann. Cas. 1912D, 705; *State ex rel. v. Hennings*, 194 Mo. App. 545, 185 S. W. 1153. The relators insist that the injunction in this case is merely ancillary to the main proceeding, which was to have a receiver, and that therefore the supersedeas would operate to suspend the entire proceeding. Relators cite no authority by which a distinction is drawn between a case where injunctive relief is the main purpose of the suit and where it is merely ancillary to the main purpose.

In this case we could not say that the injunctive relief was not the main purpose of the suit. The petition filed in the circuit court states a cause of action under the statute (section 3364), which gives the circuit court jurisdiction to restrain the alienation of property by directors, trustees, or other officers of a corporation, and section 3365 in the same article provides that in such a proceeding a receiver may be appointed. So it might be said that the main proceeding was to restrain the alienation of the property, and a receiver was appointed as an ancillary or additional remedy, and that the statute provides for just that thing.

The judgment of the circuit court is in accordance with the statute, and restrains the defendant corporation and its officers and Charles Sutter and his agents from in "any wise dealing with, directly or indirectly compromising, adjusting, releasing, or discharging any of the claims, rights in action or assets of any kind or description whatsoever belonging to said defendant corporation, or in which said corporation formerly had or now has any interest, and from selling, transferring, assigning, or disposing of in any way whatever any of the assets of said corporation, and from appropriating or using the same, or any part thereof, to their own use, for any purpose whatsoever."

[2] II. Relators in addition to the matter

of injunction assert that the receiver is proceeding to execute his office, and retains possession of the property placed in his hands, and continues to control the same, notwithstanding the supersedeas bond. The return of the respondents, however, shows that the only property he had in his hands was money which he paid back to the circuit clerk from whom he received it, and thereby restored to the statu quo before he was appointed; that in pursuance of his duties as receiver he had brought two suits, one to void a sale of assets of the sanitary company, and the other to recover from relator Sutter assets of the sanitary company; that since the appeal and supersedeas he has taken no further steps in those actions. The office of a writ of prohibition issued from a superior court is to prevent an inferior court from exercising authority where it has no jurisdiction or is proceeding beyond its jurisdiction.

[3] The return of the respondents, which must be conceded to be true on the motion for judgment on the pleading, shows that no proceeding of any kind or character by the circuit court or by its receiver, and no attempt to execute the judgment rendered before Judge Garesche, is contemplated or threatened.

The writ of prohibition is denied, and preliminary rule discharged.

ROY, C., absent.

PER CURIAM. The foregoing opinion by WHITE, C., is adopted as the opinion of the court.

All the Judges concur.

(277 Mo. 663)

CASSIN v. LUSK et al. (No. 19557.)

(Supreme Court of Missouri, Division No. 1.  
March 1, 1919. Rehearing Denied  
April 1, 1919.)

1. MASTER AND SERVANT §278(14)—INJURY TO SERVANT—DEFECTIVE CONDITION OF HOSE—KNOWLEDGE OF MASTER.

In action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for injuries to a coach cleaner by the parting of a hose with which he was filling a water cooler of a passenger coach, evidence held to afford sufficient basis for inference of knowledge on the part of defendant's foreman of defective condition of hose.

2. COMMERCE §27(5)—INJURY TO SERVANT—ENGAGEMENT IN "INTERSTATE COMMERCE."

A coach cleaner, injured by the parting of a hose with which he was filling a water cooler of a passenger coach stopped overnight to be cleaned, held engaged in "interstate commerce."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]



**8. APPEAL AND ERROR**  $\Leftrightarrow$ 1066—**HARMLESS ERROR—FAILURE OF INSTRUCTION TO COVER ENTIRE CASE.**

Where first instruction given for plaintiff covered entire case, and referred to all other instructions given in the case, failure to re-submit, in an instruction relating only to comparative negligence, issue whether parties were engaged in interstate commerce, was not reversible error; the uncontradicted evidence disclosing that plaintiff was engaged in interstate commerce.

**4. TRIAL**  $\Leftrightarrow$ 258(1) — **FAILURE OF INSTRUCTION TO COVER ENTIRE CASE.**

While an instruction, which purports to cover the entire case and direct a verdict, must contain within itself a submission of all the issues upon every phase of the evidence, an instruction directed only to particular phases or particular issues need not.

**5. TRIAL**  $\Leftrightarrow$ 295(5) — **INSTRUCTIONS — CONSTRUCTING TOGETHER.**

Instructions directed only to particular phase of evidence, or particular issues, are correctible or supplementable by other instructions given, all of which must be considered together by the jury in arriving at their verdict.

**6. APPEAL AND ERROR**  $\Leftrightarrow$ 1064(1)—**ERRONEOUS INSTRUCTIONS—HARMLESS ERROR.**

In action for injuries under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), while instruction that jury was "only warranted" in reducing amount of damages in proportion which plaintiff's negligence bore to combined negligence of himself and defendants was erroneous, *held*, it was not harmful, in the absence of any substantial evidence showing that plaintiff was guilty of negligence contributing to his injury.

**7. MASTER AND SERVANT**  $\Leftrightarrow$ 235(2) — **KEEPING APPLIANCES IN SAFE CONDITION—DUTY OF SERVANT.**

A coach cleaner is not required to keep in a reasonably safe condition the hose furnished him for filling water coolers on passenger coaches.

**8. MASTER AND SERVANT**  $\Leftrightarrow$ 286(4)—**DEFECTIVE APPLIANCES—EVIDENCE.**

In action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for injuries to coach cleaner by the parting of a hose with which he was filling a water cooler of a passenger coach, evidence *held* to warrant submission of issue whether hose was old, defective, and rotten.

**9. MASTER AND SERVANT**  $\Leftrightarrow$ 270(11)—**INJURY TO SERVANT—CUSTOM—ADMISSIBILITY.**

In action under federal Employers' Liability Act (Comp. St. §§ 8657-8665) for injuries to a coach cleaner by the parting of a hose with which he was filling a water cooler of a passenger coach, *held*, there was no error in admission of testimony as to common custom of using clamps to connect the two pieces of hose.

**10. MASTER AND SERVANT**  $\Leftrightarrow$ 101, 102(5) — **REPAIR OF APPLIANCES—METHOD.**

A master is not required to adopt any specific method of connecting pieces of hose used by servant, other than such a one as would make the use reasonably safe.

Appeal from Circuit Court, Dade County; B. G. Thurman, Judge.

Action by William Cassin against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendants appeal. Affirmed.

W. F. Evans, of St. Louis, and Ben M. Neale and Mann, Todd & Mann, all of Springfield, for appellants.

F. P. Sizer, of Monett, for respondent.

**BOND, J. I.** Action to recover damages for personal injuries. Plaintiff, William Cassin, a man 45 years of age, was employed by the receivers of the Frisco Railroad Company, as a coach cleaner. On January 23, 1915, at Lawton, Okl., while he was filling one of the water coolers of a passenger coach by means of a hose which he had carried to the top of the coach, the hose parted, and he was thrown to the ground and a freight train passing on a parallel track ran over one of his feet, crushing it, so that it had to be amputated.

The petition was in two counts; the first pleading the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]), and the second based on common-law negligence. On the trial the court at defendants' request instructed the jury that no recovery could be had on the latter count. The case originated in Lawrence county, but was sent to Dade county on a change of venue. Negligence was charged for failure to exercise ordinary care to furnish plaintiff with a reasonably safe hose with which to work, and failure to inspect and see that the hose with which plaintiff was supposed to work was in such repair as to make it a safe appliance. The answer was a general denial, coupled with the defense of contributory negligence and assumption of risk. The plaintiff replied, denying negligence on his part, or that his knowledge of the risk in using said hose was equal to or greater than the knowledge of the defendants.

The evidence tended to show that it was plaintiff's usual duty to fill water coolers in certain passenger coaches which were stored overnight at Lawton, preparatory to a day trip to and return from Quanah, Tex. A water cooler is located at each end of such coaches, and is filled by a hose which is carried to the top of the coach and inserted in the cooler. The hose used in this instance

was 65 feet in length and consisted of new hose, 50 feet long, which was spliced to an old piece 15 feet long by means of an 8-inch iron pipe. When this splicing was originally made, the two pieces of hose fitted the pipe closely; but in time, owing to hard usage and the fact that the hose was dragged about, it became loose and fell apart. The condition of the hose was reported to the foreman, and he in turn had a car inspector repair it, by wrapping a piece of wire around the two pieces where they came together over the piece of iron pipe and twisting the two ends of wire together. It appears that this splicing was not very successful, and often allowed the hose to break apart. It was frequently reported to the foreman, and the car inspector continued to repair it with wire, as stated above. On one occasion, when it was found that the hose had broken again, the car inspector gave his pliers to plaintiff and told him that he and Frazier (the man who turned on the hydrant when plaintiff reached the top of the coaches) could fix it themselves.

On the night of the accident, plaintiff, as usual, went on top of the coach by means of a ladder, dragging the hose behind him. He filled one cooler, and started toward the other end of the coach to fill the other, when the hose broke apart, causing him to lose his balance and fall to the ground, and as a result was run over by a moving freight train and injured.

The coach on which plaintiff was working was one of the coaches of a passenger train, which was used every day in interstate commerce between Lawton, Okl., and Quanah, Tex. The train left Lawton at 7 o'clock in the morning, and returned from Quanah at 4:50 in the afternoon, when the coaches were run on a storage track and left to be cleaned for the next day's run.

After the accident plaintiff was taken to a hospital at Lawton, where his foot was amputated, and later was taken to a hospital at Springfield, Mo., where it was found that a second amputation of the leg was necessary.

The jury returned a verdict for plaintiff, and assessed his damages at the sum of \$12,000. From a judgment of this amount, defendants appealed.

[1] II. The evidence recited above afforded a sufficient basis for a legitimate inference of knowledge on the part of defendants' foreman of the defective condition of the hose. Hence the jury were entitled to consider it in determining the cause of the injuries to plaintiff.

[2] The evidence tended to prove that plaintiff was engaged in interstate commerce, for his duties pertained to the preparation of a coach for use the next morning in interstate commerce; said coach having arrived the evening before after a similar

use, and was left overnight to be prepared for a journey in interstate commerce the following morning. This evidence tended to show that the coach in question was permanently appropriated for interstate commerce and that it was merely stopped overnight, to be cleaned and put in order for a continuance of an interstate commerce journey next day. It, therefore, did not fall within the rule stated by the Supreme Court of the United States in *Minneapolis, etc., Ry. v. Winters*, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54, where the facts did not show that the engine being repaired by the plaintiff when he was injured "was permanently engaged" in interstate commerce. On the contrary, it was held to be subject to local use. Said the court:

"An engine as such is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul, to be repaired and go on. It simply had finished some interstate business, and had not yet begun upon any other. Its next work, so far as appears, might be interstate, or confined to Iowa, as it should happen." 242 U. S. loc. cit. 356, 37 Sup. Ct. 171, 61 L. Ed. 358, Ann. Cas. 1918B, 54.

In the present case the coach in question was exclusively used in interstate business, and was only stopped for preparation for that use, and hence it fell within the doctrine announced by the United States Supreme Court in *N. Y. Cent. R. R. v. Carr*, 233 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298, N., C., etc., *Ry. v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159, *Pedersen v. Railroad*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, and other cases cited in respondent's brief. In the first of these cases the Supreme Court of the United States, speaking as to this point, said:

"The scope of the statute is so broad that it covers a vast field about which there can be no discussion. But owing to the fact that, during the same day, railroad employes often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions, where it is difficult to define the line which divides the state from the interstate business. \* \* \* The matter is not to be decided by considering the physical position of the employe at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars." (Italics ours.) 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298.

Again, said the same court on this subject:

"It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still in futuro. It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant. See *Pedersen v. Delaware, etc., Ry.*, 229 U. S. 148, 151, 38 Sup. Ct. 648, 57 L. Ed. 1125 [Ann. Cas. 1914C, 153]. 232 U. S. loc. cit. 260, 34 Sup. Ct. 309, 58 L. Ed. 591, Ann. Cas. 1914C, 159.

The trial court did not, therefore, err in overruling respondent's demurrer to the evidence.

[3] III. The remaining assignments of error relate to the giving and refusing of instructions and the admission of testimony. Taking these in order: It is insisted for appellants that the court erred in giving instruction No. 5, in that said instruction contained no formal submission of the issue of whether or not plaintiff was engaged in interstate commerce at the time he was injured. While that is so, still it must be borne in mind that the instruction in question was not one which covered the entire case, but was one relating only to comparative negligence of the parties, and concluded, to wit:

"And even though you may believe from the evidence that plaintiff was guilty of negligence which directly contributed to his injuries, yet if you further find that the defendants were also guilty of negligence which directly contributed to plaintiff's injuries, as set forth in the other instructions herein, then you are only warranted in reducing the amount of damages to be awarded to plaintiff in proportion as his negligence bears to the combined negligence of himself and the defendants."

In other words, it is apparent that the portion of the instruction above quoted and complained of was intended solely to prescribe the duty of the jury to make a comparison in case they should find that both parties were guilty of negligence and reduce the damages recoverable by plaintiff according to the rule fixed by the federal Employers' Liability Act.

[4] However, the first instruction given for plaintiff did cover the entire case, and did submit to the jury every phase of the evidence under the issues raised by the pleadings, and, among other things, "that the plaintiff, as well as the defendants, at the time was engaged in interstate commerce between the different states" and "that the parting of said hose and the consequent injury to plaintiff was due to the negligence of defendants, their agents, servants, or employes, in whole or in part, in the particulars as set forth in the next succeeding instructions and the other instructions

herein" as prerequisites to a verdict for the plaintiff on the first count of the petition. It is the established rule in this state that an instruction, which purports to cover the entire case and direct a verdict, must contain within itself a submission of all the issues upon every phase of the evidence, and any failure on the part of the first instruction in that respect would have been reversible error.

[5] But such is not the rule applicable to instructions directed only to particular phases of the evidence or particular issues. Instructions of the latter kinds are correctible or supplementable by any other instructions given in the case, all of which must be considered together by the jury in arriving at their verdict. We do not think, therefore, that the omission to resubmit to the jury the issue as to whether or not the parties were engaged in interstate commerce was a reversible error, in view of the complete submission of that issue in the first instruction for plaintiff, and especially in view of the fact that said instruction in terms referred the jury to all other instructions which might be given in the case, thus telling them that they should be guided by the instructions as a totality. We do not think in these circumstances, and in view of the fact that the uncontradicted evidence disclosed a state of facts which proved that plaintiff was engaged in interstate commerce, that the jury could have been misled in their consideration of this case.

[6] It is, however, contended that instruction No. 5 was faulty in another respect. This complaint is that the instruction in question, by the use of the terms "only warranted," failed to inform the jury that it was their bounden duty to exclude from the recovery, in case both parties were negligent, "a proportional part of the damages corresponding to the employe's contribution to the total negligence." *Seaboard, etc., Ry. v. Tilghman*, 237 U. S. loc. cit. 501, 35 Sup. Ct. 654, 59 L. Ed. 1069; *Blankenbaker v. Railroad*, 187 S. W. 842; *Crecelius v. Railroad*, 274 Mo. 671, 205 S. W. 185. In the two last cases this court has followed the paramount authority of the Supreme Court of the United States in construing the federal Employers' Liability Act, and has held that an instruction defining the duty of the jury in cases where the evidence shows *negligence on the part of the plaintiff as well as of the defendant* must contain terms or language requiring the jury to diminish the whole amount of damages allowable by such a sum as represents the proportional negligence attributable to the plaintiff. From that ruling this court will not recede, so long as the Supreme Court of the United States adheres to its ruling on the subject. If the words "only warranted" in the instruction had been substituted (with the nec-

essary changes of the context) by some such terms as "you will" or "you must," the instruction under review would have been technically flawless under the rule of both the Supreme Court of the United States and of this court, cited above.

As it is phrased, however, the instruction on this point is incorrect. Hence the only question is whether or not it constituted reversible error under the testimony in this record bearing on the question of contributory negligence of the plaintiff. If the record discloses any facts or circumstances which would have warranted a finding by the jury that the plaintiff was guilty of negligence directly contributing to his own injuries, then this judgment would have to be reversed under the terms of the federal statute applicable to the duty of the jury in cases of joint negligence. Section 3, act April 22, 1908, 35 Stat. 65, c. 149, U. S. Comp. Stat. 1916, § 8650. Of course, if upon the conceded facts no inference of negligence on the part of plaintiff is legally deducible, then the instruction under review was harmless. The only plea of contributory negligence contained in the answer of the defendants is in paragraph 8, and in substance avers that the plaintiff contributed to his own injury, "in that in using said hose he took no precautions whatever for his own safety, when by the exercise of ordinary care on his part he could not only have kept the hose in good condition, which it was his duty to do and which he failed to do, but that he also by the exercise of ordinary care on his part could have prevented himself from falling, and by the exercise of ordinary care on his part could have prevented any injury to himself by reason of the use thereof, which he failed to do." This was all the answer contained in reference to a charge of contributory negligence on the part of plaintiff. The other part of the answer referred to assumption of risk, a doctrine not applicable to this case. *Fish v. Railroad*, 263 Mo. 106, 172 S. W. 340, Ann. Cas. 1916B, 147.

[7] Clearly it was not the duty of the plaintiff to keep the hose furnished him by the master in a reasonably safe condition. That duty the law imposed upon the employer. Nor have we been able to find any evidence tending to show any negligence on the part of the plaintiff which contributed to his falling from the top of the car while he was drawing up the hose in order to fill the coolers. Of course, defendants cannot rely on any theory of contributory negligence beyond the averments contained in their answer, unless, which is not the case, negligence was shown as a matter of law by testimony given for plaintiff in submitting his case.

In these circumstances failure to embody in the instruction under review language re-

quired by the federal Employers' Liability Act in cases only where both parties are negligent was not harmful error, in the absence of any substantial evidence showing that plaintiff was guilty of negligence directly contributing to his own injury in the manner stated in the answer of defendants.

Our conclusion is that we would not be warranted under the facts in this record in reversing this case on account of the erroneous phraseology of the instruction defining the duty of the jury in cases where joint negligence is shown.

[8] IV. Appellant complains of the language contained in instruction No. 2 given by the plaintiff, because, in a clause therein, an issue was submitted to the jury whether or not the hose furnished to plaintiff "was old, defective, and rotten"; the contention being that there is no evidence tending to support that theory. On that point a witness for plaintiff testified, to wit:

"The foreman furnished Cassin and me with a long hose for watering coaches; it was about 65 feet long, I suppose—something like that—and at times it was longer. Sometimes it would get cut off; it would get worn out, and one thing and another; and sometimes they would let the cars run over it, using it across the tracks. This hose was made up of two pieces; the longest piece was about 50 feet; the shortest about 12 or 15 feet—something like that. The short piece was the old hose. It was from a long hose, I suppose 50 feet long, that had been worn and cut off—some full of holes until it got down that short. The old hose from which the short piece was taken might have been there two or three years, or four."

It is evident if the witness correctly described the hose, the instruction in question was not without support in the evidence. Besides, it must be borne in mind that, if the jury were required to find any bad condition of the hose not warranted by the testimony, plaintiff simply shouldered an additional burden which did not harm the defendants.

[9, 10] V. It is insisted that the court erred in the admission of testimony in reference to the common custom of using clamps to connect the two pieces of hose. Defendants were not compelled to adopt any specific method for that purpose other than such an one as would make the use of the hose reasonably safe. However, the evidence in question cannot be said to have been without any evidentiary force, since the very existence of the general custom consists with the idea that prudent men may have followed it. On that subject this court, in *Gordon v. Railroad*, 222 Mo. loc. cit. 536, 121 S. W. 85, approved a decision of the Court of Appeals in the following language:

"In *Brunke v. Telephone Co.*, 115 Mo. App. 36 [90 S. W. 753], it was held that 'evidence of a custom in doing a certain thing has probative force bearing upon negligence, since custom

arises from its adoption by many prudent men, and the law recognizes the value of arriving at the nature or tendency of the given act by considering its effect upon the conduct of others as shown by a general custom"—citing *O'Melia v. Railroad*, 115 Mo. 205 [21 S. W. 508], *White v. Railroad*, 84 Mo. App. 411, and other Missouri cases."

There was no complaint that the verdict in this case was excessive. We have not been able to find any valid reason, under the facts in this record, why it should be disturbed. It will therefore be affirmed. It is so ordered.

All concur; BLAIR, P. J., in paragraphs 1, 2, 4, 5, and result.

#### ANDERSON v. CRUM. (No. 15358.)

(St. Louis Court of Appeals. Missouri. Feb. 4, 1919. On Motion for Rehearing, April 24, 1919.)

#### 1. TRUSTS $\Leftrightarrow$ 102(1)—CONSTRUCTIVE TRUSTS—BREACH OF DUTY.

Where plaintiff sent money to an official of a corporation to buy bonds of the corporation and such officer bought the bonds which were made payable to bearer, plaintiff held not entitled to recover the money paid to the officer on the ground that there was a constructive trust, where the officer deposited the money to his own account and paid for and received the bonds, but failed thereafter to deliver them for several years and until they became worthless.

#### 2. TRUSTS $\Leftrightarrow$ 94½—TRUSTS EX MALEFICIO.

Fraud, actual or constructive, is the very foundation of a constructive trust or a trust arising ex maleficio.

Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

"Not to be officially published."

Suit by A. E. Anderson against Bird Crum, administratrix of the estate of Mathias Crum, deceased. From a decree for plaintiff, defendant appeals. Reversed.

Fry & Fry, R. D. Rodgers, and Stocks & Stocks, all of Mexico, Mo., for appellants.

A. C. Whitson, of Mexico, Mo., for respondent.

ALLEN, J. This is a suit in equity seeking to recover against the estate of Mathias Crum, deceased, the sum of \$500 and interest. The trial below resulted in a decree in favor of plaintiff, from which the defendant administratrix prosecutes this appeal.

The petition, filed August 6, 1915, alleges that on November 1, 1914, the said Crum died intestate in Audrain county, and that on July 21, 1915, letters of administration on his estate were issued to defendant ad-

ministratrix. And it is averred that on June 25, 1910, plaintiff, through Crum, "subscribed for and agreed to take \$500 worth of bonds in the Mexico, Santa Fé & Perry Traction Company, a corporation of which the said Mathias Crum was president," and paid said sum to Crum, who, on May 30, 1910, acknowledged the receipt thereof; and that from time to time thereafter, until April 11, 1913, plaintiff made demand of Crum for said bonds and was informed that they had been issued and would soon be delivered to him. And it is alleged that on April 30, 1913, plaintiff was informed, at the "direction" of Crum, that the traction company had gone into the hands of a receiver; that under the receivership proceedings all of the property of the company was sold to satisfy a certain judgment; "that thereafter the plaintiff ascertained that said sum of \$500 had not been by the said Mathias Crum invested in bonds in the said Mexico, Santa Fé & Perry Traction Company of Missouri for him," and that "no bonds of said company had been issued to him or in his name." And plaintiff "states that said sum of \$500 was used by the said Mathias Crum in paying obligations he had himself incurred for the purchase of bonds in said Mexico, Santa Fé & Perry Traction Company, and that he took, held, and used said bonds so purchased with plaintiff's money for his own use."

And it is alleged that, by reason of the facts pleaded, Crum became a trustee for plaintiff as to said sum thus paid him, and that the same is owing to plaintiff from his estate, with interest from May 30, 1910. Judgment is prayed accordingly.

The answer first contains a general denial, and then avers that in 1910 M. Crum was president of the traction company mentioned, and a member of its board of directors; that plaintiff was desirous of purchasing four bonds of that company, of the par value of \$250 each, which bonds had been authorized but which had not been then issued, as plaintiff knew; and that all of the bonds of the company were issued payable to bearer. And it is averred that "about or just before" March 20, 1910, plaintiff paid the corporation through Crum, as president thereof, \$500, and received and accepted a receipt for the same from Crum as president, in payment of four of said bonds; that when plaintiff first negotiated for the bonds he understood that in purchasing them in this way he could procure four bonds of \$250 each, for \$500; that four of such bonds were issued and delivered by the company to Crum for plaintiff, and that Crum held the same as plaintiff's property until Crum's death on November 1, 1914; that, owing to ill health in 1913 and 1914, Crum neglected to deliver said bonds to plaintiff; and that defendant administratrix had repeatedly offered to de-

liver them to plaintiff, but he had refused to accept them. And by the petition four such bonds were tendered to plaintiff, and, it is said, were deposited in court for him. The answer also pleads the statute of limitations.

The reply is conventional.

The evidence shows that in 1910 Mathias Crum, known as "Judge Crum," was president of the Mexico, Santa Fé & Perry Traction Company, a corporation organized for the purpose of constructing and operating an electric railway in the vicinity of Mexico, Mo. Plaintiff resided at Genoa, Neb. One Averitt, a cousin of plaintiff, residing at Mexico, Mo., was in the employ of the traction company, having previously been employed by Judge Crum. It appears that Averitt had had certain correspondence with plaintiff in regard to the purchase by plaintiff of bonds of the traction company. And on or about the date last mentioned plaintiff sent to Averitt a draft, dated January 25, 1910, for \$250, payable to plaintiff's order and which had been by him indorsed to the order of Averitt. Averitt in turn indorsed it to the order of M. Crum, and delivered it to Judge Crum for the purpose of acquiring for plaintiff a bond or bonds of the traction company which had authorized an issue of bonds, each of the par value of \$250, but which were not ready to be issued. Again, on or about March 12, 1910, plaintiff sent another draft, of that date, for \$250, likewise payable to the order of Averitt which was by him indorsed to Judge Crum and delivered to the latter for the purpose mentioned above.

Averitt was permitted, over defendant's objections, to testify to his conversations with Judge Crum when these drafts were delivered to the latter, but subsequently the court struck out this portion of Averitt's testimony upon the theory that Averitt was then acting as plaintiff's agent. Defendant, however, waived objections to certain letters passing between plaintiff and Averitt, and they were introduced in evidence. In a letter to plaintiff, of date January 27, 1910, Averitt acknowledged the receipt of the first draft, stating that it had been credited to plaintiff on the bonds; that the bonds were being printed; that Judge Crum had directed the writer to say that when the other payment was made the bonds would be sent to plaintiff; and that he felt sure that plaintiff's investment would be "the starter toward locating" plaintiff "in a good position with the company." And in a letter of March 15, 1910, Averitt wrote plaintiff acknowledging receipt of the second draft, stating that the amount had been placed to plaintiff's credit, and informing plaintiff that, though the bonds had been printed, the company had not then succeeded in getting its affairs in condition so that they could be issued.

On May 25, 1910, plaintiff wrote Averitt telling him that he would like to have "a receipt of some description," so that he "would have something to show for that \$500." It appears that Averitt conferred with Judge Crum in regard to the matter, and that under date of May 30, 1910, Judge Crum, as president of the traction company, executed the following instrument which was sent by Averitt to plaintiff, viz.:

"Mexico, Mo., May 30, 1910.

"Mr. A. E. Anderson, Genoa, Neb.—Dear Sir: This is to certify that your \$500.00 was received and paid for four of the bonds of this company. These bonds will be forwarded to you when the board of directors take up their bonds soon after the fifth mile of road is complete.

"Yours truly, Mathias Crum, President."

Though Judge Crum paid the company for quite a number of bonds in 1910 (a matter to which we shall refer later), it appears that no bonds were delivered to him until some time in the early part of 1912.

So far as appears, nothing further was done by plaintiff in regard to the matter until 1913. There is testimony of Averitt, adduced by plaintiff, which the court declined to strike out, to the effect that shortly prior to January 21, 1913, Judge Crum told this witness that he had received a letter from plaintiff "inquiring about the bonds and why he hadn't received them, and demanding that he receive either his money, his bonds, or something," and that Judge Crum asked the witness to write plaintiff and tell him the situation, "the troubles the company was in at that time," and to "give him an explanation of why he (Crum) held the bonds at that time." And the record shows that on January 21, 1913, Averitt wrote plaintiff a letter telling him that Judge Crum was holding his bonds, and that they were "just as good as any of the bonds," that had been issued; that there was not enough of the road in operation to pay interest on them; and that Judge Crum had been holding them "hoping that he would be able to get things in proper shape" so he could send them to plaintiff and "feel that they would be profitable" to him. It appears that in February, 1913, a receiver was appointed for the traction company, and that in the receivership proceedings its property was sold to satisfy a judgment enforcing a contractor's lien, and that the bonds became worthless.

Judge W. W. Botts, a witness at the trial, was the treasurer of the company from 1908 until 1912 or 1913. From a brief memorandum made by him, of date January 15, 1910, he testified that Judge Crum then subscribed \$2,000 for the purchase of bonds of the company. He produced a record of a resolution of the board of directors of the traction company, apparently dated January 18, 1910, by which resolution it was resolved, among

other things, that bonds and stock of the company be sold in an amount sufficient to realize not less than \$15,000 or more than \$20,000 upon subscriptions of not less than \$1,000; each subscriber to receive for each \$1,000 eight bonds, of \$250 each, and also 10 shares of the stock of the company. And the witness stated that Judge Crum's subscription, mentioned above, and that of other directors made at the time (though appearing to have been made on January 15, 1910), were made in pursuance of this resolution. However, Judge Botts testified positively that this resolution was never "carried out," that no stock was in fact issued with the bonds, and that Judge Crum "only got bonds dollar for dollar." And there is nothing to contradict this.

The record discloses that each of the two drafts indorsed and delivered to Judge Crum by Averitt, as aforesaid, were indorsed and deposited in his personal bank account. Just when the respective drafts came into his hands does not appear. From the testimony of the assistant cashier of the bank, testifying from its records, it appears that the first draft, of date January 25, 1910, was deposited in Judge Crum's account on January 28, 1910; and that the second draft, dated March 12, 1910, was deposited by Judge Crum on March 15, 1910. The evidence shows that prior to the date of the first draft Judge Crum had paid to the treasurer of the traction company \$500 on his subscription of \$2,000; and that on January 31, 1910, Judge Crum, by check, paid \$250 to the company's treasurer, in purchase of bonds. Thereafter, prior to March 14, 1910, he made two other like payments of \$250 each to the company's treasurer, for the same purpose. And he paid to the treasurer on March 14, 1910, \$500; on March 22, 1910, \$250, and on April 8, 1910, \$250, for the purpose mentioned.

The foregoing are the specific payments shown to have been made by Judge Crum in the purchase of the company's bonds. However, Judge Botts, who was first called as plaintiff's witness, testified, on cross-examination of defendant's counsel, that "there were many payments after that." He was later called to the stand by defendant, and (though he said that he did not have all of his memorandum present) testified from what he had before him that "up to April 8, 1910," Judge Crum had paid \$3,000 for bonds; that he paid for many others in cash; and that ultimately "about 42 bonds" were delivered to Judge Crum, 4 of which were delivered to him for certain cash advancements made long prior to the subscription mentioned, and for certain services. The witness further stated that Judge Crum received no bond as a gift. Forty-four of these bonds, it appears, were in fact found among Judge Crum's effects after his death.

All of the bonds were made payable to bear-

er. Judge Botts testified that he had no record or memorandum showing plaintiff's name as a purchaser of bonds.

The defendant administratrix testified that her father, Judge Crum, was in very poor health for about a year prior to his death on November 4, 1914. She further testified that about three months after her father's death Averitt came to her and told her that he held a receipt signed by her father for \$500 (being the instrument of date May 30, 1910, supra), and wanted to know what the witness was going to do about the matter; that she told Averitt that if Mr. Anderson, plaintiff herein, purchased bonds, she was perfectly willing to give them to him; and that she offered to give him four bonds, although she then stated that her father had received only two bonds for that amount of money, which offer plaintiff refused.

Certain questions are raised by defendant regarding the admission of evidence, and pertaining to the defendant's plea of the statute of limitations. These matters we deem it unnecessary to discuss, in the view which we take of the case.

It is earnestly insisted by appellant's learned counsel that the facts shown in evidence were not such as to entitle plaintiff, in equity, to the judgment or decree entered in his favor. A careful consideration of all the evidence adduced has caused us to conclude that this contention is well founded, and that this judgment, a money judgment for \$500 and interest, cannot be sustained.

Respondent's view of the matter, as appears from his brief, is that Judge Crum "was a constructive trustee for the \$500 which came into his hands, a trustee ex maleficio." It is said that it is a well-settled doctrine of equity "that a constructive trust arises when one party has obtained money which does not belong to him and which he cannot in good conscience retain and withhold from another who is beneficially interested," and that "a constructive trust arises where one wrongfully takes possession of or assumes control of property belonging to another." In this connection, a number of authorities are cited which we deem it unnecessary to discuss. We do not think that the doctrine invoked by respondent has, in any event, any application to the facts of the case in hand, as one seeking to recover the money invested.

[1] From the allegations of the petition quoted above, it will be seen that plaintiff in his pleading admits that the \$500 received by Judge Crum from plaintiff was invested in bonds of the traction company. And, indeed, this appears from the evidence in the record. It is true that the evidence shows that these drafts, having been specifically indorsed to the order of Judge Crum personally, were not delivered by him to the traction company with his indorsement, but were indorsed and deposited in his bank account. However, the

record shows, and the petition concedes, that plaintiff's money was paid to the treasurer of the traction company in purchase of bonds. Whatever effect the deposit of these drafts by Judge Crum in his bank account might have under other circumstances, it cannot help plaintiff's case, as for the recovery of a money judgment, for the reason that, not only is it conceded that plaintiff's money was utilized in the purchase of bonds, in accordance with plaintiff's directions, but thereafter plaintiff accepted the instrument of date May 30, 1910, executed by Judge Crum as president of the traction company, acknowledging in behalf of the company the receipt of the money, and certifying that plaintiff was entitled to four bonds; which instrument plaintiff retained during all of the succeeding years mentioned above, until the time of the trial of this case. In view of the fact that plaintiff, when informed that his money had been invested precisely as he intended that it should be invested, accepted and retained the instrument above mentioned, as the indicia of his ownership of four bonds of the company, and his acquiescence in the situation shown by the evidence to have existed for some years, we regard it as entirely clear that plaintiff has no standing in equity to recover the purchase money from the defendant estate. He was entitled to receive the bonds which had been purchased for him, when ready for delivery. If the subsequent conduct of Judge Crum in retaining the bonds after they came into his hands was such as to render him liable to plaintiff, in conversion or otherwise (which we do not here decide), this would render the estate at most liable for the value of the bonds, and not for the return of plaintiff's original investment. We are not prepared to say that any demand upon Judge Crum for the bonds was shown by competent evidence, but that question is one not involved in the issues here presented.

Plaintiff's case appears to proceed in part upon the theory that the proceeds of the drafts were paid by Judge Crum to the traction company on his own personal bond subscription of \$2,000, and that this rendered him liable to account to plaintiff for such proceeds. But the facts shown in evidence do not support this theory. It is true that prior to receiving the first of these two drafts Judge Crum, it is said, had signed a subscription of some sort for bonds, to the amount of \$2,000; though the subscription itself was not shown in evidence. And so far as appears, he had paid but \$500 upon this subscription when he received plaintiff's first draft. However, the record unmistakably shows that thereafter he paid out of his own funds much more than \$2,000 to the company's treasurer, to be applied on the purchase of bonds. It is unnecessary to rehearse the facts which we have stated above in regard to this phase of the case. Manifestly, it cannot be said that Judge Crum utilized

this \$500 in order to perform the obligation resting upon him (if he had incurred any legally enforceable obligation in the premises) to pay this subscription of \$2,000.

[2] The evidence makes it appear that plaintiff expected to get for his \$500 four bonds of \$250 each, and thereby reap an extraordinary profit. And there is some evidence to indicate that he and his cousin had in view that such investment would aid plaintiff in obtaining a position with the company. His money having gone into the purchase of such bonds, for which he held the company's obligation, and which were subsequently delivered to and held by Judge Crum for him, it would be highly inequitable and unjust to permit him now to entirely repudiate the original transaction and recover from the defendant estate upon the theory that his money was misapplied. Fraud, actual or constructive, is the very foundation of a constructive trust, or a trust arising *ex maleficio*. See *Ferguson v. Robinson*, 258 Mo. 113, loc. cit. 130, 137 S. W. 447. The facts in evidence do not, in our judgment, entitle plaintiff to the relief sought upon the theory that Judge Crum was guilty of fraud, either actual or constructive, in respect to the investment of plaintiff's money.

The fact that plaintiff's name did not appear upon the records or memoranda of the company, as a purchaser of bonds, is not of material consequence under the circumstances of the case. The bonds, by the terms thereof, were payable to bearer, and plaintiff's right or title to the bonds purchased for him in no wise depended upon anything to be shown by the company's records. The case is quite unlike one where a party purchases real estate with funds belonging to another and wrongfully takes the title thereto in his own name. It cannot be said that Judge Crum wrongfully took title to these bonds in his own name.

Our conclusion is that the judgment below should be reversed, and it is so ordered.

REYNOLDS, P. J., and BECKER, J., concur.

#### On Motion for Rehearing.

ALLEN, J. Respondent insists that the opinion herein is in conflict with the decision in *Freeland v. Williamson*, 220 Mo. 217, 119 S. W. 560, and with that in *Harrison v. Murphy*, 106 Mo. App. 465, 80 S. W. 724. The *Freeland* Case was a suit in equity to establish a resulting trust in land which had been purchased by the father of the plaintiff, a married woman; the title having been taken in her husband's name. The facts clearly established a resulting trust, as the court held. Cases of this character, with which our reports abound, can, we think, have no application to the case before us. In *Harrison v. Murphy*, *supra*, it was held that the defendant "had collected and had



in his hands money which did not equitably belong to him and which he could not in good conscience withhold from the plaintiff who was beneficially entitled to it," and that upon the facts a constructive trust arose in plaintiff's favor, and that plaintiff could maintain an action for money had and received. Were the facts before us such as to bring it within the well-known doctrine applied in the Harrison Case, no one could doubt plaintiff's right to the relief sought. The facts, as we have stated them in the opinion, however, make it appear, we think, that plaintiff is not in equity and good conscience entitled to a recovery of the money invested by him through Judge Crum.

Likewise the other authorities cited by respondent in his brief, and again referred to in the motion for rehearing, are here no more closely in point than are the cases cited above.

The motion for rehearing charges that we are in error in stating that it is conceded that plaintiff's money was utilized in the purchase of bonds, according to his directions. It is shown in the opinion that plaintiff in his petition alleged that Judge Crum "took, held, and used said bonds so purchased with plaintiff's money for his own use." And it will thus be seen that by his pleading plaintiff concedes that his money was used in the purchase of the bonds of the company mentioned, and that he charges that these bonds were held and used by Judge Crum.

It is further insisted that a constructive trust arose under the facts of the case, and that our conclusion to the contrary is highly erroneous. A further study of the facts presented by the record, in the light of the principles of equity which must be brought to bear thereupon, has not altered our view of the matter as expressed in the opinion. It appearing that plaintiff turned over his money to Judge Crum, for the purpose of having the latter purchase bonds therewith (proceeding in this manner doubtless with a view of obtaining bonds at one-half of their par value), and it further appearing (and, as we say, the petition conceding) that the money was so utilized by Judge Crum, who subsequently received and held the bonds for plaintiff, as the latter was informed, we are of the opinion that it cannot be said that in equity and good conscience there remained in the hands of Judge Crum \$500 belonging to plaintiff for which the estate should now be held liable. There was no misuse of plaintiff's money; nor does it appear that Judge Crum violated any trust or confidence reposed in him by receiving the bonds for plaintiff when the company was ready to deliver them. Evidently, plaintiff expected to receive his bonds, not directly from the treasurer of the company, but through Judge Crum to whom he had given

his money. The subsequent withholding of the bonds by Judge Crum does not, in our judgment, entitle plaintiff to the relief herein sought.

With the concurrence of the other Judges, the motion for a rehearing is overruled.

# AYRES v. MIDDLETON THEATER CO. (No. 15409.)

(St. Louis Court of Appeals. Missouri. April 8, 1919.)

## 1. PLEADING $\S$ 237(5) — AMENDMENT AT TRIAL—EVIDENCE ADMITTED WITHOUT OBJECTION.

An original petition alleging merely insults to plaintiff by a theater usher in refusing admission to the theater can be amended at the close of plaintiff's testimony under Rev. St. 1909, § 1848, where testimony that the usher assaulted plaintiff was admitted without objection.

## 2. TRIAL $\S$ 76—EVIDENCE—TIME FOR OBJECTION—REPETITION OF TESTIMONY.

An objection to testimony not applicable to the pleadings is too late, where the same testimony had previously been admitted without objection.

## 3. THEATERS AND SHOWS $\S$ 6—LIABILITY TO PATRONS—ASSAULT BY USHER.

Though the license granted by the sale of theater tickets is revocable, a holder of such ticket who was assaulted by an usher who refused him admittance can recover from the proprietor for such assault.

## 4. THEATERS AND SHOWS $\S$ 6—LIABILITY TO PATRON—DAMAGES—INJURIES TO FEELINGS.

Where an assault by a theater usher on a holder of tickets was accompanied by loud, offensive, and insulting language in the presence of many persons, damages may be allowed against the proprietor for injured feelings and humiliation.

Appeal from St. Louis Circuit Court; Kent K. Koerner, Judge.

"Not to be officially published."

Action by Harry F. Ayres against the Middleton Theater Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

Reynolds & Harlan and Chase Morsey, all of St. Louis, for appellant.

Chas. A. Smith and William McNamee, all of St. Louis, for respondent.

ALLEN, J. The petition, as originally filed herein, charged:

That on February 18, 1915, the defendant corporation was engaged in conducting a theater in the city of St. Louis, and that on the evening of the day mentioned plaintiff, having purchased

from defendant four tickets for admission to defendant's theater, entitling him to four seats therein, entered the same accompanied by his sister, her husband, and another companion, but that, though plaintiff and his companions were properly conducting themselves, defendant's agents and servants in charge of its theater, without cause, refused to allow plaintiff to occupy a seat therein, and "in a loud, insolent, and insulting manner, in the presence and hearing of a great number of patrons of said theater who were then and there present, whose names are unknown to the plaintiff, told plaintiff that he and the persons accompanying him could not obtain seats in said theater, and that he must leave said theater, and then and there defendant, through its said officers, agents, servants, and employes, in a loud tone of voice and insulting language, ordered plaintiff and the persons accompanying from said theater; that plaintiff, by reason of being publicly insulted and expelled in the manner as above stated, suffered great pain of mind and humiliation, and by reason of his expulsion, as above set forth, the plaintiff has been, and still is, greatly injured in his good name, fame, and credit, and was and is brought into public scandal, infamy, and disgrace with and among his associates and others."

The answer is a general denial.

Plaintiff, a resident of Mineral Point, Mo., testified that having purchased four tickets to defendant's theater, the "Grand Opera House," for 10 cents each, he and his companions entered the theater and were directed by an employe of defendant to go to the second floor or balcony thereof, and that upon entering the aisle on the second floor he was stopped by an employe of defendant. Plaintiff testified:

"The doorkeeper [evidently an usher] on the second floor, he takes me by the arm and pulls me back; told me to 'Hold on'; says, 'You can't go in here.' \* \* \* I says, 'What is the matter?' 'Well,' he says, 'your clothes.' I says, 'My clothes? What is the matter with my clothes?' And he looked me up and down and in a loud tone of voice says, 'Why you are not dressed sufficient to be admitted here.' He says, 'You clothes are not sufficient to be admitted.' \* \* \* This fellow had kindo' pushed me back towards the stairs, and I explained to him, I says, 'What are you going to do; I bought tickets for all of us?' He says, 'That don't make any difference; you can't be admitted here; you are not dressed sufficiently to be admitted.' I says, 'What do you mean? Do you mean to get out?' He says, 'Yes, sir; you leave the theater; you can't be admitted here.'"

And plaintiff testified that he and his companions then returned to the first floor, where he spoke to a doorkeeper and told him what had occurred, and that the doorkeeper said: "Here is your tickets; what are you kicking about?" that plaintiff thereupon took the tickets to defendant's office, where he received back the money which he had paid therefor. Plaintiff further testified that defendant's said servant on the second floor, in addressing him, "talked

loud and boisterous," and attracted the attention of persons in the theater in their seats and of others who had congregated near plaintiff and his companions in the aisle. The testimony shows that plaintiff had on a blue serge coat and vest which were practically new, corduroy trousers, a gray flannel shirt, with collar and necktie, new shoes, and had a new corduroy cap, and that his clothes were clean.

The testimony of plaintiff's companions corroborates that of plaintiff as to what occurred upon the occasion in question.

A witness for defendant testified that he was an usher in defendant's theater, on the second floor thereof, on the evening mentioned; that as he stood at the door leading to this floor a man and a lady entered followed by two men; that, as there were only two vacant seats on the floor at the time, he stopped the two men in the rear, telling them that they would have to take seats "upstairs"; that these men refused to go upstairs, saying they would get their money back, and that the man and the lady mentioned then also went down the stairway. The witness could not identify plaintiff and his companions as being the persons mentioned, but he testified that he said nothing to plaintiff in regard to the latter's clothes, had no argument with plaintiff, and did not put his hand upon plaintiff's arm.

Defendant's ticket collector testified that upon the evening in question a "party of four" entered the theater, and later returned and "asked for their tickets back"; that he was busy and did not have time to listen to what was said, but returned their tickets to them.

At the close of all the evidence in the case the court, on plaintiff's request, allowed plaintiff to amend his petition by interlineation, so as to charge that "defendant's agents and servants assaulted plaintiff by laying hands upon him and expelled him from said theater," charging that plaintiff had been damaged by reason of being assaulted as well as being publicly insulted and expelled.

The trial, before the court and a jury, resulted in a verdict and judgment for plaintiff in the sum of \$300, and the defendant appealed.

[1, 2] I. It is urged by appellant that the trial court committed error in permitting plaintiff to amend his petition at the close of all the evidence in the case. This point does not appear to be well taken. Plaintiff's testimony to the effect that defendant's employe caught him by the arm, pulled him back, and pushed him toward the stairway, which we have set out above, came in without objection. It is true that thereafter, when plaintiff, in the course of his testimony, stated again that the door-

keeper or usher took him by the arm and pushed him back, defendant's counsel interposed an objection, which was overruled. No point is made as to this ruling here, but obviously the objection came too late. *Surbeck v. Surbeck*, 208 S. W. 645. This amendment of the petition was allowed to conform to the proof admitted, as said, without objection, and was therefore in the furtherance of justice and properly allowable under section 1848, Revised Statutes 1909. And the record shows that no affidavit of surprise was filed, and that defendant made no request for a continuance. In passing upon defendant's objection to the amendment, the trial court said:

"The objection is overruled; and, there being no request for a continuance on the part of the defendant, the case proceeds to a conclusion."

Under the circumstances appellant cannot justly complain of the ruling. See *Goldsmith v. Holland Building Co.*, 182 Mo. 597 loc. cit. 610, 81 S. W. 1112.

[3, 4] II. Appellant further insists that the facts shown in evidence do not warrant a recovery by plaintiff, and that the trial court consequently erred in overruling appellant's demurrer to the evidence. To this we are unable to assent. It is true that the license granted to plaintiff by the sale of the theater tickets to him was one revocable at the will of defendant, the proprietor of the theater. But it by no means follows from this that plaintiff was without remedy under the facts of this case. What recourse plaintiff would have had for expulsion from the theater, attended by acts of insult and humiliation, but without the use of force or any act constituting in law an assault upon him, we need not say. In this connection, however, see *Weber-Stair Co. v. Fisher* (Ky.) 119 S. W. 195; *Smith v. Leo*, 92 Hun, 242, 38 N. Y. Supp. 949; *Aaron v. Ward*, 208 N. Y. 351, 96 N. E. 738, 38 L. R. A. (N. S.) 204. The evidence for plaintiff tends to show facts constituting an assault upon his person, within the legal meaning of that term; for plaintiff's evidence is that defendant's employé, without having first made a request upon plaintiff to leave the theater, caught plaintiff by the arm, pulled him back, and pushed him toward the stairway. Appellant's learned counsel argue that the evidence does no more than show that defendant's employé laid his hand upon plaintiff's arm for the purpose of attracting plaintiff's attention, but such is not the effect of the testimony in the record when viewed in the light most favorable to plaintiff. The facts shown by plaintiff's evidence in this connection constituted a direct invasion of plaintiff's right of personal security. *Lonergan v. Small*, 81 Kan. 48, 105 Pac. 27, 25 L. R. A. (N. S.)

976; *Dyk v. De Young*, 35 Ill. App. 138; 8 Cyc. 1067 et seq. And since this wrongful act, according to plaintiff's evidence, was accompanied by unnecessary loud, insulting, and offensive language, in the presence of many persons, damages may be allowed as for injured feelings and humiliation. See *Morris v. Railroad*, 184 Mo. App. 65 loc. cit. 75, 169 S. W. 325; *White v. Met. St. Ry. Co.*, 132 Mo. App. 339 loc. cit. 346, 112 S. W. 278; *Lonergan v. Small*, supra.

We perceive no reversible error in the record, and the judgment should consequently be affirmed.

It is so ordered.

REYNOLDS, P. J., and BECKER, J., concur.

#### HEIDEMANN v. KLEINE. (No. 15335.)

(St. Louis Court of Appeals. Missouri. April 8, 1919.)

#### 1. MUNICIPAL CORPORATIONS — 706(6) — USE OF STREETS—NEGLIGENCE.

Evidence that a huckster, having twice walked past a child who was sitting on the curb near the rear of the wagon, turned sharply in starting so as to throw the rear wheels against the child, established prima facie negligence sufficient for the jury.

#### 2. MUNICIPAL CORPORATIONS — 706(8)—USE OF STREETS—INSTRUCTIONS—APPLICABILITY TO PLEADINGS.

An objection, that an instruction permitting the jury to find that defendant wagon struck plaintiff is broader than a petition alleging that a wheel of the wagon struck plaintiff, is without merit.

#### 3. JUSTICES OF THE PEACE — 178—TRIAL DE NOVO ON APPEAL—INSTRUCTIONS—APPLICABILITY TO PLEADING.

An instruction, in case appealed from justice court, requiring the jury to find that defendant saw or could have seen plaintiff, is not erroneous as broader than the allegation of petition filed in justice court that defendant carelessly managed his wagon so as to injure plaintiff, in view of liberality of construction of informal pleadings.

#### 4. NEGLIGENCE — 85(3) — CONTRIBUTORY NEGLIGENCE—CHILD.

The court can instruct jury as a matter of law that a four year old child cannot be charged with contributory negligence.

#### 5. APPEAL AND ERROR — 1064(4) — HARMLESS ERROR — INSTRUCTION — IMMATERIAL STATEMENT.

Where an instruction that the four year old child injured could not be charged with contributory negligence was not error, under the facts, the further statement that no negligence can be charged to so young a child, if error, was not prejudicial to defendant.

**6. TRIAL — 210(3) — INSTRUCTION — CREDIBILITY OF WITNESSES.**

Where there is a direct conflict in testimony as to a material fact which cannot reasonably be attributed to mistake, an instruction that the jury might reject all or any portion of the testimony of a witness who had knowingly sworn falsely to a material fact is proper.

Appeal from St. Louis Circuit Court;  
Rhodes E. Cave, Judge.

"Not to be officially published."

Action by William J. Heldemann, an infant, by Edward Heldemann, next friend, against Benjamin Kleine. Judgment for plaintiff on appeal from justice of the peace, and defendant appeals. Affirmed.

Walton & Senti and Igoe & Carroll, all of St. Louis, for appellant.

Robert M. Wilson, of St. Louis, for respondent.

ALLEN, J. This is an action for personal injuries sustained by plaintiff, an infant, alleged to have been caused by the negligence of the defendant in managing his horse and wagon in a public street of the city of St. Louis. The suit was instituted before a justice of the peace, where plaintiff had judgment. Upon defendant's appeal to the circuit court, and a trial there de novo, before the court and a jury, there was a verdict and judgment for plaintiff in the sum of \$350, from which the defendant prosecutes this appeal.

The statement filed before the justice, and upon which the cause was tried in the circuit court, alleges that on July 16, 1915, plaintiff was sitting on the curbstone on the east side of Knapp street, in the city of St. Louis, in front of plaintiff's home; that defendant had his horse and wagon upon this street; and that he "so carelessly led or drove and managed" the same that by reason of his negligence one of the wheels of the wagon struck and ran over plaintiff, injuring him.

The defendant filed no answer.

Plaintiff's evidence tends to show that on the day above mentioned plaintiff, who was then a little over four years of age, was sitting upon the curbstone on the east side of Knapp street in front of his father's house; that defendant, who was a huckster owning a horse and a covered huckster's wagon which he operated in his business, drove the same south on Knapp street, along the east side of the street, and stopped the wagon in front of the Heldemann house, a foot or a foot and a half from the curb, and with the rear thereof a short distance from plaintiff as he sat upon the curbstone. According to the testimony for plaintiff, the defendant, having stopped his wagon in the position aforesaid, walked by plaintiff and entered the

Heldemann yard. It is said that he returned a little later, again walked by plaintiff who had remained seated upon the curbstone, went around the rear end of the wagon, caught his horse by the bridle, and turned the horse and wagon sharply to the right or north. Plaintiff's evidence is to the effect that defendant made a very sharp turn with his wagon, causing the right front wheel thereof to strike the "middle pole" of the wagon, which caused the rear wheels to slide over to the curb, by reason whereof plaintiff's foot was caught between the wheel and the curb and injured. Such is the substance of the testimony of the several witnesses who testified in plaintiff's behalf.

Though not pleaded, certain ordinances of the city of St. Louis were introduced in evidence: One of them providing that a vehicle, except when passing a vehicle ahead, shall keep as near the right-hand curb as possible; another providing that "a vehicle crossing from one side of the street to the other shall do so by turning to the left, so as to head in the general direction of traffic on that side of the street"; another providing that no vehicle shall stop with its left side to the curb line.

The defendant's testimony, substantially corroborated by that of his witnesses, is to the effect that plaintiff got upon the step at the rear end of defendant's wagon, and received his injuries by falling therefrom to the street.

[1] It is earnestly insisted by appellant's learned counsel that no negligence was shown on the part of defendant, and that consequently the trial court erred in refusing to peremptorily direct a verdict for defendant. To this we are unable to assent. We are of the opinion that the evidence for plaintiff tends to establish negligence on the part of defendant, proximately causing plaintiff's injury, making the case one for the jury. Though obviously defendant violated the ordinances, supra, such violation was not submitted to the jury as a predicate of liability. The case was submitted by plaintiff's main instruction upon the theory that under the evidence adduced by plaintiff defendant could properly be found guilty of negligence, at common law, in starting his wagon in such manner as to strike and injure plaintiff, under the circumstances. In this we think that the court committed no error. If plaintiff's evidence be true, the defendant drove his wagon near the curb upon which this little child was sitting, walked by the child in entering the Heldemann yard and in returning therefrom, and then, passing around the rear of his wagon, caught the bridle of the horse and turned the horse and wagon so sharply as to throw the rear wheels of the wagon against the child as he sat upon the curbstone. This evidence we think clearly estab-

lished a prima facie case of negligence as for the failure of defendant to exercise ordinary care to avoid injury to plaintiff—such care as an ordinarily prudent person would have exercised under the circumstances.

[2] It is argued that the main instruction given for plaintiff is broader than the petition or statement filed by plaintiff, in that it permits the jury to find that defendant, in starting his horse and wagon, caused the "wagon" to strike plaintiff; whereas, the petition alleges that plaintiff was struck by "one of the wheels" of the wagon. Obviously there is no merit in this assignment of error.

[3] It is further argued that this instruction is broader than the pleadings for the reason that it tells the jury that if they find and believe from the evidence that defendant saw, or by the exercise of ordinary care could have seen, plaintiff, then, finding the other matters mentioned in the instruction, to find for plaintiff; whereas, plaintiff's statement does not allege that defendant saw, or by the exercise of ordinary care could have seen, plaintiff, but merely alleges that defendant "carelessly led or drove and managed" the horse and wagon. But it cannot be held that the rule invoked by appellant—viz., that instructions must not be broader than the pleadings—was violated by the giving of this instruction, since the case originated before a justice of the peace where the pleadings are quite informal and are viewed with liberality. The general allegation of negligence contained in plaintiff's statement sufficed to warrant the submission of the case to the jury upon an instruction such as that under consideration.

[4] Appellant assigns as error the giving of the following instruction at plaintiff's request, viz.:

"The court instructs the jury that, if you find and believe from the evidence that plaintiff was at the time of the injury mentioned in the petition but four years of age, then he cannot, because of his tender years, be guilty of or be charged with negligence or carelessness in respect to the injury in this case, as no negligence can be charged to so young a child."

We are of the opinion that no reversible error was committed in giving this instruction. In *Berry v. Railroad*, 214 Mo. 593, 114 S. W. 27, where the action was one for injuries to a child four years of age, it is said, by Lamm, J.:

"A child may be of such an age that whether he is or can be guilty of negligence, under the circumstances of a given case, is a question of fact for the jury, and such is the usual case. He may have arrived at such degree of maturity

in age and judgment that the court might say as a matter of law he could be guilty of contributory negligence. On the other hand, he may be so tender in age and infantile in judgment that the court as a matter of law might rule he could not be guilty of contributory negligence in the circumstances of a given case. This child, under the facts here, came within the latter class. He was non sui juris. *Holmes v. Railroad*, 190 Mo. loc. cit. 105 et seq. [83 S. W. 623]; *Cornovski v. Railroad*, 207 Mo. loc. cit. 273 et seq. [106 S. W. 51]; *Donahoe v. Railroad*, 83 Mo. loc. cit. 565; *Frick v. Railroad*, 75 Mo. loc. cit. 608; *O'Flaherty v. Railroad*, 45 Mo. loc. cit. 74 [100 Am. Dec. 343]."

[5] Under the facts here in evidence, we are of the opinion that it may be ruled, as a matter of law, that this child, four years of age, was not chargeable with contributory negligence. If the concluding words of the instruction, viz., "as no negligence can be charged to so young a child," ought to have been omitted therefrom (which we do not decide), it is clear that their presence could not have prejudiced the appellant.

[6] The court, of its own motion, gave an instruction on the credibility of the witnesses and the weight to be given to their testimony, which, among other things, told the jury that, if they believed that any witness had knowingly sworn falsely to any fact or facts material to the issues in the case, then they were at liberty to reject all or any portion of the testimony of such witness.

Appellant's learned counsel argues that it was reversible error to give this instruction, citing and quoting from the opinion of the Supreme Court in *Keeline v. Sealy*, 257 Mo. 496, 165 S. W. 1088. In that case, however, the giving of a like instruction was held to be error because of the fact that there was nothing in the testimony in the case to afford a basis for the giving thereof. Subsequent to the decision in that case, it has been repeatedly held that where, as here, there is a direct conflict in the testimony as to a material fact, or material facts, which cannot reasonably be attributed to mistake, inadvertence, or lapse of memory, so that the jury might with propriety find that a witness or witnesses willfully gave false testimony as to a matter or matters material to the issues, it is not error to give an instruction of this character. See *Robert v. Rialto Bldg. Co.*, 198 Mo. App. 121 loc. cit. 125, 126, 127, 199 S. W. 428, and authorities there cited.

We perceive no reversible error in the record, and the judgment should accordingly be affirmed. It is so ordered.

REYNOLDS, P. J., and BECKER, J., concur.

**CULMER v. CITY OF GLASGOW.**  
(No. 13217.)

(Kansas City Court of Appeals. Missouri.  
April 7, 1919.)

**COSTS  $\S$ 42(2) — OFFER OF JUDGMENT — ACCEPTANCE WITHIN STATUTORY TIME.**

Under Rev. St. 1909,  $\S$  1965, as to offer of judgment, plaintiff had 10 days in which to accept defendant's offer, and his acceptance within that limit carried all proper costs up to the date of acceptance, though case came on for trial and was tried within 10 days after defendant's offer, on which trial jury disagreed, so that additional costs were thus added.

Appeal from Circuit Court, Boone County;  
D. H. Harris, Judge.

Action by Allene P. Culmer against the City of Glasgow. From a judgment for plaintiff, defendant appeals. Affirmed.

James H. Denny, of Glasgow, R. M. Bagby, of Fayette, and N. T. Gentry, of Columbia, for appellant.

McBaine & Clark, of Columbia, A. H. Waller, of Moberly, and Paul Prosser, of Fayette, for respondent.

ELLISON, P. J. Plaintiff instituted an action against defendant in the circuit court of Howard county for personal injuries received by her on one of its streets. The venue was changed and the case sent to the circuit court of Boone county, where it was set for trial on the 11th of July, 1918. Eight days prior to that date, viz. July 3d, defendant served plaintiff with a notice in writing offering to allow judgment to be taken against it for \$300. Plaintiff did not accept the offer at once, and before she accepted the case went to trial on July 11th, and on July 12th the jury, being unable to agree, was discharged. On the next day, July 13th, being within the 10 days limited by the statute, plaintiff duly accepted the offer for judgment for \$300, and the court rendered judgment for that sum, together with all the costs in the case.

The statute (section 1965, R. S. 1909) under which the offer was made reads as follows:

"The defendant in any action may, at any time before trial or judgment, serve upon the plaintiff or his attorney of record an offer in writing, to allow judgment to be taken against him for the sum or to the effect therein specified. If the plaintiff accept the offer and give notice thereof within ten days, he may file the offer and an affidavit of notice of acceptance, and judgment shall be entered accordingly. If the notice of acceptance be not given the offer shall be deemed withdrawn, and shall not be given in evidence or commented on before a jury; and if the plaintiff fail to obtain a more

favorable judgment he shall pay the defendant's cost from the time of the offer."

Defendant contends that it is only liable for the costs accrued up to the date of its offer of judgment, and that therefore the court erred in taxing the costs against it which accrued after the offer of judgment.

Under the terms of the statute plaintiff had 10 days in which to accept an offer for judgment, and an acceptance within that limit carried all proper costs up to the date of acceptance. The fact that the case came on for trial and was tried within 10 days after defendant's offer and additional costs were thus added is an embarrassment brought about by defendant in not making its offer sooner. Defendant knew that plaintiff had a period in which to consider the offer which would carry the offer beyond the date of the trial. It ought not to be allowed by such delay to force plaintiff to decide on acceptance before the time the statute gave him expired, by holding over him the risk of paying costs of a trial if he recovered less than the offer.

We have given due consideration to the interesting suggestions made in argument by defendant, both oral and written, but feel that they should not be allowed to overcome the opposing view. We think the question is governed by the decision of the St. Louis Court of Appeals, per Allen, J., in *Haffner v. Tainter*, 204 S. W. 966, a case not differing from this in any essential particular.

The judgment will be affirmed.

All concur.

**DEWITT v. J. G. HUTCHINSON & CO.**  
(No. 13205.)

(Kansas City Court of Appeals. Missouri.  
April 7, 1919.)

**1. APPEAL AND ERROR  $\S$ 635(4)—ABSENCE OF NOTICE OF WRIT—DISMISSAL—STATUTE.**

Where the abstract does not show that any notice of writ of error, required by Rev. St. 1909,  $\S$  2071, was served on defendant in error, the writ will be dismissed.

**2. APPEAL AND ERROR  $\S$ 635(4)—ABSENCE OF WRIT OF ERROR—DISMISSAL.**

Under Rev. St. 1909,  $\S$  2072, where writ of error issuing from Court of Appeals, with return of clerk indorsed thereon showing his obedience thereto, does not appear from what seems to be intended for the transcript itself, which has been filed in the Court of Appeals, there not appearing to be any writ of error in the case, either in the abstract or anywhere else, the writ will be dismissed.

Error to Circuit Court, Sullivan County;  
Fred Lamb, Judge.

"Not to be officially published."

Action by Leonard J. Dewitt against J. G. Hutchinson & Co. To review judgment for plaintiff, defendant brings error. Writ dismissed.

J. M. Wattenbarger and Calfee & Painter, all of Milan, and D. C. Payne, of Oklahoma City, Okl., for plaintiff in error.

John W. Clapp and W. H. Childers, both of Milan, for defendant in error.

ELLISON, P. J. Plaintiff's action was instituted to recover damages for breach of contract, alleged to have been committed by defendant. He recovered judgment in the trial court. Defendant afterwards sued out a writ of error, which plaintiff moves to dismiss.

[1] The abstract does not show that any notice of the writ of error required by section 2071, R. S. 1909, was served on plaintiff.

[2] There does not appear to be any writ of error in the case, either in the abstract or anywhere else. What seems to be intended for the transcript itself has been filed here; but the writ issued from this court, with the return of the clerk indorsed thereon showing his obedience thereto, does not appear.

For the reasons foregoing, the writ of error will be dismissed. Sections 2071, 2072, R. S. 1909; Garth v. Motter, 248 Mo. 477, 154 S. W. 733; Kenner v. Doe Lead Co., 141 Mo. 248, 42 S. W. 683.

All concur.

#### KIRCHER v. EVERS et al. (No. 15360.)

(St. Louis Court of Appeals. Missouri.  
April 8, 1919.)

#### COVERTS $\Rightarrow$ 231(6) — CONSTITUTIONAL QUESTION—JURISDICTION.

Where a constitutional question is in good faith presented by the record, the Supreme Court alone has jurisdiction of an appeal, even should decision of such question prove to be unnecessary to the final disposition of the case on appeal.

Appeal from Circuit Court, Clark County; N. M. Pettingill, Judge.

"Not to be officially published."

Suit in equity by Frank Kircher, to restrain Casper Evers and others, directors of School District No. 85 in Clark County, and the clerk thereof, from drawing warrant upon the public school funds. From a decree in favor of defendants, plaintiff appeals. Transferred to the Supreme Court.

E. R. McKee, of Memphis, O. C. Clay, of Canton, and B. L. Gridley, of Kahoka, for appellant.

Wm. Berkhelmer and Chas. Hiller, both of Kahoka, for respondents.

ALLEN, J. This is a suit in equity seeking to restrain the directors of school district No. 85, in Clark county, and the clerk thereof, from drawing any warrant upon the public school funds of said district for the purpose of defraying any of the costs and expenses of conducting a certain school, termed a Catholic parochial school, at the village of St. Patrick, in said county; and to restrain the county treasurer of Clark county from paying out any of the school funds belonging to the district for any such purpose.

The petition, after alleging that plaintiff is a resident and taxpaying citizen of Clark county, residing within the school district mentioned, and setting forth the official positions occupied by the various defendants, alleges that said school district is and for many years has been, the owner of about one acre of ground, describing the location thereof, upon which is situated the public school building of the district, within which the public school of that district was conducted for many years; that "in the year 1909 the board of directors of said district, in violation of their duties and in violation of the Constitution of the state of Missouri (article 11, § 11, p. 131, R. S. 1909) and the school laws of the state of Missouri," conspiring with the "officers, priests, sisters and members" of a Catholic Church at St. Patrick, in said county, closed the district school building, took therefrom the furniture, fixtures, and appliances belonging to the district, and transferred them to a Catholic parochial school, at said village of St. Patrick, owned and controlled by said Catholic Church, situated about a mile distant from the district school building.

And it is alleged that for a period of five years the defendant directors of the district have employed a teacher to teach in said Catholic parochial school, and have drawn their warrants upon the treasurer of Clark county to pay the salary of said teacher and the incidental expense of maintaining such parochial school out of the funds belonging to the school district; that in 1915 the defendant members of said board of directors entered into a contract with one "Sister Ruth" to teach school for the district in said parochial school at St. Patrick, and are "about to, and threatening to," pay her for her services out of the public school funds of the district and to issue warrants to pay the incidental expenses of said parochial school.

Availing that by reason of the alleged unlawful acts of the said board of directors plaintiff and his family and other persons residing within the district have been and will be deprived of the benefits of the public school, and that, if the alleged misappropriations of the moneys of the district be not restrained, plaintiff and his family and others will sustain irreparable injury and damage,

and are without adequate remedy at law in the premises, injunctive relief is prayed.

The answer, after making certain formal admissions, denies generally the allegations of the petition. It then admits the removal of the district school from the building owned by the district to a room in a Catholic parochial school building at St. Patrick, averring that this was authorized by a vote of the qualified voters of the district at an annual school meeting. It is alleged that such removal was advantageous to the children and taxpayers of the district, for reasons set forth in the answer; that all of the voters of the district are Catholics, except one, who does not complain; that in the room where the district school is conducted no religious services are held, and no religious creed or doctrine taught, "but, on the other hand, only the studies, text-books, and exercises are taught and held as is common in all of the public schools of the state of Missouri."

The answer further alleges that at the annual school meeting at which said removal was authorized plaintiff voted in favor of such removal, and thereafter did not complain thereof until 1915; that for reasons stated plaintiff has not suffered damage by such removal, and has not brought the suit in good faith, but actuated by malice and ill will toward one Donnovan, a Catholic priest; and that to remove the public school to the "old schoolhouse" will work great injury to the taxpayers and the children of the district.

Upon a trial of the cause below the court entered a decree in favor of the defendants, dismissing plaintiff's bill; and the case is here on plaintiff's appeal.

An examination of the record has led us to the conclusion that the case is one involving a construction of the Constitution of this state, and hence not within our jurisdiction on appeal. As shown above, plaintiff by his petition invokes the provision of article 11, § 11, of our state Constitution, asserting that the matters complained of constitute a violation of such constitutional guaranties or inhibitions. And the constitutional question, thus appearing in the case from the beginning, is discussed in appellant's brief filed in this court. The question was presented below, and is presented here, whether the acts sought to be restrained, admitted by the pleadings or shown in evidence, are in violation of the Constitution of this state.

The Constitution provides that the Supreme Court shall have exclusive jurisdiction "in cases involving the construction of the Constitution of the United States or of this state." In *Dorrance v. Dorrance*, 242 Mo. 625, loc. cit. 644, 148 S. W. 94, 98, it is said, in this connection:

"Construction is a broad term, and perhaps as instructive a definition as could be stated is quoted from Abbott in Webster's Interna-

tional Dictionary as follows: 'Strictly, the term [construction] signifies determining the meaning and proper effect of language by a consideration of the subject-matter and attendant circumstances in connection with the words employed.' In other words, it does not stop with interpretation, but applies the language as interpreted to both the subject-matter and the attendant circumstances. The constitutional provision does not, to give this court jurisdiction in this case, require findings that some constitutional provision has been violated, or constitutional right denied, for that is the ultimate object for which the jurisdiction exists. It is only necessary that a constitutional question be presented to the court in the manner required by the rules governing its practice, and on its presentation the jurisdiction attaches to determine it."

The trial court refused to grant the relief sought, upon the ground that plaintiff had not shown that such damage had accrued to him, by reason of the acts complained of, as to entitle him to injunctive relief. But this ruling, whether sound or otherwise, does not operate, we think, to give this court jurisdiction. Where a constitutional question is, in good faith, presented by the record, the jurisdiction of the Supreme Court will not be defeated, even should a decision of such question prove to be unnecessary to the final disposition of the case on appeal. *Skinner v. Railroad*, 254 Mo. 228, loc. cit. 230, 162 S. W. 237; *City of Milan v. Allen*, 175 S. W. 933, 934; *Dorrance v. Dorrance*, supra.

It is accordingly ordered that the cause, and files and papers therein, be transferred to the Supreme Court.

REYNOLDS, P. J., and BECKER, J.,  
concur.

#### McMILLIAN v. CITY OF OLINTON. (No. 12635.)

(Kansas City Court of Appeals. Missouri.  
Dec. 2, 1918. On Rehearing, April 7,  
1919.)

#### MUNICIPAL CORPORATIONS — 759(5) — MAINTENANCE OF STREETS — PERSONAL INJURIES — LIABILITY OF CITY.

Where a pedestrian stumbled into a hole for an electric light pole on a street that had been open for travel for many years, although no sidewalk had been put in, the city was liable; its obligation to maintain a street in good repair arising as soon as it is devoted to the uses of the public.

Appeal from Circuit Court, Cass County; Ewing Cockrell, Judge.

"Not to be officially published."

Action by Katie McMillian against the City of Clinton. Judgment for plaintiff, and defendant appeals. Affirmed.



W. E. Owen and C. A. Calvird, Jr., both of Clinton, and Allen Glenn, of Harrisonville, for appellant.

W. W. Wood, of Humansville, Herman Pufahl, of Bolivar, and J. S. Brierly, of Harrisonville, for respondent.

ELLISON, P. J. Plaintiff is a married woman residing on Ohio street inside the city of Clinton, though not far from the limits. The defendant city owned its electric light plant, and in attempting a part of its reconstruction, or repair, its employes had dug a hole in which to set a pole near the edge of the street and left it unguarded for several days. Whether this hole was dug inside the street boundary, or partly in and partly out, was a disputed question. But there was evidence tending to show that fences were built on the property line, and that this hole, which was near 2 feet deep and from 10 to 14 inches in diameter, larger at the top than bottom, was partly under the fence; some testimony putting much the greater part of it on the street side. There was evidence tending to show that Ohio street was open the full width for travel beyond where plaintiff lived for, perhaps, 30 years, and beyond the hole; that the city had graded the street proper, leaving a space on either side 6 feet wide for sidewalks, and further on a crossing was made from one side of the street to the other. The street proper was used by the inhabitants for vehicles, and the sidewalk space was used by pedestrians, and had been for many years. No sidewalk was ever constructed out of material, but the people, in using the walk, had worn a path in the grass that grew on the sidewalk space. This path was somewhere near the center of the sidewalk.

The city maintained street lamps in this vicinity, though at the time in question none were burning. Plaintiff had been up in the principal part of the city, and was returning, after night, in company with her husband. She had seen the hole before, and thought she would avoid it, but suddenly stepped into it and was very severely injured. While there was a well-defined path near the center of the sidewalk space, there was evidence tending to prove the whole space was smooth or level, and that people walked "every place on it." There was evidence tending to show that weeds grew on the space outside the pathway, but there was also evidence that at this place there were no obstructions outside the path to prevent one walking anywhere in the space. We have considered the cases cited by defendant, especially *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168, but do not think they control the facts in the present record. We think this case falls well within the decisions of the Supreme Court announced in *Curran v. City of St. Joseph*, 264 Mo. 656, 175 S. W.

584, and *Benton v. City of St. Louis*, 217 Mo. 687, 118 S. W. 418, 129 Am. St. Rep. 561, and of this court in *Jackson v. Sedalla*, 193 Mo. App. 597, 187 S. W. 127. The first of these cases is the latest utterance of the Supreme Court to which our attention has been called. It was there said that the mere dedication of a street does not impose on a city the duties of repair and maintenance; "yet these obligations do arise the instant a city, with or without such formalities, devotes a highway to the uses of the public by recognizing it as open for travel, or invites the public to use it as a street. And such acts on its part may be shown either by direct or circumstantial evidence." In the case before us there was as much, or more, to show that for many years the city had recognized that the street was open for traffic, and that the public had been invited to use it, including the sidewalk space, than there was in the *Curran Case*. The court in that case also said that—

"While there was no evidence that the city improved either of the sidewalk spaces in question, yet there was evidence tending to show that the sidewalk spaces on both sides of the street were used not only by the residents but by the public generally."

And so here there was evidence that the sidewalk space in question had been used by the public for years. Further on the court said that—

"These and other circumstances fully set forth in the record in this case, afforded the basis of an admissible inference that the city after its acceptance of the dedication of the street had instructed its officers to appropriate it as a public highway by the constructive work done thereon, and had permitted the residents on both sides of the street and the public generally to make use of the sidewalk spaces for the purpose of travel and ingress and egress to the houses bordering the sidewalks."

In view of defendant's attack on the credibility of some of the evidence in plaintiff's behalf, we have examined the record in that respect, and find that there is abundant evidence tending to establish the foregoing. It was all a matter of belief by the jury. There was a warm contest on the facts and the relative value of testimony given in behalf of the respective parties. We must accept the verdict of the jury, and have only to consider the correctness of the court's action on the instructions.

Those given for plaintiff were in every respect proper under the repeated ruling of our Supreme and appellate courts. Those given for defendant brought out every feature of defense to which defendant was entitled. Several were refused, and, we think, properly. They confine the walk to the footpath, and, as confessedly plaintiff was not in the footpath when she stepped in the hole, the instruction was, in effect, a direction to find for the defendant.

We have no right to interfere, and hence affirm the judgment.

All concur.

#### On Rehearing.

BLAND, J. Since the granting of the motion for a rehearing and the reargument of the case nothing has been presented to us to convince us that we in any respect erred in what we said and did in the opinion in this case written by ELLISON, P. J., and handed down on December 2, 1918.

For these reasons, the judgment will be affirmed.

All concur.

(201 Mo. App. 245)

#### GROES v. WHITE. (No. 13034.)

(Kansas City Court of Appeals. Missouri.  
April 7, 1919.)

#### 1. LIBEL AND SLANDER §123(8)—PRIVILEGE—STATEMENTS BY WITNESS—QUESTIONS OF LAW.

In an action for slander based on a statement by defendant on the witness stand in another action that he had gotten all of a certain quantity of corn except what plaintiff stole, whether such statement was absolutely privileged was a question of law for the court.

#### 2. LIBEL AND SLANDER §38(4) — STATEMENTS BY WITNESS CONCERNING PERSONS NOT PARTY.

If a statement by a witness on the witness stand is privileged, it is privileged where it is made concerning a person not a party to the record in the suit wherein made.

#### 3. LIBEL AND SLANDER §38(4)—PRIVILEGE AS MATTER OF LAW—STATEMENTS ON WITNESS STAND.

In an action for slander based on a statement by defendant as a witness in another action, in answer to a direct and relevant question and responsive thereto as to whether witness had gotten all of a certain quantity of corn, that he had gotten all except what defendant stole, was privileged as a matter of law.

Appeal from Circuit Court, Linn County;  
Fred Lamb, Judge.

Action by George E. Groes against Henry White. A demurrer to the petition was sustained, and plaintiff appeals. Affirmed.

H. J. West, of Brookfield, for appellant.  
Bailey & Hart, of Brookfield, for respondent.

TRIMBLE, J. Plaintiff sued defendant for slander. The trial court sustained a demurrer to the petition, and plaintiff has appealed.

The following facts appear from the petition: John P. Sharp leased a portion of his

farm to defendant White and another portion to one Eichman for the crop season of 1916. Thereafter said Sharp died testate, March 24, 1916, leaving a widow and certain children.

The estate was administered in the probate court by J. W. Moore and Linville Sharp, executors of decedent's will. When the executors in 1917 filed their final settlement, plaintiff, Groes (who had bought the interest of some of the children in the estate), filed objections and exceptions to said final settlement, and on or about June 4, 1917, the issues raised thereby were tried in the probate court.

The issues raised by the exceptions and tried by the probate court were whether the executors had used due diligence in collecting rent from the defendant herein, Henry White, for that part of the land he had rented from decedent, Sharp, and had occupied in 1916, and in allowing said tenant to haul away property belonging to said estate, charged to have been hauled away and converted by said tenant, and in failing to collect the value of same from said tenant, and whether or not the final settlement should be approved, including the extent of executor's liability, if any, to the legatees and distributees of said estate on account of their alleged lack of diligence.

During the trial of these questions in the probate court, and while White, the defendant herein, was on the stand testifying as a witness, and being cross-examined by the attorney for the exceptor, Groes, this question was asked defendant: "Did you get all the corn grown on the place (meaning the John P. Sharp farm hereinabove referred to), except what Eichman got?" To which question the witness, defendant herein, replied: "Yes; all but what George Groes stole."

[1, 2] The question raised by the demurrer is whether the statement made under the above circumstances is absolutely privileged. This was a question of law for the court. *Sullivan v. Strathan*, etc., *Commission Co.*, 152 Mo. 268, 283, 53 S. W. 912, 47 L. R. A. 859; *Jones v. Brownlee*, 161 Mo. 258, 266, 267, 61 S. W. 795, 53 L. R. A. 445. If privilege exists, it extends to a case where the statement complained of is concerning a person not a party to the record. *Jones v. Brownlee*, *supra*, 161 Mo. loc. cit. 265, 61 S. W. 795, 53 L. R. A. 445.

[3] The matter under consideration in the trial before the probate court involved the questions of the liability of the executors for not collecting the rent or making it out of the crop and the extent of that liability. The exceptor's counsel was asking as to the amount of corn the tenant got. It would seem that, if any were surreptitiously taken or stolen from the farm, this would affect the extent of the liability of the executors,

since they could not be held responsible for not making the rent out of that part stolen and carried away. The question asked was directed to the issue of the executors' liability and the extent thereof, and the statement complained of was made in answering the direct question above specified. The statement was, therefore, in our opinion, not only fairly responsive to the question, but also pertinent and material to the inquiry. We need not, therefore, go into the question whether the rule in Missouri is that, even if the statement is made on the witness stand in answer to a direct question, still the answer must be relevant, or it will not be absolutely privileged. Both of these elements exist in the case now before us, and the court did right in sustaining the demurrer, for the answer was privileged as a matter of law. *Newell on Slander and Libel* (3d Ed.) § 535, p. 544; 25 Cyc. 381; *Crecelius v. Bierman*, 59 Mo. App. 513; *Jones v. Brownlee*, 161 Mo. 258, 268, 61 S. W. 795, 53 L. R. A. 445; *Hyde v. McCabe*, 100 Mo. 412, 13 S. W. 875; *Lamberson v. Long*, 66 Mo. App. 253; *Calkins v. Sumner*, 13 Wis. 193, 80 Am. Dec. 733; *Hutchinson v. Lewis*, 75 Ind. 55; *Townshend on Slander and Libel* (4th Ed.) § 223.

The judgment is affirmed.

All concur.

# MARKLAND v. MODERN WOODMEN OF AMERICA. (No. 12828.)

(Kansas City Court of Appeals. Missouri. April 7, 1919.)

## 1. INSURANCE ⇨787 — BENEFICIAL INSURANCE—FORFEITURE—MURDER BY BENEFICIARY.

Where a fraternal benefit life insurance certificate provided that, if insured should die "at any time by the hand of his beneficiary or beneficiaries" except by accident, the "certificate should thereby become null and void," and insured died from wounds inflicted by the beneficiary, who shot herself and died before insured, the policy became void, and insured's heirs could not collect under a certificate provision that, if beneficiary died before insured, payment should be made to insured's estate.

## 2. INSURANCE ⇨787 — BENEFICIAL ASSOCIATION—FORFEITURE—"BENEFICIARY."

The word "beneficiary," as used in a fraternal life insurance benefit certificate provision that certificate should become void if insured should die at the hands of a beneficiary, means the "beneficiary" at the time the mortal wounds are inflicted, and not necessarily a beneficiary at the time of insured's decease.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Beneficiary.]

Appeal from Circuit Court, Howard County; A. H. Walker, Judge.

"Not to be officially published."

Action by William F. Markland, a minor, by W. L. Markland, his guardian, against the Modern Woodmen of America. Judgment for defendant, and plaintiff appeals. Affirmed.

Willard P. Cave, of Moberly, for appellant. Bailey & Hart, of Brookfield, and Truman Plantz, of Warsaw, Ill., for respondent.

BLAND, J. This is an action on a benefit certificate issued by the defendant upon the life of William Markland. The beneficiary mentioned in the certificate was the insured's wife, Sallie W. Markland. The certificate provided that, in the event of the death of the beneficiary prior to the death of the insured, and upon his failure to designate another beneficiary, then the amount to be paid under the certificate should be due and payable to the legal heirs of said insured. The plaintiff herein is the legal heir of said William Markland, and under the provisions of the benefit certificate brings this suit; the beneficiary, Sallie W. Markland, mentioned in policy being dead. The suit was tried by the court without the aid of a jury, and resulted in the court giving an instruction in the nature of a demurrer to the evidence, and, judgment being rendered for the defendant, plaintiff has appealed.

The facts show that after the execution of the benefit certificate, and about the hour of 12 o'clock midnight on Wednesday, May 10, 1916, Sallie W. Markland, the wife of the insured and the beneficiary in the certificate, fired three shots from a revolver at said William Markland, inflicting mortal wounds upon him, from which he died in about three hours thereafter; that, soon after inflicting the said wounds upon her husband, Sallie W. Markland shot herself through the heart, and died immediately, and before the death of her husband.

[1, 2] The benefit certificate contains the following clause:

"If any member of this society holding a benefit certificate \* \* \* shall \* \* \* die \* \* \* at any time by the hand of his beneficiary or beneficiaries, whether such beneficiary or beneficiaries be sane or insane (except by accident), his benefit certificate shall thereby become null and void, and all payments made thereon shall be absolutely forfeited to the society."

The case turns upon what is meant by the word "beneficiary" as used in the benefit certificate. It is the contention of the plaintiff that the deceased did not die at the hand of his beneficiary because the beneficiary at the time of his death (Sallie Markland having died prior thereto) was this plaintiff, and not insured's wife. Certainly that is not what is meant by the provision in the certificate we have quoted. The exact point has been decided by the Springfield Court of Appeals

adversely to plaintiff in the case of Greer v. Supreme Tribe of Ben Hur, 195 Mo. App. 836, 190 S. W. 72. Plaintiff endeavors to have us disagree with the Springfield Court of Appeals, but there is no question in our minds but that that court was right in its decision.

In his brief plaintiff says, "To be a beneficiary, one must outlive the person whose life is insured." In answer to a similar contention the Springfield Court of Appeals said in the Greer Case, 195 Mo. App. loc. cit. 340, 190 S. W. 73:

"This is certainly a very sharp and technical construction of this by-law, and, if followed to its necessary conclusion, a beneficial member can never be killed by one who is more than a contingent beneficiary when the mortal blow is inflicted; for, perchance, lightning or some such quick agency might end the life of the slayer before that of his victim. Using the illustration suggested by plaintiff that a boy is never his father's heir until after the father's death, so the beneficiary, as or being such, never kills the member because he is not a beneficiary until after the killing is over. This reminds us of the reasoning adopted by the builder of the 'One Hoss Shay,' q. v."

To hold as plaintiff contends would be to absolutely nullify the provisions of the certificate. There are only two cases where we find that this point has been passed upon—one the Greer Case; and the other the case of Grand Circle Women of Woodcraft v. Rausch, 24 Colo. App. 304, 134 Pac. 141. In both cases the point is ruled against plaintiff, and we likewise so rule.

The judgment is affirmed. All concur.

#### ROPER v. GREENSPON et al. (No. 16439.)

(St. Louis Court of Appeals. Missouri. April 8, 1919.)

##### 1. MUNICIPAL CORPORATIONS ⇨706(8) — STREETS—COLLISION—NEGLIGENCE—QUESTION FOR JURY.

In action by driver of automobile for injuries sustained in collision with an unlighted wagon obstructing the street after nightfall, negligence charged being failure to display light on wagon in violation of ordinance and permitting wagon to remain across street for a period of 30 minutes without giving any signal or warning, *held*, that court did not err in refusing to direct verdict for defendants.

##### 2. MUNICIPAL CORPORATIONS ⇨706(1)—COLLISION IN STREET—FAILURE TO GIVE WARNING—PLEADING.

In action by driver of automobile for injuries sustained in collision with an unlighted wagon obstructing the street after nightfall, petition, charging negligence in permitting a

wagon to remain "without giving any signal or warning" to approaching vehicle driven by plaintiff, sufficiently charged common-law negligence in failing to give warning of presence of wagon so as to authorize instruction thereon.

##### 3. MUNICIPAL CORPORATIONS ⇨706(8)—COLLISION WITH STATIONARY VEHICLE—DUTY TO DISPLAY LIGHT—INSTRUCTION.

In action by driver of automobile for injuries sustained in collision with unlighted wagon obstructing street after nightfall, *held*, that plaintiff was entitled to an instruction that it was defendants' duty to display a light upon the wagon in compliance with ordinance, so that defendants were not prejudiced by an instruction which merely permitted the jury to so find.

##### 4. MUNICIPAL CORPORATIONS ⇨706(8)—COLLISION WITH STANDING VEHICLE—NEGLIGENCE—INSTRUCTION.

In action by driver of automobile for injuries sustained in collision with unlighted wagon obstructing street after nightfall, where petition charged negligence of defendants, their servants, and employes in respect to matters mentioned, *held*, that instruction was not fatally defective in that it authorized a verdict for plaintiff as for the negligence of drivers of wagons mentioned, with only one of which the automobile collided.

##### 5. DAMAGES ⇨216(1)—PERSONAL INJURIES—INSTRUCTION.

In action by driver of automobile for injuries sustained in collision with unlighted wagon obstructing street after nightfall, the use of the word "compensate" without qualification, in instruction authorizing such damages as "under all the evidence in the case will compensate him for the injuries received," was not reversible error.

Appeal from St. Louis Circuit Court; Samuel Rosenfeld, Judge.

"Not to be officially published."

Action by Bruce Roper against Louis Greenspon and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Glendy B. Arnold, of St. Louis, for appellants.

Sidney Thorne Able, of St. Louis, for respondent.

ALLEN, J. This is an action for personal injuries sustained by plaintiff while driving an automobile upon one of the streets of the city of St. Louis, occasioned by reason of coming into collision with certain steel beams upon one of defendants' wagons, and alleged to have resulted from the negligence of the defendants. This is the second appearance of the case in this court. See Roper v. Greenspon, 192 S. W. 149. On the former appeal, from a judgment in favor of plaintiff, the cause was certified to the Supreme

Court, where the judgment was reversed and the cause remanded. See *Roper v. Greenspon*, 272 Mo. 288, 198 S. W. 1107, L. R. A. 1918D, 128. Upon a retrial in the circuit court, before the court and a jury, there was a verdict and judgment for plaintiff in the sum of \$3,500, from which the defendants prosecute this appeal.

At the time of plaintiff's injury, to wit, on the night of July 14, 1912, he was employed by a taxicab company as a chauffeur, and was driving an automobile east on Lawton avenue, in the city of St. Louis, crossing Channing avenue, an intersecting street. A long "reach wagon," belonging to defendants and in charge of their driver, loaded with heavy steel beams, had been driven north on Channing avenue, along the east side of that street, to Lawton avenue, and in crossing the latter street the team became "stalled" because of the fact that the rear wheels of the wagon sank somewhat into the surface of the asphalt street, which had become soft by reason of the extreme heat of the sun during the preceding day. The front wheels of the wagon were near the north curb line of Lawton avenue. There is a conflict in the testimony as to whether they were a short distance north or south of that line. The rear wheels were at about the center of Lawton avenue, and the steel beams extended some distance beyond the rear of the wagon. As to whether the wagon and beams entirely blocked vehicle traffic on Lawton avenue, the evidence is conflicting. Another team and wagon belonging to the defendants came upon the scene, and the drivers of the wagons undertook to extricate the "reach wagon." While they were thus engaged, plaintiff drove his automobile against the beams protruding from the rear of the reach wagon, whereby he sustained his injuries. The evidence for plaintiff tends to show that the defendants had no light upon the wagon containing the beams, as required by ordinance; that the only lights at this street intersection at the time were two gas lamps situated on diagonally opposite street corners; and that the protruding iron beams were near the color of the asphalt street, making it difficult to distinguish them. The facts will be found stated in more detail in the former opinions herein, referred to above. Reference will be later made to certain portions of the testimony adduced at the last trial, in considering the contention of appellants that the testimony in this record differs materially in certain respects from that contained in the record on the former appeal.

The petition charges that defendants negligently failed to display a light on the wagon or beams in violation of an ordinance of the city of St. Louis pleaded, and negligently permitted the wagon, with these pro-

truding beams thereon, to remain across Lawton avenue for a period of 30 minutes "without giving any signal or warning to the approaching vehicle driven by plaintiff."

[1] I. The first insistence of appellants' learned counsel is that the court below erred in refusing to peremptorily direct a verdict for appellants. This contention proceeds upon the theory that plaintiff's testimony on the last trial shows that a light upon this wagon would not have enabled plaintiff to discover the protruding beams, unless perchance it had been hung on the extreme rear end of the beams, which was not required by the ordinance; and that consequently the violation of the ordinance, if any, cannot be regarded as the proximate cause of plaintiff's injury. Upon the former appeal the Supreme Court disposed of this question—as presented by the record before it—in the following language, viz.:

"Such a light, so located, might have, and no doubt would have, indicated to plaintiff the true character of the load on the wagon. A glance at such beams would or might have indicated to him that they were liable to extend beyond the rear wheel, although it be granted that the light on the front end of the load might not have so lighted the protruding ends of the beams as to make them visible. In other words, this light would have shown the character of the load on the wagon, and, with a knowledge that the wagon was so loaded, might have indicated to plaintiff that the beams protruded beyond the rear wheel."

It is argued, however, that certain testimony given by plaintiff at the last trial renders the language quoted inapplicable to the record now before us. This testimony is as follows:

"Q. Suppose there had been a lantern on the north end of that wagon, that wouldn't have helped you any? A. If I would have seen a light there—I don't know whether it would or not.

"Q. Because lanterns don't show anything on these wagons on a real dark street except a light, do they? That is all you could see? A. I think they would have a red light.

"Q. Your red light, if it wasn't light enough for you to see the body of the car, the red light wouldn't help you any on a dark night; all you could see would be that red light? A. That would be all.

"Q. If it was a very dark night and a man was standing in front of that car you were driving, all he would see would be those two lights; he couldn't see the body of the car? A. That is all."

We do not think that this testimony is such as to warrant us in ruling upon this question otherwise than did the Supreme Court upon the former appeal. The ordinance requires "one or more lights or lanterns" to be displayed on a vehicle of this

character at night. In his testimony plaintiff did not say that "a lantern on the north end of that wagon" would not have served to reveal the character of the load. And his subsequent testimony, to the effect that one looking at the front or the rear of his "car," on a very dark night, would see only the small side lamps or the red "tail light," does not, we think conclude the matter, under the circumstances. It is true that we held with appellants upon this question on the former appeal, but the Supreme Court held otherwise; and we are of the opinion that this ruling of the Supreme Court is controlling upon this matter as presented by the record now before us.

It is further argued that the evidence in this record fails to show that this reach wagon had been allowed to stand across Lawton avenue for a sufficient length of time to give the driver thereof an opportunity, either to discover the danger to plaintiff or other persons driving upon Lawton avenue, or to take steps to warn such persons of this obstruction in the street. In the opinion of the Supreme Court, *supra*, it is said:

"True it is that the mere stopping of the wagon under the circumstances was not negligence, nor was the delay of 30 minutes or more in getting it out negligence; but if it was dark and the wagon's contents could not be seen, and the wagon and its contents did in fact block the travel of that portion of the avenue, we are inclined to think that the defendants and their agents owed some duty toward the traveling public, by way of warning or signals of some kind."

The record before us does not definitely show how long the wagon had been standing across Lawton avenue prior to the collision. One witness said that "it was about three or four minutes, five; something like that." Other testimony shows that the wagon had remained at this place for a time sufficient, at least, to enable defendants' servants to take a team from another wagon and to partly perform the work of "hooking" the horses in front of the team attached to the reach wagon. Another witness testified that he walked a hundred feet after seeing the wagon, prior to the collision. While there is no evidence in this record of a delay of 30 minutes, we think that the ruling of the Supreme Court, *supra*, is nevertheless applicable; that whether there was negligence in failing to give some warning of the presence of the wagon with its protruding beams was, under all of the circumstances, a question for the jury.

It is also argued that plaintiff was shown to have violated the very ordinance relied upon by him, which requires that automobiles display at night at least two lighted lamps showing white lights visible at least

200 feet in the direction toward which the automobile is proceeding. This automobile had two small side lamps only; no headlights. We regard it as clear, however, that these lamps complied with the ordinance, and that this contention of appellants' learned counsel is without merit.

Other matters are discussed in this connection; but they appear to be fully disposed of by the opinion of the Supreme Court, *supra*, and need not be here touched upon. Certainly, in view of the decision of the Supreme Court, *supra*, plaintiff cannot be held guilty of contributory negligence, as a matter of law; and the evidence relating to this matter need not be set forth. In one respect, at least, the evidence contained in this record is somewhat stronger in plaintiff's favor, on this issue, than was that before us on the former appeal; for it now appears by positive testimony, though not undisputed, that the steel beams were of about the color of the asphalt street, and that, because of an upward grade on Lawton avenue east of Channing avenue, as one approached the beams from the west the surface of the street would furnish a background from which the beams could not be readily distinguished.

We consequently hold that the demurrer to the evidence was properly overruled.

[2] II. But two instructions were given at plaintiff's request. It is argued that plaintiff's main instruction, covering the case and directing a verdict, is erroneous in that it submits a charge of negligence not made by the pleadings, *viz.*, that it authorizes a verdict for plaintiff if the jury find, either that defendants failed to carry a light on the wagon or beams, or failed to give a warning of the presence of the wagon and beams in the street; whereas, the petition does not charge common-law negligence in failing to give such warning. This point we think is not well taken, for the petition, *inter alia*, charges negligence on the part of defendants' servants, not only in permitting the wagon to remain in the street (for 30 minutes it is alleged), but in permitting it to so remain "without giving any signal or warning to the approaching vehicle driven by plaintiff."

[3] III. It is also urged that plaintiff's main instruction erroneously submits an issue of law to the jury, in that it permits the jury to determine what was the duty of the defendants' servants under the circumstances. The portion of the instruction thus drawn in question is as follows:

"If you further find and believe from the evidence that with the wagon so stopped it was the duty of the defendants' agents and employees in charge of the wagon \* \* \* in the exercise of ordinary care to have displayed a light," etc.

This portion of the instruction is not well worded, but the giving of the instruction in this form could not have been in any wise prejudicial to the defendants. Plaintiff was entitled to an instruction telling the jury that it was the duty of the defendants to display a light upon the wagon in compliance with the ordinance, and defendants cannot be prejudiced by reason of the fact that the instruction merely permitted the jury to so find.

[4] IV. It is further said that this same instruction is fatally erroneous, in that it authorizes a verdict for plaintiff as for the negligence of both of the drivers of the wagons mentioned; whereas, the petition charges only negligence on the part of the driver of the reach wagon. But an examination of the petition reveals that it charges that plaintiff's injury was due to the negligence of the defendants, their servants and employes, in respect to the matters mentioned above; and we perceive no merit in the contention that the instruction is bad on this ground. The cases of Gebhardt v. Transit Co., 97 Mo. App. 373, 71 S. W. 448, and Peterson v. United Rys. Co., 270 Mo. 67, 192 S. W. 938, are not here in point.

[5] V. Plaintiff's instruction on the measure of damages is likewise assailed, upon the ground that it authorizes the jury to allow plaintiff such damages as, "under all the evidence in the case, will compensate him for the injuries received," without restricting the recovery to such damages as would be a fair and reasonable compensation therefor. We do not think that such use of the word "compensate," without qualification, constitutes reversible error. The giving of an instruction on the measure of damages in this form is not without precedent (see *Mirrlees v. Wabash Ry. Co.*, 163 Mo. 470, loc. cit. 483, 63 S. W. 718; *Gayle v. Car & Foundry Co.*, 177 Mo. 427, loc. cit. 453, 76 S. W. 987), and we have been shown no authority for condemning the instruction on this ground. The instruction refers the jury to the evidence in the case, and the jury doubtless understood that they were not thereby authorized to award an amount that would constitute more than a reasonable and just compensation to plaintiff. Furthermore, there is no contention that the verdict is excessive, and, in view of the injuries sustained by plaintiff, it is clear that the sum awarded is by no means unreasonable.

We perceive no reversible error in the record, and the judgment should, accordingly, be affirmed. It is so ordered.

REYNOLDS, P. J., and BECKER, J., concur.

**BOWMAN v. KNIGHTS OF PYTHIAS OF STATE OF MISSOURI, etc. (No. 15414.)**

(St. Louis Court of Appeals. Missouri. April 8, 1919.)

**TRIAL  $\S$  140(1)—TAKING CASE FOR JURY—PRIMA FACIE CASE.**

Where plaintiff had otherwise established a prima facie case to recover on benefit certificate, testimony by one of her witnesses on cross-examination favorable to defendant cannot authorize the court to direct a verdict for defendant.

Appeal from St. Louis Circuit Court; William T. Jones, Judge.

"Not to be officially published."

Action by Julia Bowman against the Knights of Pythias of the State of Missouri, Subordinate to the Supreme Lodge of North America, Europe, Asia, and Africa. Judgment for the defendant on a directed verdict, and plaintiff appeals. Reversed and remanded.

McShane & Goodwin and Ed H. Bolm, all of St. Louis, for appellant.

Crittenden Clark, of St. Louis, for respondent.

ALLEN, J. This is an action upon a benefit certificate issued on January 5, 1905, by the defendant, a fraternal beneficiary association, to plaintiff's husband, Milton Bowman, then a member of a local lodge of the defendant order; the amount named in the certificate, to wit, \$300, being payable to plaintiff in the event of Milton Bowman's death while "in good standing with his lodge and the endowment bureau." Bowman died on August 9, 1914.

The action was instituted before a justice of the peace, and reached the circuit court on appeal, where it has been twice tried. Upon the second trial in the circuit court, the court peremptorily directed a verdict for defendant; whereupon plaintiff took an involuntary nonsuit, and, after an unsuccessful motion to set the nonsuit aside, appealed to this court.

To sustain the issues on her part plaintiff introduced in evidence the benefit certificate, and testified that her husband died on August 9, 1914. She also testified that on or about April 6th her husband, being then sick, received a letter from officers of the local lodge, which was introduced in evidence. It constituted a notice to Bowman that his indebtedness to the local lodge for dues amounted to \$4.24, including dues for the month of April, 1914, and that, unless the same were paid, he would be suspended on April 11, 1914. Plaintiff testified that the next meeting of

the lodge was to be held, not on April 11, but on the evening of April 16, 1914, and that on that evening, about 7:30 o'clock, she went to the lodge hall and tendered to the treasurer the dues owing by her husband, but that the treasurer refused to accept them, saying that Bowman had been suspended. And this testimony is corroborated by a witness who accompanied plaintiff.

Plaintiff called as a witness one Turner, the "keeper of the records and seal" of the local lodge, who testified, from the record of the meeting of the lodge on April 16, 1914, that Bowman was not suspended until about 11:30 that night. On cross-examination the witness testified that he talked with Bowman after the latter's suspension, and tried to induce him to make application for reinstatement, but that Bowman refused to do so, for the reason, as he said, that, being separated from his wife, he had no one to whom he cared to leave any insurance. In this connection it may be said that plaintiff's testimony is to the effect that she and her husband were living together at that time; that they were separated from about November 1, 1913, until the latter part of February, 1914, but thereafter lived together until his death.

Certain further evidence was adduced, but it is unnecessary to notice it.

Apparently the trial court forced plaintiff to a nonsuit because of the testimony of the witness Turner on cross-examination referred to above. But obviously the court erred in peremptorily directing a verdict for defendant on this testimony, though contradicted. The other evidence adduced by plaintiff clearly made out a prima facie case, and this prima facie case could not be destroyed by the mere oral testimony of the witness Turner on cross-examination. See *Kelly v. Knights of Father Matthew*, 179 Mo. App. 608, 162 S. W. 682; *Gooden v. Modern Woodmen of America*, 194 Mo. App. 668, 189 S. W. 394; *Gannon v. Laclede Gaslight Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 506; *Johnson v. Bankers' Life Co.*, 193 S. W. 993; *Stratman v. Supreme Council of Catholic Union*, 195 S. W. 55; *Rasch v. Bankers' Life Co.*, 201 S. W. 919.

Under the circumstances it is unnecessary to notice the point made by appellant that the testimony of Turner in regard to conversations said to have been had between him and Bowman was incompetent, Bowman being dead, though it may be stated that plaintiff did not object to this testimony at the time, but later moved to strike it out.

The judgment is reversed, and the cause remanded.

REYNOLDS, P. J., and BECKER, J., concur.

# KROELL v. LUTZ. (No. 13153.)

(Kansas City Court of Appeals. Missouri.  
Feb. 17, 1919.)

## 1. MUNICIPAL CORPORATIONS ⇨706(2)—COLLISION IN STREETS—PLEADING—VARIANCE.

The use of the word "west," in a petition in an action for damages due to a collision of automobiles, held a clerical error, it being manifest from the other allegations of the petition that the collision took place on the east side of the street; and hence there was no variance, where plaintiff proved that the collision occurred on the east side of the street, the use of the word not being a material difference, under Rev. St. 1909, § 1846.

## 2. MUNICIPAL CORPORATIONS ⇨706(6)—COLLISIONS—PHYSICAL LAWS.

Where there was a collision of automobiles at a street intersection, it cannot be said as a matter of law that the accident did not happen as stated by either party, solely from the respective positions of the automobiles after the accident; there being such a complexity of forces and resultants as to afford no idea where the two automobiles would go or what they would do.

## 3. APPEAL AND ERROR ⇨1064(1)—HARMLESS ERROR—INSTRUCTIONS.

In a negligence case, where an instruction was in the conjunctive, and required the jury to find all of the specifications of negligence submitted before they could return a verdict for plaintiff, the defendant cannot complain that one of the alleged grounds of negligence, would not have alone constituted negligence.

## 4. APPEAL AND ERROR ⇨1090(1)—HARMLESS ERROR—MISCONDUCT OF COUNSEL.

While it would be reprehensible in a negligence case, to bring to the jury's attention, that the defense was being made by an insurance company, it cannot be said that an alleged innuendo to this effect was reversible error, where the court would have to suspect that the intention was to make such innuendo, that such innuendo existed in fact, and then conjecture that the jury gave the same suspicious heed to it that the complaining counsel for defendant did.

## 5. MUNICIPAL CORPORATIONS ⇨706(8)—STREETS—AUTOMOBILE COLLISION—INSTRUCTIONS—EVIDENCE.

Statement in a petition and instruction that plaintiff was "knocked against the automobile in which she was riding and onto the street pavement," was supported by evidence that she was thrown out onto the street, where she could not have been thrown out from the position in which she was sitting, without her body striking the side of the automobile as she went out.

## 6. DAMAGES ⇨216(7)—INSTRUCTIONS—FUTURE PAIN AND SUFFERING.

An instruction allowing damages for future pain and suffering was proper, where there



was evidence that plaintiff was suffering at the time of the trial, although there was no evidence that her injuries were permanent, there being a difference between permanent injuries and future pain and suffering.

Appeal from Circuit Court, Jackson County; Daniel E. Bird, Judge.

"Not to be officially published."

Action by Gladys Kroell against Frank Lutz. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Humphrey, Boxley & Reeves, of Kansas City, for appellant.

Milton J. Oldham, of Kansas City, for respondent.

TRIMBLE, J. Plaintiff brought this action to recover damages for personal injuries received in a collision of defendant's Ford automobile truck with the automobile wherein plaintiff was riding in company with her husband; the latter being at the wheel. There was a verdict and judgment for plaintiff in the sum of \$1,000, and defendant has appealed.

The automobile in which plaintiff and her husband were riding was on the south or right-hand side of Seventeenth street, and was proceeding east, approaching the intersection at Oak street, at about 9 miles per hour, and started across said intersection at a much slower speed, having slowed down before entering upon said intersection. After they had proceeded past, or east, of the center of the intersection, defendant's delivery truck, which came south along the west half, or perhaps near the center, of Oak street at a high speed, and which veered to the southeast as if crossed the intersection, struck plaintiff's automobile just back of the left front wheel, tearing it off, whirling the latter automobile around, and it stopped close to the curb on the east side, with its front pointing to the northeast. The Ford machine was thrown on its side, and lay at the southeast corner of the intersection, with its front also pointing to the northeast. The broken wheel of plaintiff's automobile went some distance south, and brought up against a building or a fence. Plaintiff was thrown out to the pavement and was injured.

At the time plaintiff's automobile entered upon the intersection on its eastward way across same, the defendant's truck was approaching the intersection from the north, going south on Oak street and at a very high rate of speed. It was downhill, and the evidence of various witnesses who watched it, among whom were persons on Oak street proceeding south in a wagon, which the defendant's truck passed shortly before it reached the intersection, say the truck was

"going awful fast," at between 35 and 40 miles per hour, and some say faster than that.

The petition contained numerous allegations as to negligence—that defendant negligently operated said truck on the west side of the street, and negligently ran it with great violence into the automobile in which plaintiff was riding; that defendant carelessly operated said automobile truck, driving it at a high and dangerous rate of speed south along and upon Oak street from Sixteenth to Seventeenth street, and at a point where Oak street is crossed and intersected by Seventeenth street caused said automobile truck to strike with great force and violence against the automobile in which plaintiff was riding; that defendant carelessly and negligently failed to stop the truck, or to slow down the speed thereof, or to turn and swerve the same to one side, and thus avoid the collision, when he saw or should have seen the automobile in which plaintiff was riding, in time to have avoided the collision; that defendant negligently failed to give warning of the high speed with which he was approaching; that by an ordinance pleaded every person operating a motor vehicle on the streets is required to drive the same in a careful and prudent manner, and at a rate of speed that shall not endanger the life or limb of another, provided that a speed in excess of 15 miles per hour for more than 200 feet in the "congested district" specified (which included the intersection in question), and in passing any street intersection a speed of 10 miles per hour, shall be presumptive evidence of negligence, when any person or vehicle is thereon and may be in danger of collision; and that defendant carelessly and negligently operated his car in violation of said ordinance, and negligently caused and permitted his automobile to strike the one in which plaintiff was riding, knocking her to the street, and injuring her.

The case was submitted to the jury on the questions of negligent high and dangerous rate of speed in excess of the ordinance limit, and of whether the truck was operated on the east side of the street when it should have been on the west side.

[1] It is urged that there is a variance between plaintiff's petition and the proof, but clearly this is not the fact. The alleged variance consists in the claim that the petition charges that the defendant's truck was negligently operated on the *west* side of Oak street, when the proof is that the collision occurred on the *east* side thereof. The *west* side was the right-hand side of the street for a vehicle going south on Oak, and consequently the allegation that it was on the *west* side would show that the automobile was on the proper side. It is manifest on the face of the petition, that the word "*west*" was a clerical

cal error, being inadvertently used for the word "east"; for, prior to this allegation, the petition alleged that when the automobile in which plaintiff was going east "reached a point past the center of Oak to turn north on said Oak street, it was run into and struck," etc. This clearly placed the point of collision on the *east* side of Oak street. Again, in the allegation in which it is alleged that defendant negligently operated the truck on the *west* side, it is charged that the plaintiff's automobile, when struck, was "at a point between the center of Oak street and the east curbing," thus showing that the collision took place on the *east* side, and hence the use of the word "west" was evidently a clerical error. In still other allegations it is alleged that plaintiff's automobile was at "a point between the center and east side of Oak street."

Indeed, were it not for the fact that the plaintiff's instruction submitted the case upon a basis which included the negligent operation of the car upon the east side of the street, we would not regard the allegation above mentioned as being one of the acts of negligence pleaded as a ground of recovery, but would have looked upon it as a statement of where the defendant's was in coming down Oak street at a negligent rate of speed before reaching the intersection. All the evidence shows the truck was on that side of the street, or perhaps near the center thereof, as it approached the crossing, and that it did not get over east of the center of said street until on said intersection when the defendant's employé driving the truck veered to the southeast in a vain attempt to escape the collision. So that we do not think it should be said there was a variance, since the whole petition clearly shows on its face, and it is therefore manifest and beyond question that the wrong side of the street where the injury occurred, and where the truck was charged as having been negligently driven, was the *east* and not the *west* side thereof, although the petition did in one place use the word "west" when "east" was meant. There was no misleading of the opposite party thereby; no objection was raised in any way at the trial; had the clerical error been noticed or mentioned in any way, it could have been easily changed by amendment. It was therefore not a material difference under the statute. Section 1846, R. S. 1909; *Shelton v. Durham*, 76 Mo. 435; *Olmstead v. Smith*, 87 Mo. 602; *Fisher & Co. Real Estate Co. v. Staed Realty Co.*, 159 Mo. 562, 62 S. W. 443.

[2] It is urged that no combination of forces could have left the two cars in the respective positions they were left in, if the collision happened the way plaintiff's witnesses say it did, and hence we are asked to set aside the judgment because it rests wholly on testimony in conflict with well-known physical

laws. But manifestly this is not the case. Bodies, when acted upon by different forces at different angles, move along a line called the resultant of all those forces; and the momentum of the two moving cars, the sudden impact and stopping of the front portions thereof, the swinging around or skidding of the heavy rear portions thereof, thus suddenly arrested in their forward movement, the interlocking and taking off of one wheel, and the resistance caused by ploughing up the asphalt, all done in an instant of time and with terrific force, are sufficient to present such a complexity of forces and resultants as to afford no idea of where the two cars would go or what they would do, and the only way to find out would be to survey them after they ceased movement.

[3] Plaintiff's instruction No. 1 was in the conjunctive, and required the jury to find all of the specifications of negligence submitted before they could return a verdict for plaintiff. In this situation we are unable to see how the defendant can complain because the plaintiff assumed the additional and unnecessary burden of proving that at the time of the collision the defendant's car was on the wrong or east side of the street. Had this last been a separate ground of negligence, or had the instruction permitted a recovery upon any one or more of the acts of negligence specified in the instructions, then there might perhaps have been some question as to whether the getting on the wrong side of the street would have constituted negligence alone and of itself, since in such case that would be merely the sudden and instinctive effort to turn out to avoid hitting the other car. But the jury were required to find all of the other acts of negligence submitted, and we cannot see how defendant was harmed by adding the further one of getting on the wrong side of the street, when that was but the result of the wild and negligent approach to the intersection.

[4] We would be wholly unwarranted in reversing and remanding the case on the ground of alleged leading and suggestive questions. We find no such flagrant violation of the rule in this regard as defendant appears to urge in his brief, and the example cited is not to our mind open to the charge of being leading. Nor does the record disclose that extrinsic matter was injected into the case, tending to create bias and prejudice in the minds of the jury. Of course, if it were brought to the jury's attention that the defense was being made by an insurance company, such conduct would be reprehensible, and, when such a thing is done, we will deal with it in a way that it deserves. But it cannot be said that an innuendo to this effect was contained in the question asked, and remark made, of which defendant complains. To base a reversal of the case on this ground in this particular instance,

we would have to *suspect* that the intention was to make such innuendo, that such innuendo existed in fact, and then *conjecture* that the jury gave the same suspicious heed to it that counsel for defendant did.

[5] It is urged that plaintiff's petition and instructions spoke of plaintiff being "knocked against the automobile in which she was riding and onto the street pavement," when there was no evidence of either. We must again disagree with defendant. Unquestionably plaintiff's evidence is that she was thrown out onto the street. She could not have been thrown out, without her body striking the side of the automobile as she went out, seated where she was. While she says she was rendered unconscious by the impact, and does not remember falling from the automobile, yet when she came to her senses she was on the pavement, with her clothes bursted loose, and some one was helping her up and holding her skirts about her.

[6] Plaintiff's instruction on the measure of damages did not submit a matter not included in the pleadings or the evidence. She charged that she received certain serious and permanent injuries, specifying them, the last of which was a severe and lasting shock to her entire nervous system. Her instruction did not submit the question of *permanent* injuries, and properly so, because they were not proven to be permanent. It did submit the question of whether she is reasonably certain to suffer in the future. There was evidence of pain and suffering at the time of the trial and of the likelihood of suffering in the future. Plaintiff testified that "I have quite a bit of misery in my back yet," and that "I am very nervous at night, and at different times I can hardly sleep at all." There is a difference between permanent injuries and future pain or suffering.

There is no substantial error in the record, and the judgment should therefore be affirmed. It is so ordered.

All concur.

NATIONAL LIVE STOCK COMMISSION  
CO. v. DONOHUE et al. (ELDRIDGE and  
RUSSELL, Interpleaders). (No. 13145.)

(Kansas City Court of Appeals. Missouri.  
March 3, 1919.)

# 1. ANIMALS ~~§~~10 — MARKS AND BRANDS — EVIDENCE.

Evidence held not to sustain allegations of interplea, filed by interpleaders, claiming proceeds of sale of cattle, in that it showed that the + which was interpleaders' brand, had not been burned as alleged, but had been changed by adding to it and making an H out of the cross.

## 2. JUDGMENT ~~§~~248—SUPPORTED BY PLEADING AND PROOF.

The decree which is awarded a plaintiff must be authorized by the facts stated in the petition and by the proofs.

## 3. PLEADING ~~§~~893—VARIANCE—MARKS AND BRANDS ON CATTLE.

Where interpleaders claiming proceeds of sale of cattle alleged the method by which their brand, a +, had been changed, they engaged to prove it, and could not require the opposing party to prepare to meet one state of facts and prove other and different ones at the trial.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"Not to be officially published."

Bill by the National Live Stock Commission Company against W. T. Donohoe and others, asking that Eldridge & Russell be required to interplead. The court found against interpleaders, and they appeal. Judgment affirmed.

Harding, Deatherage, Murphy & Stinson, of Kansas City, for appellants.

Dwight M. Smith, of Kansas City, for respondent.

ELLISON, P. J. Plaintiffs, the National Live Stock Commission Company, are commission salesmen at the stockyards in Kansas City, Mo., and as such received for sale from defendant Donohoe two carloads of cattle shipped from Red Rock, Okl. They were sold by plaintiff on the day received. Defendants Eldridge and Russell as partners claimed to be the owners of seven head of the cattle, and that they were branded with a cross +, and notified plaintiff before the latter sold. Plaintiff then weighed and sold the seven head separately, and they brought \$660.19. Defendant Donohoe, whose brand was the letter H, did not acquiesce in the claim of Eldridge and Russell, and plaintiff then filed the present bill, asking that these claimants be required to interplead for the proceeds of the sale, and deposited the money in court. Interpleas were filed, and the trial court found that Donohoe was the owner of the cattle, and adjudged him to be entitled to the money.

It was alleged in the interplea of Eldridge and Russell that his brand of a cross + had been altered to the letter H, the allegation being that—

"They admit that in the shipment were seven head of steers as described in said petition; but these defendants (interpleaders) aver that the H brand on said steers was not the real, genuine, and original brand on said steers, but that the actual and real brand on the same was a cross (+), and that said cross (+) brand had been, in the common parlance

of dealers in cattle, 'burned' by attempting to make an H out of the same; that these defendants (interpleaders) were the owners of said steers, and the same were branded with a cross instead of an H, and that these defendants claimed the same, and do now claim the same."

[1-3] The evidence failed to sustain the allegations of the interplea petition, in that it showed the cross + brand had not been burned, but had been changed by adding to it and making an H out of the cross. There was a failure to show the change had been made in the manner charged. Interpleaders, Eldridge and Russell, made no offer to amend the interplea so as to make it conform to the proof, and hence the trial court could only find against them. The decree which is awarded a plaintiff "must be authorized both by the facts stated in the petition and by the proof." *Newham v. Kenton*, 79 Mo. 382; *Schneider v. Patton*, 175 Mo. 684, 723, 75 S. W. 155; *Henry County v. Citizens' Bank*, 208 Mo. 209, 226, 106 S. W. 622, 14 L. R. A. (N. S.) 1052; *Reed v. Bott*, 100 Mo. 62, 12 S. W. 347, 14 S. W. 1089; *Irvin v. Chiles*, 28 Mo. 576. In alleging the method of the change they engaged to prove it. They could not require the opposite party to prepare to meet one state of facts and then spring other and different ones at the trial.

We find this to be more than a mere technical objection. It is one of such nature as affects one's right of preparation of proof and conduct of a trial. The allegation is based on the idea that the cross + brand had been changed to an H by applying a hot H brand over the perpendicular stroke and partly over the horizontal stroke of the cross, the other side or upright of the H completing the transformation of the cross into an H. If that is not the idea intended to be conveyed, it must have been meant that a hot iron bar was applied over the perpendicular and horizontal part of the cross and again perpendicularly to one side of the cross, thus changing it into an H. But whatever was otherwise meant by the pleading, it was, at all events, charged that the cross brand had been burned over by making it into an H, while the case made by the proof is that there was no burning over the cross brand and the change had been made by merely adding to and connecting with, such brand, thus turning into an H. Some of the pleader's most important witnesses disproved these allegations in the pleading, whereupon he changed his position and undertakes to obtain relief on a totally different ground. If this should be upheld, it would be such disregard of a case made by the pleading as to often lead to very great injustice.

The judgment is affirmed.

All concur.

(201 Mo. App. 349)

**GORDNER v. ST. LOUIS SCREW CO.**  
(No. 16310.)

(St. Louis Court of Appeals. Missouri. April 8, 1919. Rehearing Denied April 24, 1919.)

**1. MASTER AND SERVANT  $\Leftrightarrow$  332(2)—INJURIES TO THIRD PERSON—QUESTION FOR JURY—SCOPE OF EMPLOYMENT.**

Where a master mechanic, allowed wide discretion in the performance of his duties, was taking, as on prior occasions with his master's consent, castings from one plant to another in his own automobile on his way home just before closing time, instead of sending them by messenger furnished by his master, it was a jury question whether he was within the scope of his employment so as to render the master liable for injuries caused by a collision between his automobile and plaintiff's wagon.

**2. MASTER AND SERVANT  $\Leftrightarrow$  302(1)—INJURIES TO THIRD PERSON—SCOPE OF EMPLOYMENT.**

Master is liable for injuries caused by a servant while driving his own automobile in the prosecution of his employment, though no express agreement in the nature of hiring the automobile is shown, if the circumstances warrant the inference that the master impliedly authorized its use.

**3. APPEAL AND ERROR  $\Leftrightarrow$  1033(5)—HARMLESS ERROR — INSTRUCTIONS—ERROR FAVORABLE TO PLAINTIFF.**

An instruction that defendant was liable if its servant was using his own automobile in defendant's business with its direction, knowledge, and consent, is not prejudicial to defendant, though there was no evidence that it had directed the use, since defendant's knowledge and consent to the use was sufficient to render it liable.

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

Action by Charles E. Gordner against the St. Louis Screw Company and another. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Jourdan, Rassleur & Pierce, of St. Louis, for appellant.

Kinealy & Kinealy, of St. Louis, for respondent.

ALLEN, J. Plaintiff, respondent here, instituted this action against the St. Louis Screw Company, a corporation, appellant here, and one Edward Mongrain, to recover damages for personal injuries sustained by plaintiff resulting from a collision between an automobile owned and operated by defendant Mongrain and a wagon driven by plaintiff. At the time of the collision, defendant Mongrain was in the employ of his codefendant, the St. Louis Screw Company, as its master mechanic at a plant operated by that company in the city of St. Louis,

and liability is asserted against that company upon the theory that Mongrain was acting within the scope of his employment as the company's servant at the time of plaintiff's injury. The trial, before the court and a jury, resulted in a verdict and judgment against both defendants in the sum of \$4,000. From this judgment the defendant St. Louis Screw Company alone has appealed.

[1] The evidence shows that at the time of respondent's injury, to wit, November 7, 1916, and for a long time prior thereto, the appellant owned and operated two plants in the city of St. Louis. One, termed the "north plant," was located at Prescott and Keber streets, one block east of Broadway; while the other, termed the "south plant," was located on Clarence avenue, a little more than a block east of Broadway, and nine or ten blocks south of the north plant. The north plant was a rolling mill, having in connection therewith a blacksmith shop, facilities for welding, and other mechanical equipment. The south plant, at which was appellant's main office, was a screw factory.

Plaintiff was injured shortly before 5:40 p. m., on the day above mentioned. He was driving his horse and wagon northwardly on Prescott avenue, between Broadway and appellant's south plant, crossing Clarence avenue a street extending east from Broadway to this south plant, when his wagon was struck by the automobile driven by Mongrain who was proceeding east on Clarence avenue. The evidence touching the alleged negligence of Mongrain in operating the automobile, and the conduct of plaintiff in driving his wagon, need not be stated, since upon this appeal, of the St. Louis Screw Company, no question is raised respecting these matters.

The evidence shows that, as appellant's master mechanic, Mongrain had under him a number of departments comprising defendant's north plant, or rolling mill. One English, Mongrain's immediate superior, was appellant's superintendent at the north plant, and next in authority above him was one Burgess, appellant's general manager. Mongrain testified that his duties, in general, were to repair machinery and try to keep the north plant in running order. English testified that Mongrain's duties, "in a general way," were "to take care of the machinery and keep it in running order, and to assist in new constructions and so forth—mechanical work."

On the day of plaintiff's injury, two small castings, used upon a machine constituting a part of the equipment of the south plant, had been sent from the latter plant to the north plant to be repaired. The work of making such repairs was under Mongrain's supervision; but, after any piece of machinery from the south plant had been repaired in the north plant, it was usually turned over to

the "storkeeper" of the latter plant to be delivered by him to some one sent from the south plant to receive it. Upon the occasion in question, at about 5 o'clock that afternoon one Hollerman, foreman of the south plant, telephoned to Mongrain inquiring whether the repairs upon these castings had been completed. Mongrain told him that the castings would be ready within a few minutes; whereupon Hollerman said that he would send a boy for them. Mongrain thereupon said that it would not be necessary to send for them, as he was going home soon and would take the castings to the south plant on his way home. It appears that Mongrain lived on north Grand avenue, and that to go home he would proceed south on Broadway, as far as Clarence avenue, and that consequently to take these castings to that plant would require a deviation from his route of only about one block east from Broadway. He owned an automobile which, it appears, he had purchased in August of that year. He used this automobile in going to and from his work, used it whenever he was called out to the north plant at night to make repairs, as occasionally happened, and also used it at times in making trips to the south plant when his work required him to go there for any purpose. And he testified that he had used the machine, "once or twice," to deliver and call for castings upon which appellant had had machine work done outside of its plants.

It appears that Mongrain was allowed considerable discretion with respect to his movements and the performance of his duties. English testified that Mongrain was accustomed to go to the south plant whenever he desired, "whenever the occasion might demand to Mr. Mongrain's notion"; that if Mongrain desired to go from the north plant to the south plant he sometimes asked permission and sometimes did not; that he "used his own pleasure."

It was shown in evidence, however, that appellant had provided facilities for transporting articles from one plant to another; that heavy articles were taken in trucks; and that ordinarily light articles, such as these castings, were carried by messenger boys.

The evidence shows that on the afternoon in question Mongrain, a few minutes before "quitting time," viz. 5:40 p. m., put these castings into his automobile, which was then standing in the street near the north plant, and drove south upon Broadway, turning east upon Clarence avenue, to the point of the collision near the south plant. After striking plaintiff's wagon, and finding that plaintiff was injured, Mongrain went into the south plant, where he procured assistance and delivered the castings. It is said that the collision occurred about two or three minutes before "quitting time" at the plants.

The evidence shows that several of the officers and superior servants of the appellant, including Mongrain, owned automobiles which they used more or less in prosecuting defendant's business. Burgess, the general manager, testified:

"Practically all of the automobiles, to some extent, are used in the service of the company, which includes my own."

And it was shown that Mongrain and the other superior servants or officers of appellant who owned automobiles, and thus used them to some extent in appellant's business, with the exception of Burgess, were regularly furnished gasoline and oil therefor by appellant, and that the machines were kept in repair by appellant; though it is said that Mongrain, being a mechanic, did much of the repair work upon his own machine.

Appellant's learned counsel insists that under the evidence adduced appellant cannot be held liable, under the doctrine of respondeat superior, for the injuries inflicted upon plaintiff by reason of the alleged negligence of Mongrain. In support of this contention, it is argued that, in delivering these castings to the south plant, Mongrain was not acting within the course of his employment, as appellant's servant, but was voluntarily performing a service for which he was not employed, and for the performance of which appellant had provided messengers; and that consequently appellant is not liable for any negligence of Mongrain in performing such service. We are of the opinion, however, that this contention cannot be sustained. In this connection appellant quotes the language of Maule, J., in *Mitchell v. Craswell*, 13 C. B. 235, loc. cit. 246, as stating correctly the rule of law here applicable, "stripped of the uncertainty which follows the use of such expressions as 'course of employment' or 'scope of employment.'" The language quoted is as follows:

"The master is liable even though the servant in the performance of his duties is guilty of a deviation or a failure to perform it in the strictest and most convenient manner. But where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it."

In that case the servant, whose duty it was at the close of the day to "put up" his master's horse and cart which he had been using in the master's business, drove the same upon a journey for the accommodation of another employé of the master, without the latter's consent, in the course of which he ran over the plaintiffs. The servant was therefore doing something which in no way pertained to the duties of his employment. The language quoted had reference to that

situation, but may be misleading in a case such as that before us. Though Mongrain was not employed to act as a messenger, nevertheless if the act of taking these castings to the south plant was one which pertained to the duties of his employment—one which he had implied authority to perform if he chose so to do—it was one within the scope of his employment, within the meaning of that term.

Appellant further quotes from a decision of this court in *Farber v. Railroad*, 32 Mo. App. 378, loc. cit. 381, 382, as follows:

"The mere fact that a tortious act is committed by a servant while he is actually engaged in the performance of the service cannot make the master liable. Something more is required. It must not only be done while employed, but it must pertain to the duties of the employment. That has been repeatedly decided in this state. *McKeon v. Railroad*, 42 Mo. 83; *Snyder v. Railroad*, 60 Mo. 419; *Jackson v. Railroad*, 87 Mo. 430 [56 Am. Rep. 460]."

The facts of the instant case, however, we think warrant the submission of the case to the jury upon the theory that the act of Mongrain here in question was not only one performed by him while employed by defendant, but was one pertaining to the duties of his employment. As appears from our statement of the facts, supra, Mongrain was allowed wide discretion with respect to his movements and the performance of duties which he deemed necessary or proper in connection with his main duties. He had authority to go to the south plant at any time; and he delivered castings, using his machine, whenever he saw fit to do so. Consequently when, before the close of working hours on the day of plaintiff's injury, he decided that he would return these castings to the south plant, rather than have a messenger sent from the latter place, it cannot be held as a matter of law that he was performing a service wholly beyond and without the scope of his employment, or not in any way pertaining thereto. On the contrary, the act was one which a jury may find to have been within the scope of the employment and impliedly authorized by appellant.

In *Garretzen v. Duencke*, 50 Mo. 104, loc. cit. 112 (11 Am. Rep. 405), it is said:

"When the servant acts in the course of his employment, although outside of his instructions, the master will be held responsible for his acts."

In *Shamp v. Lambert*, 142 Mo. App. 567, loc. cit. 575, 121 S. W. 770, 773, it is said by this court, through Norton, J.:

"The test for the prima facie responsibility of the master in such cases is, not whether the particular service being performed was specially authorized, but it is whether the act which occasioned the injury was within the scope of

the servant's authority in prosecuting the business for which he was employed."

And see *Snyder v. Railway*, 60 Mo. 412; *Chandler v. Gloyd*, 217 Mo. 394, loc. cit. 415, 116 S. W. 1073; *Scott v. Realty Co.*, 241 Mo. 112, 145 S. W. 48; *Moore v. Light Co.*, 163 Mo. App. 266, 146 S. W. 825; *Gibson et al. v. Dupree*, 26 Colo. App. 324, 144 Pac. 1133.

Further authorities cited by appellant in this connection are not controlling or persuasive upon the facts here involved.

[2] And we regard it as quite clear that the evidence shows, prima facie, that the automobile used by Mongrain at the time of plaintiff's injury was being used in the furtherance of appellant's business with the implied assent and authority of appellant, rendering appellant liable to respond for negligence in the use thereof. Though Mongrain owned the automobile, the evidence shows that it was habitually used in appellant's business, with the knowledge and assent of appellant's officers, in consideration of which appellant furnished Mongrain gasoline and oil and did repair work thereupon. It is immaterial that no express agreement in the nature of a hiring of the machine by appellant was shown; it is amply sufficient for plaintiff to show facts and circumstances from which it may be reasonably inferred that appellant impliedly authorized the use thereof for such purpose as Mongrain might see fit to put it in the pursuit of appellant's business. In this connection, see *Patten v. Rea*, 2 C. P. N. S. 606; *Lovington v. Bauchens*, 84 Ill. App. 544; *Williams v. Natl. Cash Register Co.*, 157 Ky. 836, 164 S. W. 112; *Lewis v. Natl. Cash Register Co.*, 84 N. J. Law, 598, 87 Atl. 345; *Waters v. Pioneer Fuel Co.*, 52 Minn. 474, 55 N. W. 52,

38 Am. St. Rep. 564; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440; *Standard Oil Co. v. Parkinson*, 152 Fed. 681, 82 C. O. A. 29. See, also, *Railly v. Railroad*, 94 Mo. 600, 7 S. W. 407.

We think that the demurrer was well ruled.

[3] By an instruction given at plaintiff's request, the court told the jury that the verdict should be against appellant if the jury found, among other things, that—

"At the time of the collision Mongrain was in the employ of defendant St. Louis Screw Company, and with its direction, knowledge, and consent was using the automobile in question in said company's business."

It is argued for appellant that there is no evidence to support a finding that Mongrain was using the automobile, at the time in question, at the direction of appellant; and that consequently in this respect this instruction is unsupported by the evidence. As to this we need only say that it was not necessary that the jury find that the automobile was being used by the direction of appellant, but that it sufficed to show that such use was with appellant's knowledge and consent, and hence with its implied authority. And the instruction in question is not fatally defective, since it requires the findings mentioned in the conjunctive, and hence simply requires the findings of more than is necessary to warrant a verdict for plaintiff.

We perceive no reversible error in the record, and the judgment should therefore be affirmed. It is so ordered.

REYNOLDS, P. J., and BECKER, J., concur.

(138 Ark. 94)

**CAMPBELL v. SANDERS et al.** (No. 162.)

(Supreme Court of Arkansas. March 31, 1919.)

**TAXATION** ~~60~~761—**SALE OF LAND FOR TAXES**  
— **VALIDITY** — **SALE OF SEPARATE LOTS IN**  
**MASS.**

In view of Kirby's Dig. §§ 6976, 7018, 7087, a tax deed showing on its face that separate lots in a town were sold in mass for a lump sum is invalid.

Appeal from Circuit Court, Jackson County; Dene H. Coleman, Judge.

Action by W. W. Campbell against H. C. Sanders and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

This is a suit in ejectment by W. W. Campbell against H. C. Sanders and S. Brundidge to recover possession of lots 5 and 6 in block 13, in Morris' addition to the city of Newport, Ark.

The complaint alleges that the defendants are in the possession of the lots. The plaintiff bases his claim and right of possession solely upon a tax deed executed to him by the clerk of Jackson county, Ark., on the 18th day of June, 1918. Lots 5, 6, 7, and 8 of block 13, in Morris' addition to the city of Newport, Ark., are vacant lots contiguous to each other and under one inclosure. They were assessed as a whole for the year 1915, and, the taxes being unpaid, they were returned delinquent and offered for sale by the collector. W. W. Campbell bid and offered to pay the taxes, penalty, and costs against all of said lots for lots 5 and 6. Lots 5 and 6 were then sold to said Campbell, and in due course he received the clerk's tax deed therefor.

The circuit court was of the opinion that the sale for taxes for the year 1915 was void and dismissed the plaintiff's complaint.

From the judgment rendered, the plaintiff has duly appealed to this court.

L. L. Campbell, of Newport, for appellant.

Joe M. Stayton, of Newport, and Harry Neely, of Searcy, for appellees.

**HART, J.** (after stating the facts as above). We are of the opinion that the holding of the circuit court was correct, and that the case is ruled by *La Cotts v. Quertermous*, 83 Ark. 174, 103 S. W. 182, where the court held that a tax deed is void which shows on its face that two separate lots within a town were sold in mass for a lump sum.

Counsel for appellant insists that, inasmuch as the record in the case just cited does not show that one valuation was placed by the assessor upon both lots as one tract, the holding in that case does not control here. The record does show, however, in that case

that there was a frame building on both lots, and that both lots were sold as one tract by the collector at the tax sale. The statute in regard to the sale of delinquent lands provides that the collector shall offer for sale each tract of land, city or town lot for the tax, penalty, and costs thereon. Kirby's Digest, § 7087. The collector in making the sale takes the description from the tax books. The tax books are made out by the county clerk and delivered to the collector, but they are made out from the descriptions of the assessor and placed by him on his books. So the presumption is that the collector sold the land in that case from the description as prepared in his list of delinquent lands, and these in turn would be just as made out by the county clerk as taken from the assessor's books. This finding is in accord with our statutes on the subject.

Subdivision 2 of section 6976 of Kirby's Digest provides that the return of the assessor shall contain the name of the owner and the description of each lot in each town or city and the value thereof as determined by the assessor. Section 7018 of Kirby's Digest relative to the making of the tax books by the county clerk provides that each separate lot or a tract of real property in each city or town shall be set down in a line opposite the name of the owner. When all of the sections of our revenue act are construed together, we think the intention of the framers of the act was that each lot should be separately assessed and valued so as to bear its own portion of the taxes. The rule is well expressed in *Terrill v. Groves*, 18 Cal. 149, as follows:

"We think the true meaning of the provision is, to require a separate assessment and valuation of each lot in cases like this of city property. If a man owned a hundred lots, or if, after the assessment, he sold some of them, and it became necessary or desirable to pay the taxes on a part of the property, it would be impossible to do so without paying the full amount assessed. It was evidently the intention of the statute that each lot should be made to bear its own portion of the public burdens, and a great deal of confusion and injustice would grow out of a gross assessment of several lots, and a sale in gross for the payment of the general tax."

This construction is in accord with *Hutton v. Jones*, and *Hutton v. King*, 205 S. W. 296. There we had under consideration the penalties accruing for failure of the owner to meet the board of assessment. The court said that under our system of taxation the charge is made against the land, and not the owner; and that it was intended to provide a separate assessment of each lot and a separate penalty chargeable thereon in case of omission from the list furnished by a non-resident owner.

Therefore the judgment will be affirmed.



(128 Ark. 215)

**BRODERICK v. McRAE BOX CO. et al.**  
(No. 161.)

(Supreme Court of Arkansas. March 31, 1919.)

**1. FRAUDS, STATUTE OF §72(3) — SALE OF GROWING TREES—NECESSITY OF WRITING.**

A sale of growing trees is within the statute of frauds, and must be evidenced by a writing.

**2. EVIDENCE §441(3)—PAROL EVIDENCE—DEED—RESERVATION OF TIMBER.**

In the absence of fraud, or mistake, the grantor in a warranty deed may not show by parol that standing timber was excepted when the deed was executed.

**3. REFORMATION OF INSTRUMENTS §45(4)—EVIDENCE—SUFFICIENCY.**

Clear and decisive evidence is necessary to reform an instrument on the ground of fraud.

**4. VENDOR AND PURCHASER §228(2)—BONA FIDE PURCHASER—NOTICE.**

Where before the execution of a warranty deed the vendor informed the vendee that the timber on the land had been sold, it was notice to the vendee which put him on inquiry as to the rights of those who had purchased the lumber.

**5. VENDOR AND PURCHASER §244 — BONA FIDE PURCHASERS — EVIDENCE — SUFFICIENCY.**

Only a preponderance of evidence is required to establish actual notice to a vendee of the rights of third persons.

Appeal from White Chancery Court; J. E. Martineau, Chancellor.

Suit by Thomas E. Broderick against the McRae Box Company and others. From a decree for defendants, plaintiff appeals. Affirmed as to some of the defendants and reversed and remanded as to the others.

Thos. E. Broderick brought this suit in equity against the McRae Box Company, Jim K. Hale, E. T. Hall, and S. M. Hall, to restrain them from cutting and removing timber from the 80 acres of land described in the complaint, and also to account to him for the value of the timber already cut.

E. T. and S. M. Hall filed a separate answer to the complaint. They stated that they had sold the land described in the plaintiff's complaint to the plaintiff, and that the gum timber on the land was excepted by them from the sale; that the plaintiff was informed by them at the time he purchased the land that they had already sold the gum timber.

The McRae Box Company filed an answer which contained a general denial of the allegations of the complaint. The question of the jurisdiction of the chancery court to try the cause was raised, and all the parties to the suit filed a written stipulation, in which

they agreed that the cause might be heard and determined in the chancery court.

Thos. E. Broderick testified for himself. According to his testimony, Dr. Hall told him that he had sold the hickory timber on the land, but did not tell him that he had sold the gum timber on it. There was nothing said by Dr. Hall, or any one for him, about excepting the gum timber from the sale. A warranty deed was executed by Dr. E. T. Hall and by his wife, S. M. Hall, to Thos. E. Broderick for the land described in the complaint. The deed contained a general covenant of warranty, and did not contain any exceptions or reservations of the timber on the land. Broderick went into possession of the land under his deed, and afterwards a quantity of gum timber was cut and removed from the land by Mr. Hale for the McRae Box Company. The plaintiff also introduced in evidence the warranty deed from Hall and wife to him for the land in question.

Tom Hall, a son of the defendants E. T. and S. M. Hall, testified for the defendants. According to his testimony he showed the plaintiff the land, and told him that the timber on it had been sold, and that the purchaser had until some time in December, 1918, to cut and remove it from the land.

According to the testimony of E. T. Hall, one of the defendants, he told the plaintiff that the timber on the land had been sold to R. B. Hale. Hall first sold the hickory timber on the land to Hale by a written contract, and in it it was provided that Hale should have until December 1, 1918, to cut and remove the timber. Subsequently he sold to Hale all the other timber on the land by a contract in writing, and provided in it that Hale should have until the 30th day of December, 1918, to cut and remove the timber. Both of these timber contracts were executed in 1917. The deed from Hall to Broderick was executed in March, 1918. Mrs. S. M. Hall was present when Dr. Hall and Mr. Broderick made the contract for the sale of the land. She stated that her husband told Mr. Broderick that the timber on the land had already been sold, and that the purchaser had a certain time in the future within which to cut and remove the timber.

In rebuttal G. W. Treece testified that he bought from Dr. Hall the land south of the land in question, and that nothing was said to him about any timber on the land having been sold to Hale or any one else. The land purchased by Treece from Dr. Hall was a part of the land described in the timber contract from Hall to Hale.

Broderick again testified in rebuttal, and denied that Dr. Hall had said anything to him whatever about the timber on the land having been sold by him previously to the sale of the land.

The chancellor found the issues in favor of the defendants, and dismissed the complaint for want of equity. The plaintiff has appealed.

John E. Miller and C. E. Yingling, both of Searcy, for appellant.

John De Bois, of Searcy, for appellees.

HART, J. (after stating the facts as above). [1] We think that the court erred in dismissing the complaint of the plaintiff so far as the defendants E. T. and S. M. Hall are concerned. It is settled in this state that growing trees or standing timber are a part of the realty, and that consequently a contract for the sale thereof is within the statute of frauds, and must be evidenced by a deed or other instrument in writing. *Grayson-Nashville Lumber Co. v. Saline Development Co.*, 118 Ark. 192, 176 S. W. 129, *King-Bryder Lumber Co. v. Scott*, 78 Ark. 329, 84 S. W. 487, 70 L. R. A. 873, and *Kendall v. J. I. Porter*, 69 Ark. 442, 64 S. W. 220.

It has been frequently said that the general rule that parol evidence cannot be received to modify or vary a written contract arises from the presumption that the parties place their agreement in writing to avoid the consequences flowing from defects of man's memory and the prejudice which might result from the testimony of interested witnesses.

It may be said in this connection that contracts are frequently made which are independent of the written contract, as was the case in *Kimbro v. Wells*, 112 Ark. 126, 165 S. W. 645. They may be established by parol evidence because, being collateral to or independent of the written contract, it was not the intention of the parties to include them in the writing. The value of a written contract largely depends upon the credit to be given it, so that it cannot be modified or varied by proof of facts leading up to the contract itself or occurring at the time of its execution.

[2] In the application of these principles to the facts of the present record, it may be said that all the articles of agreement between Dr. Hall and Broderick for the sale of the land were merged in and extinguished by the subsequent deed thereto between the parties. The deed in the absence of fraud or mistake is the final contract between the parties, and cannot be varied or modified by parol evidence. In the application of this rule, this court has held that an oral agreement between the vendor and purchaser of land, made at the time of the execution of the deed, to the effect that crops growing on the land shall be excepted from the conveyance and remain the property of the vendor, is of no effect, and may not be proved by the vendor. *Gibbons v. Dillingham et al.*, 10 Ark. 9, 50 Am. Dec. 233, and *Galley v. Ricketts*,

123 Ark. 18, 184 S. W. 422. So too it was held in *Hardage v. Durrett*, 110 Ark. 63, 160 S. W. 833, L. R. A. 1916E, 211, Ann. Cas. 1915D, 862, that parol evidence is not admissible to show that a covenant against incumbrances was not intended by the parties to apply to a particular incumbrance, in the absence of a question of fraud or mistake, and when no exception to that effect is contained in the deed itself. Therefore it was incompetent as far as the defendants E. T. and S. M. Hall are concerned to prove by parol evidence that the standing timber had been excepted from the sale at the time it was executed.

[3] Again it is insisted that this exception was left out of the deed by the fraud of the plaintiff. It is true that Hall and his wife both testified that this was left out of the deed at the suggestion of Broderick, but Broderick denies it in positive terms, and he is corroborated by another witness, who purchased some of the land embraced in the timber contract, and who stated that the timber was not excepted when he purchased the land. Without entering into a detailed discussion of the evidence on this point, we are of the opinion that the fraud was not established by that clear, unequivocal, and decisive evidence held necessary to reform a written instrument upon the ground of fraud. *Welch v. Welch*, 132 Ark. 227, 200 S. W. 139.

[4] The court, however, was right in dismissing the complaint so far as the *McRae Box Company* and *Hale* were concerned. Prior to the execution of the deed to the land from Hall to Broderick, Hall by a written contract sold and conveyed the timber to a third person. According to the testimony introduced for the defendants *McRae Box Company* and *Hale*, Broderick was informed by his vendor before the execution of the deed by the latter to the former that the timber had been sold. This was actual notice to Broderick, and put him on inquiry as to the rights of the parties who had purchased the timber. *Kendall v. J. I. Porter Lumber Co.*, 69 Ark. 442, 64 S. W. 220, *Collins v. Bluff City Lumber Co.*, 86 Ark. 202, 110 S. W. 806, and *Weaver-Dowdy Co. v. Martin*, 94 Ark. 503, 127 S. W. 705.

[5] It is true that Broderick denied that Hall told him that he had sold the timber at the time he made the contract with him for the sale of the land; but the testimony as to notice need only be established by a preponderance of the evidence. We are of the opinion that a preponderance of the evidence establishes the fact that Broderick had actual notice that the timber had been sold at the time he made the contract with Hall for the purchase of the land and the deed therefor was executed to him.

It follows that the chancellor was right in dismissing the complaint in so far as the defendants *McRae Box Company* and *Hale*

were concerned, and the decree as to them will be affirmed.

For the reasons given above, the court erred in dismissing the complaint as to the defendants E. T. and S. M. Hall, and for that error the decree will be reversed, and the cause remanded for further proceedings in accordance with the principles of law laid down in this opinion.

**MISSOURI PAC. R. CO. v. JENKINS et al.**  
(No. 160.)

(Supreme Court of Arkansas. March 31, 1919.)

**ADVERSE POSSESSION**  $\Leftrightarrow$  114(1)—**EVIDENCE—SUFFICIENCY.**

In an action to recover possession of land, evidence held sufficient to show that defendant had been in actual, open, adverse, exclusive, and continuous possession for more than the seven years, required by Kirby's Dig. § 5056.

Appeal from Circuit Court, White County;  
J. M. Jackson, Judge.

Action by the Missouri Pacific Railroad Company against Roy Jenkins and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

C. M. Walser, of Little Rock, for appellant.  
Brundidge & Neely, of Searcy, for appellees.

WOOD, J. This is an action by the appellant against the appellees to recover the possession of a certain tract of land, containing 17.39 acres situated in White county, Ark.

The appellant alleged that it was the owner of the land in controversy. It deraigned title through various mesne conveyances from the government, and alleged that the appellees were in the unlawful possession, and prayed that it have judgment for possession and damages.

The appellees denied all the material allegations of the complaint, and set up that they had been in possession of the lands in controversy (described in the complaint) for 15 years, and pleaded that they were the owners under the 7-year statute of limitations, which they set up as a bar to appellant's action.

Five of the eight parties, who were named as defendants below, filed a disclaimer, and expressly admitted that the title to the land was in the appellant.

The case, by agreement of the parties, was tried by the court sitting as a jury, and judgment was rendered in favor of the appellees, from which is this appeal.

The appellant offered to introduce its mun-

iments of title, and appellees waived such upon title by adverse possession.

proof, setting up that they relied exclusively One witness on behalf of the appellees testified in substance that he was a friend of John Jenkins, who had the land in his lifetime. Witness "got acquainted with it 28 years ago." Witness states:

"I happened to be over there, and he had a race track on this that he used to run his horses on, and there was a little farm there. I suppose that it was his, or he claimed the land as his; he had it inclosed then. John Jenkins was the father of the defendants. He held this land for 28 years and had it fenced. They moved the fence out to take in 6 or 8 additional acres, to the best of my recollection, in 1910 or 1911. \* \* \* I know they have made a crop in this fence for 28 years."

Another witness, one of the appellees, testified in substance that he was the son of John Jenkins, and that he knew that the land in controversy was inclosed by his father, and that part of it had been in possession of his father ever since witness could remember, and that part of it had been inclosed 7 or 8 years; that 17.39 acres had been in possession of witness' father, and appellees since his death, ever since witness could remember, about 22 years. It had been inclosed, and they had been making crops on it. The fence was moved out, taking in 7 or 8 acres, making 25 acres, in 1910. Witness helped clear the last land that was taken in, which was in the latter part of the winter of 1911. Witness had been in possession of this, holding it and claiming it ever since. Witness was 27 years old. The fence had been around the 17.39-acre tract ever since witness could remember and his father had been cultivating it. Witness was asked whether his father ever claimed it, and answered, "I suppose he did." Witness' father had been dead 17 years. Witness was asked how many acres of land his father owned, and answered, "Eight 40's, besides the land in controversy." Witness was asked if he claimed the land now as his land, and answered, "Yes, sir; I have claimed it ever since I have had anything to do to it—been heir to it."

Giving the testimony its strongest probative value in favor of the appellees, it tends to prove that the appellees and their father, John Jenkins, from whom they inherited had been in the actual, open, adverse, exclusive, and continuous possession of the land in controversy for more than 7 years, which possession was sufficient to give the appellees title by adverse possession. Section 5056, Kirby's Digest. See O'Neal v. Ross, 100 Ark. 555, 140 S. W. 743, and cases cited; Nicklace v. Dickerson, 65 Ark. 422-426, 46 S. W. 945.

The judgment is therefore correct and is affirmed.

(183 Ky. 829)

LOUISVILLE & N. R. CO. v. VAUGHAN'S  
ADM'R.(Court of Appeals of Kentucky. March 28,  
1919.)1. RAILROADS ⇨856(1)—PERSONS ON TRACK  
—LICENSEE.

Whether a party injured on a railroad track is a trespasser or a licensee must depend not on fact that accident happened in a city, incorporated town, or on a public crossing, but on number of persons using tracks at place of accident.

2. RAILROADS ⇨400(2)—PERSONS ON TRACK  
—LICENSEES—QUESTION FOR JURY.

In an action for death on track in railroad yard located in country, whether deceased was a trespasser or a licensee, *held*, in view of evidence as to number of persons using the tracks, for the jury.

3. RAILROADS ⇨394(2)—INJURIES ON TRACK  
—PLEADING—MATERIALITY OF ALLEGATIONS.

In action against railroad for death on track in defendant's yard, a description of location of yard as being between two cities was not objectionable, when coupled with an allegation that inhabitants thereof used switchyard, it being plaintiff's purpose to bring himself within line of cases holding that, where public had in great numbers used tracks, it made question of whether deceased was a trespasser one for jury.

4. RAILROADS ⇨897(1)—INJURY ON TRACK—  
EVIDENCE—RULES OF COMPANY.

In action against railroad for death on track, rules of railroad company were not admissible for purpose of showing either proper care or negligence on part of railroad's employees.

5. APPEAL AND ERROR ⇨500(3)—MATTERS  
REVIEWABLE—OBJECTIONS.

Where court's rulings on objections to admission of evidence do not appear in the record, admission of the evidence cannot be assigned as error.

6. APPEAL AND ERROR ⇨1048(5)—HARMLESS  
ERROR—EVIDENCE.

It was not prejudicial in an action against a railroad for death on track to overrule objection to questions concerning rules of railroad, where witness stated that he did not know what rules were.

7. APPEAL AND ERROR ⇨201(2)—MATTERS  
REVIEWABLE—OBJECTIONS.

In view of Civ. Code Prac. §§ 333, 334, complaint cannot be made on appeal of statements made by court to jury, where no objection or exception thereto was made or taken.

8. RAILROADS ⇨400(2)—TRESPASSERS—SIGN-  
BOARDS.

In action for death in defendant's railroad yard at a place habitually used by public, that there were signboards or warnings at either end of defendant's yard would not require that question whether deceased was a trespasser or licensee be taken from jury, where there was no

evidence that deceased either knew of presence of, or passed either of, such signs.

## 9. TRIAL ⇨114—ARGUMENT OF COUNSEL.

Reasonable latitude should be accorded counsel in closing argument to jury, provided argument be confined to facts shown by evidence and reasonable deductions therefrom.

Appeal from Circuit Court, Clark County.

Action by Clark Vaughan's Administrator against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

B. D. Warfield, of Louisville, B. R. Jouett, of Winchester, and Samule M. Wilson, of Lexington, for appellant.

Hays & Hays, of Winchester, and R. C. Musick, of Jackson, for appellee.

QUIN, J. This is an appeal from a judgment rendered in favor of the appellee, appellee's decedent having been killed in the appellant's yard at South Jackson, October 31, 1915. Many points are urged by counsel to reverse the judgment of the lower court, and we will discuss such of these as we deem material upon this hearing.

The company's yards are situated just south of the town of Jackson, and between Jackson, a city of approximately 2,000 or 3,000 inhabitants, and Quicksand, a city of from 1,000 to 1,500 inhabitants, the cities being about three miles apart. There are some mines in the immediate neighborhood, and bordering on both sides of the company's tracks, leaving Jackson, are several residences and a number of houses belonging to the railroad company.

Decedent in company with three companions, while walking in the company's yard, was overtaken by an engine that was backing from the depot southwardly to the roundhouse, and he and two of his companions were killed, the fourth being injured. There is a wagon road also a plank walk paralleling the company's tracks for a considerable distance southwardly from the town limits. It appears from the evidence that neither of these ways were much used by pedestrians or vehicles. At a point approximately 295 feet north of the scene of accident is a street crossing. The engine referred to had, just a short time previous, reached Jackson, had parked its coaches, and was proceeding southwardly to the roundhouse, headlight facing north. The flagman of the train was on the rear of the tender, and had a white and a red lantern, but neither of these gave much light; he did not see the decedent in time to prevent the accident; he gave the signal for the engineer to stop at about the same time as an engineer on a passing train sounded the alarm.

The engine was stopped, but not until after it had run over the decedent.

It is urged by the appellant that its motion to strike from the petition and its demurrer to the petition should have been sustained, and also that it was entitled to a peremptory instruction; both theories being based on the fact that decedent was a trespasser, and therefore the company was under no duty to exercise ordinary or any care to discover his presence on the track.

In the earlier cases it was held that the railroad company's duty to maintain a lookout, give warnings, and have its trains under reasonable control was confined to cities, public crossings, and thickly populated communities, and did not extend to rural communities or sparsely settled localities, though the track at these latter places may have been used by a large number of persons. *Shackelford v. L. & N. R. R. Co.*, 84 Ky. 48, 4 Am. St. Rep. 189; *L. & N. R. R. Co. v. Vittitoe's Adm'r*, 41 S. W. 269, 19 Ky. Law Rep. 612; *Miller's Adm'r v. I. C. R. R. Co.*, 118 S. W. 348; *Davis v. C. & O. Ry. Co.*, 116 Ky. 144, 75 S. W. 275, 25 Ky. Law Rep. 342; *L. & N. R. R. Co. v. Redmon's Adm'r*, 122 Ky. 385, 91 S. W. 722, 28 Ky. Law Rep. 1293; *C. & O. V. Nipp's Adm'r*, 125 Ky. 49, 100 S. W. 246, 30 Ky. Law Rep. 1131; *C. N. O. & T. P. Ry. Co. v. Harrod's Adm'r*, 132 Ky. 445, 115 S. W. 699; *Helton's Adm'r v. C. & O. Ry. Co.*, 157 Ky. 380, 163 S. W. 224; *L. & N. R. R. Co. v. Schuster, by, etc.*, 7 S. W. 874, 10 Ky. Law Rep. 65; *Johnson v. L. & N. R. R. Co.*, 122 Ky. 487, 91 S. W. 707, 29 Ky. Law Rep. 36; *Brown's Adm'r v. L. & N. R. R. Co.*, 97 Ky. 228, 80 S. W. 639, 17 Ky. Law Rep. 145; *L. & N. R. R. Co. v. Lowe*, 118 Ky. 260, 80 S. W. 768, 25 Ky. Law Rep. 2317, 65 L. R. A. 122.

[1, 2] This rule has been modified so that now the question whether a party who is injured is a trespasser or licensee must depend, not on the fact that the accident happened in a city, incorporated town, or on a public crossing, but on the number of persons using the tracks at the place of the accident. *Shrader v. L. & N. R. R. Co.*, 114 S. W. 788; *L. & N. R. R. Co. v. McNary*, 128 Ky. 414, 108 S. W. 898, 32 Ky. Law Rep. 1266, 17 L. R. A. (N. S.) 224, 129 Am. St. Rep. 308; *C. & O. Ry. Co. v. Warnock's Adm'r*, 150 Ky. 75, 150 S. W. 29; *Corder's Adm'r v. C. N. O. & T. P. Ry. Co. et al.*, 155 Ky. 536, 159 S. W. 1144; *C. N. O. & T. P. Ry. Co. v. Blankenship*, 157 Ky. 699, 163 S. W. 1123; *C. & O. Ry. Co. v. Dawson's Adm'r*, 159 Ky. 296, 167 S. W. 125; *Willis' Adm'r v. L. & N. R. R. Co.*, 164 Ky. 124, 175 S. W. 18; *C. & O. Ry. Co. v. Isaacs*, 170 Ky. 190, 185 S. W. 816. Many other cases on both these propositions could be cited, but, in view of the fact that the accident complained of happened in the company's yards, we will direct our attention to a considera-

tion of cases involving similar accidents, limiting the discussion to cases arising out of yard accidents. We will consider first the line of authorities relied upon by appellant, a few cases being used for illustration.

*Kentucky Central R. R. Co. v. Gastineau's Adm'r*, 88 Ky. 119. In this case decedent was treated as a trespasser, and there is nothing to show the extent of the use of the yards by the public, if any.

*L. & N. R. R. Co. v. Bays' Adm'r*, 142 Ky. 400, 184 S. W. 450, 84 L. R. A. (N. S.) 678. The court states there is no proof that the tracks were used by pedestrians to any considerable extent at the time of night the accident occurred.

*Watson's Adm'r v. C. & O. Ry. Co.*, 170 Ky. 254, 185 S. W. 852. In this case it appears that the right of way was inclosed with wire fences on each side, at what is termed the "Harrison street crossing," and a cattle guard extends across both tracks of the railroad, and is connected at the ends by wings, extending to the fence on each side of the right of way, nor were there any houses on either side of the right of way fronting thereon. The number of persons using the track at the point of accident is not given in the opinion, the court stating:

"The inclosure of the right of way with fences and a cattle guard was all the railroad company could be expected to do to keep persons from using the tracks, and there was an entire absence of any necessity for traveling upon the tracks or any invitation to do so."

*L. & N. R. R. Co. v. Redmon's Adm'r*, 122 Ky. 385, 91 S. W. 722, is to the same effect, the tracks of the company being inclosed by fences on both sides, with a bridge at one end and a cattle guard at the other, the number of persons using the tracks not being disclosed.

*McDermott, by, etc., v. Ky. Cent. R. R. Co.*, 93 Ky. 408, 20 S. W. 380. In this case the court says:

"And, although there was some testimony showing that persons occasionally passed from Vine street along or upon the track to the depot, it does not appear such passway was then being regularly used, or ever was used by license of the company, express or implied."

There was a sign in the vicinity of the place where appellant was injured, and he had several times been driven away; force being at one time used for that purpose.

Beginning with the case of *I. C. R. R. Co. v. Murphy's Adm'r*, 123 Ky. 787, 97 S. W. 729, 11 L. R. A. (N. S.) 352, and continuing through a long line of cases, the court has consistently held in cases presenting facts similar to the one at bar it is a question for the jury whether, in the use of the company's tracks, at the point of accident, a person injured is to be treated as a licensee or trespasser. The accident in the *Murphy Case* occurred in the company's switchyard in

the town of Central City. The tracks had been used by the public for 15 years, or longer as a roadway for foot passengers, with the knowledge of the operators of the trains. The court says:

"The use is shown to have been so extensive, constant, and continued as to raise a presumption of knowledge by the company that it was so used."

We quote further from this opinion:

"If the railroad company knows that the public habitually uses its tracks and right of way in a populous community as a foot passway, so that it knows that at any moment people may be expected to be found thereon, such knowledge is treated as equivalent to seeing them there, and their presence must be taken into consideration by the train operatives in the movement of their trains. Such foot passengers may be in law only trespassers or licensees. They may, indeed, have no legal right to be there or to use the track; but the question comes back, if they are there, and known to be there, what, then, is the company's duty as to running its trains? It is admitted that the company has the superior right—nay, maybe has the exclusive right—to the tracks, and that some way ought to be provided for keeping trespassers off them altogether. But the fact remains, the tracks are open, inviting for easy travel, are traveled constantly, and so known to be by the company. The difference between the cases in the country and those in thickly settled towns and cities is one of practical materiality. In the country there are occasional sporadic uses of the tracks by the foot passengers, but they are comparatively rare. To compel the railroad trains to creep along under full control, in anticipation of what probably would not occur, viz. the meeting or overtaking of a stray trespasser, would not be reasonable, because most likely wholly unnecessary. But in populous communities the probabilities are all the other way. The foot passengers, from long habit of use, which are known to and suffered by the company, may reasonably be expected at all times, and in any number. It is more than a mere probability—it is a reasonable certainty—that they will be found there. The company should no more shut its eyes to such a probability within its knowledge than to the actual fact of the presence when known. We will not say that to dash at uncontrollable speed through such a town, where people are known to be using the tracks for passing, is not negligence. Let the jury say whether it is."

In *I. C. R. R. Co. v. Holland's Adm'r*, 147 Ky. 699, 145 S. W. 389, involving an accident that occurred in the Central City yards, the court holds that the case was properly submitted to the jury. To the same effect is *C. N. O. & T. P. Ry. Co. v. Harrigan's Adm'r*, 149 Ky. 53, 147 S. W. 942.

*Carter's Adm'r v. C. & O. Ry. Co.*, 150 Ky. 525, 150 S. W. 811, is a case in many respects similar to the one at bar, and on the authority of this case alone we would be compelled to hold that the lower court properly submitted this case to the jury; the

territory, the use and location of the yards, the physical facts and general surroundings being so nearly identical to those in the instant case. One Blevins lost his life in the yards of the railroad company immediately west of the town of Russell, in Greenup county. The county road paralleled the company's tracks at the point of accident. A very illuminating diagram will be found in the reported case. 150 Ky. on page 526, 150 S. W. 812. The adjacent towns had a population somewhat smaller perhaps than Jackson and Quicksand. A wire fence separated the tracks from the county road; and, as in the present case, there was a baseball field near the point of accident. It was urged in the case under discussion that the accident having occurred in the company's private yards, which were not in a town or city, or intersected by a public crossing at the point of accident, the company did not owe the injured man the duty of lookout, etc.; the court on this point saying:

"The fact that the accident did not occur in an incorporated city or town cannot, of itself, affect the case; it is the nature and use of the crossing by the public that is to determine the applicability of the rule which requires the lookout. \* \* \*

"If the use of the track by the public for crossing purposes was general, and acquiesced in by the railroad company, it was charged with notice of such use, and the trespasser became a licensee to whom the company owed a lookout duty, although the accident happened in the company's yard."

To avoid the application of the general rule as to liability for the accident, it was contended in the *Carter Case*, as well as this one, that among those using the track were employes of the company, and hence there was no such use of the crossing by the general public as would bring the case within the rule. The daily use of from 400 to 500 people was shown in that case, while in the case at bar the testimony as to the use ranges from 10 to 500 persons daily; the court in the *Carter Case* saying:

"The evidence does not show that the use of the crossing was confined to the employes of the company; on the contrary, it tended to show that the crossing was so used by the employes and the general public to the extent indicated,"

—and the court was unwilling to say the crossing was not used by the general public to such an extent as to deprive Blevins of his right as a licensee.

*Southern Ry. Co. v. Sanders*, 145 Ky. 679, 141 S. W. 77, furnishes a splendid illustration of the point under discussion. In that case appellee recovered a verdict against the company because of injuries received in the company's yards. On appeal the case was reversed on the ground that the court was satisfied from the evidence the company was

under no duty to anticipate the presence of persons on its track at the time and place the appellee was injured; the court saying:

"It does not follow that because persons who in large numbers habitually use its tracks and right of way during certain hours of the day or during the entire day are to be treated as licensees that it will be used in the same manner during the night or that the company owes in the day and night the same degree of care."

In remanding the case for a new trial the court makes use of the following language:

"If there is another trial, and evidence is introduced in behalf of appellee to show that large numbers of persons were habitually accustomed to using during the night the tracks and premises of the appellant company at the place where appellee was injured, the case should be permitted to go to the jury, as such use imposed upon the company the duty under the circumstances of this case of operating its train at a reasonable rate of speed, keeping a lookout and giving warning of the movement of the engine. When the lookout duty is required it means such a lookout as will be effective for the purpose intended, and reasonably sufficient to discover the peril of persons on the track, as well as to stop the train or engine as soon as it can be done by the exercise of reasonable care when warning or notice of the danger is given. To meet this duty where it is required as to a backing engine in the nighttime there should be either a light on the end of the tender or a brakeman stationed there with a lantern, or a brakeman, with a lantern, walking in front of the moving engine. The fact that the engineer may be keeping a lookout is not sufficient when the way is not lighted so that he can see objects on the track. But, unless there is the quantity of evidence indicated upon the use of the tracks and premises by the public during the night or about the time appellee was injured, the court should direct a verdict for the railway company."

On the second trial of this case there was a verdict for the plaintiff, from which an appeal was taken. Opinion on the second appeal is found in 154 Ky. 421, 157 S. W. 731, where, after referring to the evidence introduced as to the use of the company's yards and the cases on the subject, the court reaches the following conclusion:

"So, in the case before us. The yards of appellant were open, and as they afforded a nearer and more direct route for the many persons passing between Woodford street and Court street, or from the north end of the station to Court street, it was but natural, and to be expected, that pedestrians would pass through them when and as it suited their convenience. The evidence shows that this use was continued until after train time, or as late as 10 o'clock at night, thus bringing the case within the rule announced in the opinion upon the first appeal. The evidence was therefore sufficient to carry the case to the jury; and, the jury being the judges of the weight to be given the evidence, we cannot say, under all the circumstances, that their verdict is flagrantly against the weight of the evidence."

L. & N. R. R. Co. v. Taylor's Adm'r, 158 Ky. 633, 166 S. W. 199; L. & N. R. R. Co. v. Lowe, 118 Ky. 260, 80 S. W. 768, 25 Ky. Law Rep. 2317, 65 L. R. A. 122. These two cases involve injuries to employes. Burton's Adm'r v. C., N. O. & T. P. Ry. Co., 113 S. W. 442.

We will not extend this phase of the opinion any further than by reference to the case of Southern Ry. Co. in Ky. v. Jones, 172 Ky. 8, 188 S. W. 873, one of the latest cases on the subject from this court, and in which the court states that under the facts presented by the record a peremptory instruction was not proper. The appellee, Jones, was injured in the company's yards at Lawrenceburg, and in the course of the opinion the court says:

"In a long line of cases we have held that such use of a railroad company's tracks as was here shown imposes upon it the duty of operating its trains at a reasonable rate of speed, keeping a lookout and giving warning of the trains' movements, and that this care is not only required at places where the public have a right to use the right of way and tracks, as at street crossings and the like, but is also to be applied at points on its road in cities, towns, and populous communities, where the public generally have been in the habit of using, with the knowledge and consent of the company, its tracks and right of way."

[3] In view of the foregoing we do not think the court erred in submitting the case to the jury.

Error of the court in overruling the defendant's motion to strike from the petition is urged as a ground for reversal. The petition, with greater particularity than necessary, described the scene of the accident: that it occurred between Jackson and Quicksand. The tracks between said two places included the company's yards, and for ten years last past the inhabitants of Jackson and Quicksand and that vicinity had continuously and at all times, both day and night used the switchyards and tracks between said two cities for public travel. The company had notice of such use by the public, and at or near the point of injury there is a public crossing, traveled and used by the public across the switchyard; and also that the company had rules prohibiting the operation of its engines and tenders in the switchyard, where the injury occurred, at a greater speed than four miles an hour.

We do not find anything prejudicial to the rights of appellant in overruling the motion to strike. The object of thus alleging the location of the company's yards, as between the two cities named, coupled with the allegation that the inhabitants thereof used the switchyard, was not objectionable. It apprised the company that there was such a use of the tracks at the point in question as to charge it with notice, necessary to bring appellee within that line of cases holding,

where the public had in great numbers used the tracks of the company, this made it a question for the jury as to whether the travel and use was sufficient to charge the company with giving to the persons using their track warning, lookout duty, and having their trains under reasonable control. While it is true the accident did not happen within the limits of an incorporated city, it was so close thereto and the community was so populated, and the tracks, according to the testimony, were used by that number of persons, as would make this a case for the jury.

[4-6] The allegation as to the rules of the company prohibiting the operation of its engines at a greater rate of speed than four miles an hour was not proper, and should have been stricken on defendant's motion. As said in *L. & N. R. R. Co. v. Dyer*, 152 Ky. 264, 153 S. W. 194, 48 L. R. A. (N. S.) 816:

"This court has committed itself to the doctrine that the care that employes of railroad companies must exercise towards the general public is to be determined by the principles of law, and not by the rules adopted by the company for the guidance of employes."

The rules of the company are not, therefore, admissible for the purpose of showing either proper care or negligence on the part of the company's employe. See, also, *Louisville Ry. Co. v. Gaugh*, 133 Ky. 467, 118 S. W. 276; *Southern Ry. Co. v. Stewart*, 141 Ky. 270, 132 S. W. 435.

But notwithstanding the fact the court overruled the motion, it does not appear from the record defendant was in any wise prejudiced thereby. It was sought to prove this rule by the witness Stivers, whose deposition was taken, and to each of the questions pertaining to the rules there is an objection noted and the question certified to the court for decision, and the court's ruling on these objections does not appear; but, even though it did, the witness states that he did not know what the rule was regarding the speed of engines in the Jackson yard at the present time; that is, at the time of the accident.

Further points covered by the motion to strike were based on the theory that decedent was a trespasser; and in view of the conclusion we have reached as to the status of the decedent at the time of the accident, we do not think it necessary to discuss these points, except that, in answer to the contention that there is no allegation as to the amount of the use, we may say we think the allegations of the petition ample to cover this point.

[7] Complaint is also made of the action of the lower court in its admonition or statement to the jury, which had had the case under consideration for two days and announced to the court that they could not agree, and it is alleged in the additional grounds

for a new trial that the court thus addressed the jury:

"Take the papers and return to the jury room and make a verdict, as some jury will have to make a verdict in the case. This court does not adjourn until Saturday, December 23d."

No objection or exception was made or taken by the defendant at the time, nor was this urged or mentioned in the original motion and grounds for a new trial; and, though the verdict was rendered and the judgment entered December 20, 1916, the first intimation that the court had of this complaint was April 24, 1917, when defendant tendered its additional grounds for a new trial.

There is a conflict in the decisions as to whether it is error for the trial court to threaten to keep the jury a given length of time, unless agreement is sooner reached. But we cannot go into a discussion of this matter, because the defendant did not object or except to this statement or admonition of the court.

Rulings of the trial court, if not excepted to in that court, will be deemed to have been waived. Civ. Code, §§ 333, 334; *Edelen's Pleadings*, etc., § 334, and notes; *Reece v. West*, 145 Ky. 381, 140 S. W. 543; *Employers' Liability Assurance Corporation v. Stanley Deposit Bank*, 149 Ky. 735, 149 S. W. 1025.

[8] The point is mentioned, but not seriously urged, that there were certain signboards or warnings at either end of the company's yards, but there is no evidence that decedent either knew of the presence of said signboards or passed either of them the night he was killed. The question of the effect of these boards is thus discussed in *Southern Ry. Co. v. Jones*, 172 Ky. pp. 12, 13, 188 S. W. 875:

"In view of the abundant evidence as to the long and constant use by the public of appellant's tracks at the place of the accident, we would be unauthorized to say that the mere presence on or near the grounds of signboards forbidding the use of the premises by the public, even though they had been maintained for a greater time than appellant's evidence tended to prove they were here maintained, would have justified the giving of the peremptory instruction asked by it."

It was in evidence in that case that the signboards had not been up a very long time, and the court thus further states:

"And in the absence of evidence tending to show that before receiving his injuries he saw or had been informed of the presence of the signboards, it will not be presumed that a person of ordinary intelligence, situated as he was, must have seen them."

The court cites with approval the text found in 33 Cyc. 761, as follows:

"As a general rule, pedestrians who use a railroad track as a thoroughfare, despite posted



notices and other warnings forbidding it, are trespassers. The existence of the signboard or warning, however, is not conclusive that a person has no license to use the way, and a license to use the tracks may be acquired by customary use, despite such signboards or warnings."

The facts bring this case within the rule mentioned in the foregoing citations.

Complaint is made of the instructions given and refused. As to the instructions given, they are almost a literal copy of the instructions directed to be given upon the retrial of *L. & N. R. R. Co. v. McNary*, 128 Ky. 408, 108 S. W. 898, 17 L. R. A. (N. S.) 224, 129 Am. St. Rep. 308, and these instructions have been approved in later cases.

As to the instructions tendered by the defendant, it is sufficient to say the facts in the McNary Case, supra, are so similar in many details to those in the instant case that the instructions written out by the court were intended to cover the whole law of that case. For example, appellant argues there was evidence that decedent and his companions did not get on the main track until about the time the flagman first saw them, and when the engine was only 15 or 20 feet away. In the McNary Case the court thus states:

"She had on a bonnet, \* \* \* and just as she got on the track she was struck and killed by a fast passenger train coming from the south, and running 40 or 50 miles an hour."

In our opinion the instructions given by the lower court embrace the theories of both the plaintiff and defendant.

One of the points urged for reversal is that the verdict is not sustained by sufficient evidence, but this ground is without merit. We think there was ample evidence to sustain the verdict.

[8] The last point urged is misconduct of counsel in his closing argument to the jury, it being alleged counsel stated, in effect, that ordinary care would require the defendant to have had a headlight on the rear of the engine or tender, as it was backing in defendant's yard. The point seems to be made on the theory, maintained throughout counsel's brief, that decedent was a trespasser, and therefore not entitled to a headlight or any light, and we do not think the argument was improper, certainly not prejudicial to the defendant. Reasonable latitude should be accorded counsel in the closing argument to the jury, provided the argument be confined to facts shown by the evidence and reasonable deductions therefrom. Argument not supported by the record is improper.

On the whole case, for the reasons hereinbefore stated, finding no error in the judgment appealed from, the same is affirmed.

## DUNN v. DUNN.

(183 Ky. 841)

(Court of Appeals of Kentucky. April 17, 1919.)

### DIVORCE $\Rightarrow$ 249(4)—PROPERTY RIGHTS—RESTORATION OF PROPERTY TO HUSBAND.

Property purchased by husband with money from estate inherited by him, and conveyed to wife during marriage in consideration or by reason of marriage and without a valuable consideration, will be restored to husband upon a divorce being granted him under Civ. Code Prac. § 425.

### Appeal from Circuit Court, Clark County.

Action by Lena C. Dunn against James H. Dunn. Judgment for defendant, and plaintiff appeals. Affirmed.

R. H. Tomlinson, of Lancaster, for appellant.

Benton & Davis, of Winchester, for appellee.

SAMPSON, J. Appellant, Lena C. Dunn, and appellee, James H. Dunn, were married in 1898, and lived together most all the time up to 1915, when Lena abandoned her husband. At the time of their marriage James H. Dunn owned a considerable farm in Garrard county, worth \$8,000 or \$9,000, and he had some personal property, all of which he inherited from his ancestors. Mrs. Dunn had nothing at the time of her marriage, but afterwards received something like \$100 from the estate of her father. Immediately after their marriage they moved onto the farm and lived there for a short while. In 1903 a part of the farm was sold and another farm purchased. In 1906 James H. Dunn bought from Harris a house and lot on Richmond street in Lancaster, for which he paid \$1,600, and a deed was made to James H. Dunn. On the 14th of September, 1908, this property was conveyed by appellee to appellant in consideration of some matter which grew out of the marriage relation. In 1906 appellee purchased of Jenny F. Arnold and others a parcel of land in Lancaster, for which he paid \$2,300, and this was deeded to appellant, Lena C. Dunn. In 1906 this property and a lot which appellee had conveyed to appellant were sold for \$3,100. Finally a house and lot were acquired in Burgin, Ky., worth about \$2,000, and one in Winchester, Ky., worth about \$3,000, but the legal title to the Burgin property was in the appellant, Lena C. Dunn, and a life estate in the Winchester property was also in her. Money derived from the sale of the lands which appellee, James H. Dunn, inherited from his forebears, was used to pay for these two pieces of property. No part of the consideration, so far as this record discloses, was provided by Lena C. Dunn, except as she obtained funds from her

husband. She does not show where she earned or acquired any money or property, except from her husband, and the \$100 which she received from the estate of her parents, and this \$100 was used by her for personal expenses.

This suit was instituted on the 28th of September, 1917, in the Clark circuit court, by Lena C. Dunn against her husband, James H. Dunn, for divorce, the custody of their only son, James H., Jr., for maintenance during the pendency of the action, and for alimony, upon the ground that appellee, Dunn, without like fault on the part of appellant, had habitually behaved towards her for not less than six months in such a cruel and inhuman manner as to indicate a settled aversion to her and to destroy permanently her peace and happiness. The answer traversed the grounds of divorce alleged in the petition, and as counterclaim alleged that the plaintiff abandoned him in February, 1915, and had since refused to and had not lived with him. Further pleading, the answer averred that appellee held the title to the house and lot in Winchester, worth \$3,000, and a house and lot in Burgin, Ky., worth \$1,800, which had been purchased and paid for with money belonging to appellee, and that appellant obtained title to both the said pieces of property from appellee during their marriage in consideration of and by reason of the fact that the plaintiff was his wife, and he asked that said property be restored to him. The grounds of divorce alleged in the counterclaim were traversed by reply.

Quite a bit of evidence was taken upon the issues as joined, but on December 20, 1918, appellee tendered and offered to file an amended answer and counterclaim, to which motion appellant objected. The motion was supported by an affidavit which is in part as follows:

"The affiant, James H. Dunn, says that since this cause was submitted, in fact, on the 16th day of December, 1916, he learned for the first time that the plaintiff was unfaithful and untrue to him while she was living with him as his wife, and that while they were living together in Winchester, Ky., the plaintiff would, under the pretense of visiting her sister, Mrs. Clyde Pullins, go to Richmond, Ky., and while there would be guilty of adultery with men, to wit [naming them], and perhaps others whose names are unknown to this affiant."

He asks to be permitted to take additional proof upon the amended answer and counterclaim tendered. The court, after due hearing, allowed the amended answer and counterclaim to be filed, and the case continued for further preparation.

Upon final hearing the court dismissed appellant's petition and granted divorce to appellee, James H. Dunn, on his counterclaim, and adjudged:

"The property mentioned in the pleadings and evidence in this case, the title to which is in the name of the plaintiff, Lena C. Dunn, was obtained by her from the defendant, James H. Dunn, during their marriage and in consideration thereof, and it is adjudged that said property be and it is hereby restored to the defendant, James H. Dunn."

The care and custody of the infant son, James H. Dunn, Jr., was committed to the plaintiff, Lena C. Dunn, with the right to defendant to visit and see his son at reasonable times. Provision was also made for the maintenance of the son out of the property of James H. Dunn; an attorney fee of \$50 was adjudged to counsel for appellant, to be paid by appellee, and a fee of \$20 to the county attorney, and appellee was adjudged to pay all the cost. From this judgment, Lena C. Dunn appeals, not to reverse the judgment of divorce, but that part of the judgment which restores the real property to James H. Dunn.

"Every judgment for a divorce from the bond of matrimony shall contain an order restoring any property not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other, during marriage, in consideration or by reason thereof; and any property so obtained, without valuable consideration, shall be deemed to have been obtained by reason of marriage. The proceedings to enforce this order may be by petition of either party, specifying the property which the other has failed to restore; and the court may hear and determine the same in a summary manner, after ten days' notice to the party so failing." Civil Code, § 425.

This section of the Civil Code has been construed and applied in the following cases: Phillips v. Phillips, 173 Ky. 608, 191 S. W. 482; Golding v. Golding, 82 Ky. 51; Fields v. Walker et al., 174 Ky. 461, 192 S. W. 491; Pruett v. Pruett, 178 Ky. 802, 199 S. W. 1073.

There is little or no doubt that the property in question came directly through and from the means of appellee, James H. Dunn, and that appellant, Lena C. Dunn, provided no part of it. It also satisfactorily appears that she obtained title to the property in controversy from and through her husband "during marriage, in consideration or by reason thereof," and without a valuable or any consideration. By the provision of the section of Civil Code, supra, such conveyance is "deemed to have been obtained by reason of the marriage." The wife seems to have been a much better financier than her husband, because she managed and acquired all his property. Her counsel argues that, but for her frugality and adroitness, appellee's estate would have been dissipated, because he was inclined to be of a roving disposition and wasteful. This may be true, but since the property was acquired by money which came indirectly, if not directly, from the estate in-

herited by him, under the express provision of the Code it must be restored to him upon the granting of divorce.

As there is no substantial error in the judgment, it must be and is affirmed.  
Judgment affirmed.

(184 Ky. 355)

**SUPERIOR COAL CO. et al. v. RUNYON et al.**

(Court of Appeals of Kentucky. May 13, 1919.)

**1. LOGS AND LOGGING  $\S$ 21—MANUFACTURE OF LUMBER—CONSTRUCTION OF CONTRACT.**

Where a contract for the manufacture of lumber provided for payment "when the lumber is sold and paid for," the acceptance and appropriation of lumber by the owner under the contract for use in its own business amounted to a sale so as to entitle the manufacturer to compensation.

**2. LOGS AND LOGGING  $\S$ 21—MODIFICATION OF CONTRACT—EXTENSION OF TIME.**

Where a contract for the manufacture of logs into lumber for the owner was extended by the latter's manager by changing the terms of the contract so as to add an additional party, such action constituted a consent to the extension and a waiver of breach of the contract by failing to complete within the time specified.

**3. LOGS AND LOGGING  $\S$ 21—CONTRACT FOR SAWING—EXCUSE FOR NONPERFORMANCE—FAILURE TO FURNISH MILL SITE.**

Where an owner of timber took over a contract to manufacture logs into lumber because of delay in commencing the work, a counterclaim based on loss occasioned by such delay could not be maintained, where the delay was caused by the owner's failure to provide a mill site as was customary.

**Appeal from Circuit Court, Pike County.**

Action by B. W. Runyon and another against the Superior Coal Company and another. Judgment for plaintiffs, and defendant named appeals. Affirmed.

E. J. Picklesimer and Roscoe Vanover, both of Pikeville, for appellant.

Childers & Childers and Cline & Steele, all of Pikeville, for appellees.

**SAMPSON, J.** This action was instituted by Runyon and Epling in the Pike circuit court against the Superior Coal Company and W. T. Brooks, its general manager, to recover \$1,850 for manufacturing lumber by Runyon and Epling, and \$137.50 for logs cut and skid-

ded, under the contract entered into between the parties April 18, 1916, whereby Runyon and Epling undertook to manufacture a certain boundary of timber belonging to the company into lumber at the price of \$11 per thousand feet, board measure. By the terms of the contract, Runyon and Epling were to begin work within 10 days from date thereof, and to complete the job within 90 days, and to receive pay for manufacturing said lumber "when the lumber is sold and paid for." The work was not actually begun for more than 70 days after the making of the contract, for the reason that there was no suitable mill site on the land on which the timber grew, and a site had to be obtained from neighboring landowners, and, as these negotiations were drawn out, the commencement of the work was delayed. It is the contention of the appellees, Runyon and Epling, that it was the duty of the Superior Coal Company to provide a mill site upon which to set the mill for the manufacture of the lumber; that while the contract does not refer to this, by custom in that neighborhood the timber owner who contracts for the manufacture of lumber from standing timber is to provide a suitable mill site. The contract was first made between Runyon on the one part, and the Superior Coal Company and W. T. Brooks on the other. Later on, however, and some time after the expiration of the 10 days in which the work was to begin, Runyon arranged with Epling to help carry on the work and took him in as partner with the consent and approval of Brooks as the agent and representative of the Superior Coal Company, and Brooks, who had drafted the original contract between the Superior Coal Company and Runyon, interlined the name of Epling into the original contract as a party thereto, and Epling subscribed his name to it. When this was done, the question of additional time for the completion of the contract was discussed, according to the evidence of appellees, and Brooks, for the Superior Coal Company, agreed to extend the time beyond the 90 days mentioned in the original contract for the completion of the work, saying that he needed 10,000 or 12,000 feet of lumber, and that if appellees would supply him with that amount immediately, and then such lumber as he needed from time to time in the construction of his tipple and mining plant, which he was then building, it would be satisfactory. The sawing was commenced on July 3d, and within a few days thereafter appellees delivered to appellant several thousand feet of lumber such as he desired which he employed in his construction work, and within the next 30 days there was something more than 100,000 feet of lumber manufactured and stacked on the yard, as per the contract. In addition to this, a great deal of

timber had been cut into logs in the woods, and some of it had been skidded and placed on the millyard, but not sawed. About this time, Brooks, for the Superior Coal Company, began to complain that the work was not rushed along faster, and finally took charge of the job himself and ousted appellees. Thereafter Brooks had charge of the work entirely until the whole boundary of timber was worked up, amounting to approximately 222,000 feet of lumber, board measure. While appellees were to receive \$11 per thousand feet for the lumber when manufactured and placed on sticks in the yard, they had sublet the work to other persons, one to do the cutting of the lumber, another the logging, and still another the sawing and stacking, at such prices as that there was a margin profit of \$2.75 per thousand feet to appellees. Appellees expended in carrying on the job up to August 8d, when Brooks assumed control, approximately \$1,250, and had received nothing whatever from the Superior Coal Company or Brooks on the contract, although the company had sold and removed 7,000 feet of lumber and had used approximately 14,000 feet in their own business.

About 20 days after appellees were ousted from the job by Brooks, as superintendent and manager of the Superior Coal Company, they brought this action to recover on their contract. As an incident to the suit, appellees sued out an order of attachment and had it levied upon the lumber manufactured; the grounds therefor being the nonresidency of the appellant corporation.

The defendant answered, denying the allegations of the petition, except it admitted the execution of the contract and a partial performance thereof, but pleaded a counterclaim and set-off in which it alleged that, at the time of the making of the contract for the manufacture of the lumber, it was preparing to enter into the coal mining business at Elkhorn City, and that, in order to have lumber with which to erect its tippie and mining camp for which it desired to rush the work, it entered into this contract with Runyon and Epling limiting the time in which to begin the manufacture of the lumber and completion of it in order to expedite their work of building and equipping their coal mining camp; that the work of constructing the mining camp depended upon the rapidity with which the lumber was furnished; and that the failure of appellees to perform their contract according to its terms and provide the lumber with which to build the tippie and mining camp of appellant resulted in great loss and damage to appellant, in that it was delayed in starting the operation of its mines and the production of coal which was at the time in great demand and selling at high prices; and that as a result thereof appellant was damaged in the sum of \$3,000, for which it prayed judgment against appellees.

An amended petition was later filed, in which appellees averred that Brooks, as general manager and vice president of the Superior Coal Company, had willfully and for the purpose of delaying and defrauding appellees, omitted to sign the name of the company to the contract, although its name was in the body thereof, and signed the contract in person only. The appellants having filed a motion to discharge the attachment sued out by appellees, the court heard and considered same and overruled the motion, and the attachment was continued in force.

Each party acknowledged the execution of the original written contract, but appellees Runyon and Epling insisted that, at the time Epling's name was placed in the contract by Brooks, the terms of the contract were modified to the extent of giving additional time in which to complete the manufacture of the lumber, and the failure of appellee Runyon to commence the work within 10 days was waived. This is denied both by the pleading and the evidence of the Superior Coal Company and Brooks. Quite a volume of evidence was introduced upon the few controverted points, and, the case being submitted to the court for judgment, it was decreed that Runyon and Epling recover of the defendant Superior Coal Company the sum of \$1,269.40 for lumber actually manufactured at the contract price of \$11 per thousand feet; and the further sum of \$300 for work done in cutting, snaking, and skidding timber which was not manufactured into lumber, but which was partly or wholly prepared for that purpose. The attachment was also sustained. From this judgment Superior Coal Company appeals.

[1, 2] It is the contention of appellant that the petition did not allege a cause of action, in that it did not aver the contract had been fully completed, but that it only averred that appellants had sold 7,000 feet of lumber and had converted to their own use 14,000 feet of lumber; whereas, the contract specifically provides that appellees were to be paid for the manufacture of the lumber when the lumber is sold and paid for, and that the petition did not contain any averments that the lumber had been sold by the company and paid for. It is true that the written contract contains the condition as to payment set forth, but this must be construed in the light of the whole contract and the surrounding circumstances. Brooks drafted the contract. The acceptance and appropriation of the lumber by the coal company amounts to a sale thereof, and, as most of the lumber was to be used in the erection of the tipples and mining plant by the company, it must have been in the contemplation of the parties at the time of the making of the contract that the lumber should be paid for as so used. At any rate, when Brooks, for the company, ousted appellees from the job and assumed control him

self, appellees were entitled to immediate compensation for that part of the lumber manufactured and logs prepared, unless they had first breached the contract. The trial court found the facts in favor of appellees, and that appellant company through its agent had consented to the extension of the time provided in the contract for the manufacture of the lumber, and it also waived the breach of the contract, if any there was, on the part of Runyon in failing to begin the work within 10 days from the date of the writing. The evidence abundantly shows that after the work was commenced, immediately after the granting of the extension, it was prosecuted with diligence and success and a great amount of lumber was manufactured in a very short time. No reasonable complaint could have been made of the progress of the work.

[3] The trial court rejected the counterclaim of appellant, and rightfully so, we think, because the weight of the evidence is to the effect that the delay in commencing the work was due to the failure of appellant to provide a mill site, and the time in which to complete the work was extended.

The judgment of the chancellor is sustained by the weight of the evidence, and, there being no error of law cited by appellant, the judgment is affirmed.

mere statements that the box was permanent were conclusions, insufficient to put question of permanent nuisance to the jury.

Appeal from Circuit Court, Pike County.

Action by H. H. Coleman, against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Worthington, Cochran & Browning, of Maysville, and M. C. Kirk, of Paintsville, for appellant.

Childers & Childers, of Pikeville, for appellee.

CLAY, C. Plaintiff, H. H. Coleman, brought this suit against the Chesapeake & Ohio Railway Company to recover damages to his land, caused by overflow. From a verdict and judgment in his favor for \$500, the railway company appeals.

The first error assigned for a reversal is that the damages are excessive.

Plaintiff is the owner of a tract of land consisting of about 150 acres, and worth \$700 or \$800. The company constructed a line of railroad through this tract, leaving a strip of some 6 acres between its roadbed and Marrowbone creek. Upon this 6 acres plaintiff lived and conducted a storehouse. Just above plaintiff's land was a small drain, across which the railroad is constructed. To permit the water from the drain to pass under the roadbed, the company constructed a small wooden box, 4 feet broad, 8 feet long, and 18 inches deep, which it placed under the roadbed. On several occasions when the water was high, debris would accumulate in the box, and the water would pass over the company's tracks and flood plaintiff's land. A portion of the land was used for grass and corn, while other portions were used for potatoes and other garden truck. Plaintiff testified that the water stood on the land until it killed the roots of the corn, and the corn did not bring anything for a season or two. In the spring season the water would bake the land so hard that he could not break it up except in large clods. The water stood over his garden and ruined it, and injured some of his potatoes. It spread out over his land and ran under his house so that it was necessary for him to wade in order to get to the storehouse and to the lower end of his land. Other witnesses testified to seeing the water on plaintiff's land.

[1] Neither plaintiff nor any of his witnesses gave to the jury any estimate of the amount of damage, or stated facts from which the jury could estimate the damage. While plaintiff said that his garden was ruined and his corn was injured, he did not give the size or value of his crops, or the extent of the injury. All that the evidence shows is that the water sometimes overflowed

(184 Ky. 9)

CHESAPEAKE & O. RY. CO. v. COLEMAN.

(Court of Appeals of Kentucky. April 22, 1919.)

1. WATERS AND WATER COURSES ⇨178(2)—OBSTRUCTION OF DRAIN—DAMAGES—INJURIES TO LAND.

A verdict for \$500 given for injury to land caused by overflow of drain by railroad held excessive, where the evidence failed to give an estimate of the damage done or extent of the injury.

2. NUISANCE ⇨50(7)—PRIVATE NUISANCE—NATURE OF INJURY—"PERMANENT NUISANCE"—"TEMPORARY NUISANCE."

In determining damages depending on question whether a nuisance is temporary or permanent, the test is whether the nuisance can be readily abated at a reasonable expense; if so, it is temporary; if not, it is permanent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Permanent Nuisance.]

3. EVIDENCE ⇨471(19), 568(1)—CONCLUSIONS—PERMANENCY OF OBJECT.

Where injuries to land from overflow were caused by obstructions in a small box under defendant's roadbed, and circumstances indicated such box could be removed at small expense,

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

and stood on his land, thus making it inconvenient for him to walk around, and that certain crops of unknown extent and unknown value were injured. That being true, the evidence of the extent of the damage is too vague and uncertain to support a verdict of \$500. Hence we conclude that the verdict is excessive.

[2, 3] It is further insisted that the court erred in not submitting to the jury the question whether the nuisance was temporary or permanent, and in not giving the measure of damages applicable to each kind of nuisance. The test is: Could the nuisance have been readily abated at a reasonable expense? If so, it was temporary; if not, it was permanent. The character and location of the box, as well as the surrounding conditions, show that it could have been readily removed at a small expense. The company's engineers did not undertake to show that this was not the case. They only stated that the box was permanent. Under the circumstances, their statements were mere conclusions, and were not sufficient to make the question of permanent nuisance one for the jury. It follows that the court did not err in treating the nuisance as temporary, and giving the measure of damages applicable to such a nuisance.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

(183 Ky. 848)

#### THOMPSON v. PORTER et al.

(Court of Appeals of Kentucky. April 18, 1919.)

#### 1. JUDGMENT $\S$ 297, 340—VACATION OR MODIFICATION—COURTS OF CONTINUOUS SESSIONS—STATUTES.

Under Ky. St.  $\S$  988, 998, courts of continuous sessions have only such control over their judgments in actions at law for 60 days after rendition as circuit courts having terms have over their judgments during the term at which rendered, and after 60 days from rendition of judgment in a court of continuous sessions it may be vacated or modified only in same way and on same grounds on which judgment in court having terms may be vacated or modified after term as prescribed by Civ. Code Prac.  $\S$  344, 518-520, 763.

#### 2. JUDGMENT $\S$ 135—DEFAULT—VACATION—GROUNDS—STATUTES.

After 60 days from rendition by court of continuous sessions of judgment by default against persons sui juris and duly served, vacation of judgment could be granted on motion in court which rendered it on only two grounds mentioned in Civil Code of Practice, those of clerical misprision in or the void character of the judgment, covered by sections 344, 520. To obtain vacation on other grounds open to them under other sections, it was necessary to proceed by petition as in any other action.

#### 3. JUDGMENT $\S$ 141—DEFAULT—VACATION ON MOTION—JUDGMENT NOT VOID.

Where court had jurisdiction of parties and land involved, and defendants, under no disabilities except coverture of one, were regularly served with summons for requisite time before default judgment was rendered against them, judgment cannot be vacated on motion as "void," though defendants, by pursuing the method, and on one or more of the grounds prescribed by the Civil Code of Practice may be able to secure vacation of judgment and be permitted to interpose defense.

#### Appeal from Circuit Court, Fayette County.

Suit by L. E. Thompson against Harvey Porter and another. Judgment was rendered against defendants by default, and, from judgment vacating it, plaintiff appeals. Reversed, and cause remanded for proceedings not inconsistent with the opinion.

J. A. Edge, of Lexington, for appellant.

Jas. A. Wilmore and J. Keen Daingerfield, all of Lexington, for appellees.

HURT, J. On January 15, 1916, the appellant, L. E. Thompson, instituted a suit in the circuit court for the county of Fayette, which is a court of continuous sessions, against the appellees, Harvey and Diana Porter, to recover the possession from them of a certain house and lot in the city of Lexington which she alleged that the appellees were wrongfully withholding from her. It was averred in the petition by appellant that she was the owner by a fee-simple title of the lands, and entitled to their immediate possession. The appellees were duly served with a summons to appear and defend the action, but failed to do so, and on the 23d day of February, 1916, a judgment was rendered in the action by default and by which it was adjudged that the appellant was the owner of the lands, with a fee-simple title, and entitled to recover their possession from appellees, and adjudged that she recover their possession and her costs, and that a writ of possession for the lands issue upon the judgment in behalf of appellant. No step nor proceeding of any kind touching the judgment was undertaken by the appellees at any time, until the 6th day of July, 1916, when they moved the court to vacate the judgment upon the ground that it was void. The motion was sustained on the 4th day of November, 1916, at which time the court adjudged that the judgment of February 23, 1916, for the recovery of the land, be vacated, and from this judgment the appellant has appealed.

[1] The Fayette circuit court being one of continuous sessions the time within which it has control over its judgments, in actions at law, such as judgments in actions of ejectment, is governed by the provisions of

sections 988, and 998, Ky. Stats., the first of which provides as follows:

"The court shall have control over its judgments for sixty days, as circuit courts have over their judgments during the term in which they are rendered."

The latter section provides as follows:

"Proceedings to vacate or modify a final order for grounds for which, in courts having terms, it might be vacated after the term at which it was rendered, may be had in reference to any order or judgment of the court, after expiration of sixty days from its rendition. A motion to vacate a judgment, because of its rendition before the action could regularly be placed upon the trial docket, shall only be entered within three months after its rendition."

Hence, it would seem that courts of continuous sessions have only such control over their judgments, in actions at law, for 60 days after their rendition, as circuit courts having terms have over their judgments during the term at which their judgments are rendered, and, after the expiration of 60 days from the rendition of a judgment in a court of continuous sessions, the judgment may be vacated or modified only in the same way and upon the same grounds as one upon which a judgment in a court having terms may be vacated or modified after the term at which it was rendered. Sixty days following the rendition of a judgment in a court of continuous sessions is, with reference to the power of the court over the judgment, considered as a term of such court.

In *Henry Voght Machine Co. v. Pennsylvania Iron Works Co.*, 66 S. W. 734, 23 Ky. Law Rep. 2163, touching the construction to be placed upon the provisions of section 988, supra, and its application when 60 days had elapsed after the rendition of a judgment in a court of continuous sessions, this court said:

"The court had therefore lost control over the judgment and was without power to modify it or set it aside, except as provided under sections 518 and 520 of the Civil Code of Practice, regulating proceedings for this purpose after the term at which a judgment is rendered."

This construction has been adhered to in many cases. *Trapp v. Aldrich*, 67 S. W. 834, 23 Ky. Law Rep. 2430; *Williams v. Williams*, 107 Ky. 493, 54 S. W. 716, 21 Ky. Law Rep. 1208; *Roemele v. Schmidt*, 138 Ky. 336, 128 S. W. 65; *Accident Co., etc., v. Reigart*, 92 Ky. 142, 17 S. W. 280, 13 Ky. Law Rep. 442; *Louisville v. Muldoon*, 43 S. W. 867, 19 Ky. Law Rep. 1386; *Johnson v. Stivers*, 95 Ky. 128, 23 S. W. 957, 15 Ky. Law Rep. 477; *Tritsch v. Covington*, 161 Ky. 171, 170 S. W. 518, Ann. Cas. 1916B, 722; *Petty v. Wilbur Stock Food Co.*, 128 Ky. 180, 107 S. W. 699, 32 Ky. Law Rep. 956. The rule of the common law, and which has been adhered to in this state, when applied to judgments of the

circuit courts, is that a final judgment cannot be vacated or modified, by the court which rendered it, after the term at which it was rendered, except upon such grounds and in the manner prescribed by the Civil Code. *McManama v. Garnett*, 3 Metc. 517; *Davis v. Jenkins*, 93 Ky. 353, 20 S. W. 283, 14 Ky. Law Rep. 342, 40 Am. St. Rep. 197; 15 R. C. L. 691; *Hocker v. Gentry*, 3 Metc. 463; *Wise v. Wolfe*, 120 Ky. 263, 85 S. W. 1191, 27 Ky. Law Rep. 610; *Megowan v. Pennebaker*, 3 Metc. 501; *Thompson v. Brownlie*, 139 Ky. 686, 76 S. W. 172, 25 Ky. Law Rep. 622.

[2] The appellees were persons sui juris, and neither of them laboring under any disability, except coverture, and having been actually served with summons in the county wherein they resided and in which the court sat, and hence were confined in their attempts to procure the vacation of the judgment to the grounds prescribed by sections 340, 518, and 763, of the Civil Code, or to such of the grounds mentioned in those sections as apply to persons authorized to sue and be sued in their own proper persons, and not constructively summoned, and to the character of proceedings, and to be instituted within the time provided by sections 344, 519, and 520 and 763, Civil Code. After 60 days had elapsed from the rendition of the judgment, a vacation of the judgment could be granted upon a motion, in the court which rendered it, upon only two of the grounds mentioned in those sections of the Code. These grounds are a clerical misprision or because the judgment was void. To obtain a vacation of the judgment upon the other grounds open to them, it was necessary to proceed by a petition as in any other action. Sections 344, 520, Civil Code. That the entry of the judgment was not a clerical misprision is apparent. Hence the only ground upon which the court, at the time it did so, was authorized to vacate the judgment, was upon the ground that it was void, and for that reason a nullity. After the term at which they are rendered, default judgments can be vacated only by the same methods and upon the same grounds applicable to the vacation of other judgments. The judgment, if valid, rendered the questions of the title and right of possession res judicata between the appellant and appellees, so long as the judgment was not reversed, vacated, nor modified in the way and upon some of the grounds provided by law.

[3] Then, to determine the soundness of the court's action in vacating the judgment, it only remains to determine whether or not the judgment was void. If void, the court was clearly within its authority in setting it aside upon motion, as it did do; but, if not void, the action of the court was not authorized. The fact that appellees had a good defense, which they might have successfully urged, against the recovery of the

judgment by appellant if they had seen fit to offer it, does not render the judgment void, as it was within their rights to confess the claims of appellant, if they chose to do so. Neither does the fact that appellees, by pursuing the method and upon one or more of the grounds prescribed by the Civil Code, be able to secure a vacation of the judgment and be permitted to interpose a defense to the action, render the judgment void. The court had jurisdiction of the parties to the action. The appellees were regularly served with a summons to appear and defend the action, and for the requisite time, before the judgment was rendered. They resided in the county where the court sat. They labored under no disabilities, except coverture on the part of one of them, which is not a disability as to suing or being sued. The land in controversy was situated in the county where the court sat, and its jurisdiction extended to every question relating to title and possession of it which could have arisen between the parties. The judgment was within the allegations and prayer of the petition, and described the parties and the lands recovered and the issues determined between the parties. Such a judgment is not void, and the court was in error to vacate it upon such ground and was without power to set it aside upon a motion, after 60 days had elapsed from its rendition, because of any reason other than its being void.

The judgment is therefore reversed, and cause remanded for proceedings not inconsistent with this opinion.

(184 Ky. 487)

**HARTFORD ACCIDENT & INDEMNITY CO. v. DAVIS.\***

**UNITED STATES FIDELITY & GUARANTY CO. v. SAME.**

(Court of Appeals of Kentucky. April 18, 1919.)

**INSURANCE. §—668(11)—ACTION ON POLICY—QUESTIONS OF FACT.**

In an action on a death and disability insurance policy, evidence held to justify submission to the jury of the question whether insured, who was himself an insurance man, was by the accident substantially disabled from performing the duties of his business, and whether death resulted from the accident.

Appeal from Circuit Court, McCracken County.

Separate suits by Marjorie C. Davis against the Hartford Accident & Indemnity Company and against the United States Fidelity & Guaranty Company to recover on insurance policies. Judgments for plaintiff,

and defendants appeal. Affirmed in each case.

Mooquot & Berry, of Paducah, for appellants.

Wheeler & Hughes, of Paducah, for appellee.

QUIN, J. These suits were instituted by appellee, Marjorie C. Davis, wife of Frank F. Davis, against the Hartford Accident & Indemnity Company on one policy, and against the United States Fidelity & Guaranty Company on two policies, seeking recovery of the face of said policies, as well as certain weekly indemnities on each of them.

The plaintiff alleged that her husband, the insured, died as the result of an accident on May 22, 1916, when he slipped and fell on the step of a building, injuring his spine, and another accident, occurring three days later, when he injured his spine while attempting to get out of a bathtub at his residence. Liability was denied by the companies because of breach of certain warranties and misrepresentations on the part of the insured; that the alleged injuries did not wholly and continuously disable or prevent the insured from attending to his business; that he died as the result of disease, which was not brought about by any injury or accidental means, and under the terms and conditions of the policies plaintiff was not entitled to the face of the policies, nor any part thereof, nor to any indemnity whatsoever. The cases were submitted to a jury, and from verdicts adverse to appellants they have appealed.

Insured conducted a general insurance business in Paducah, and among the companies represented by him were the two appellants. All three policies were in force at the time of his death, November 21, 1916. The policies contain substantially the same provisions; those pertinent to this appeal are:

"Sec. 1. If any loss specified in this section shall result directly and exclusively from such injury, and the insured shall have been continuously and totally disabled and prevented from performing any and every kind of duty pertaining to his occupation, from the date of such injury to the date of such loss, or if, irrespective of total disability, such loss shall result directly and exclusively from such injury within three months after the date of the accident, the company will pay for loss of life the principal sum."

"Sec. 2. (a) If such injury shall immediately, continuously, and totally disable and prevent the insured from performing any and every kind of duty pertaining to his occupation, the company will pay, as long as the insured lives and suffers such total disability, the weekly indemnity above specified."



The provisions are taken from the Hartford policy.

Much medical testimony was introduced. For appellee, his widow testifies to the bathtub accident; she heard the noise of the fall; insured complained of soreness at the end of his spine; she rubbed him with some medicine she had at home. He never was well after this; he made efforts to get out, but was never able to attend to his business, like it should have been done. After the date of the accident, if he went to his office, he would be all to pieces when he came home. Most of the time she would take him in the auto to deliver policies. She never saw any external evidence of his injury; there was no change for the better in his condition from the time of the accident until his death. Prior to the accident he was always well, an athlete, fond of games. About the middle of July he went to Chicago to consult some specialists; he took a brief trip to Cerulean Springs and to South Haven, but grew worse all the time. Corroboration of different parts of her testimony is found in the evidence of five other witnesses.

Dr. Sights made a special study of the diseases of the brain and the nervous system; saw insured October 1st and practically every day until his death; found a bruised spot on the end of the spine; considered the fall on the iron steps (first accident) the primary cause of death, producing the condition that resulted in his death. This was his conclusion after close analysis of the history of the case and about 53 days' treatment.

Dr. Hearne, in answer to a hypothetical question, says the injury was the cause of death; was present when insured died; he died from convulsions; from his diagnosis it was a cerebral lesion or brain lesion.

For appellants, the bookkeeper in his office testified that the first she heard of the accident was about the middle of July; thinks she saw insured every day; saw no difference in the time he spent at the office. He wrote new business of all kinds, and did some collecting until July. She works for the present agent for these companies.

Buford Rhodes purchased the agency after insured's death; he was associated with him in the office previous to his death; he corroborates the bookkeeper, and states that he furnished appellants with a list of policies written by insured between May and November.

About 15 witnesses testify that insured solicited them, or they called him, for policies, between June and November; most of those instances occurred in June, and were taken under varying circumstances and in different portions of the city.

Eight physicians, osteopaths, allopaths,

and surgeons, testify. In the opinion of most of them, death was not due to the accident; insured had a disease of the spine, which had existed probably several months.

Several exhibits are filed with the record, such as proof of claim, application for disability clause on certain of insured's policies, certificate of death, etc. When asked in rebuttal why he stated in the certificate of death that the contributory cause of insured's death was unknown, Dr. Sights explains that he analyzed the case after insured's death.

Insured died more than 90 days after the two accidents, at the age of 32 years. His average weekly income was \$75.

In two particular instances we have had before us policies containing provisions similar to those sued on:

Natl. Life Acc. Ins. Co. v. O'Brien's Ex'x, 155 Ky. 498, 159 S. W. 1134:

The insured in that case was injured in a runaway accident. It was claimed his death was due to Bright's disease, and that the accident did not wholly and continuously disable him from performing every and any duty pertaining to his business. The court classifies the authorities construing the disability clause, and adopts the one holding that a total disability exists if the insured's injuries are of such a character that common prudence requires him to desist from his labors, and rest, so long as it is reasonably necessary to effect a speedy cure. The widow, O'Brien, testifies that—

"After he was several weeks sick, he got up; but he wasn't up very long. It might have been a week or little more, and he was taken sick again, and he wasn't well from that time on then. He would get up and go out, and come back to bed again, and sometimes maybe he would set up an hour or so."

It is held in this case that the disability would be total if of such a character as to prevent the insured from transacting any kind of business pertaining to his occupation; that it is sufficient if the disability was such as to prevent insured from doing all the substantial acts required of him in his business.

Doyle v. New Jersey Fidelity & Plate Glass Ins. Co., 168 Ky. 789, 182 S. W. 944, Ann. Cas. 1917D, 851:

Here the insured, a dentist, injured his finger June 21, 1912, and blood poisoning later developed. The provision of the Doyle policy and the policies in this case are almost identical. A recovery was denied because from August 7 until November 4 (when he died) Doyle was at his office regularly and performed at times substantially all of his accustomed duties. After quoting from the O'Brien Case, *supra*, the court says:

"From the above quotations from the O'Brien Case it will be seen that this court is committed to a 'reasonable construction' of the clause in

question 'that is as just to the assured as to the insurer,' and that that end is attained 'if the disability of the insured is such as to prevent him from doing all the substantial acts required of him in his business.' And while it is difficult to state a general rule of construction that will be applicable to all cases, we think we may safely state as an elaboration of our views upon this subject that a recovery should not be denied under such a clause as we have before us, when the evidence shows that the insured was able to be up and about, and to do minor and trivial things not requiring his time or attention, or to direct his business and do some of the work himself, if his injuries are such that common prudence demands he desist from his labors and rest, so long as it is reasonably necessary to effect a speedy cure, and he is unable to do the things which constitute substantially all of his occupation, or wholly disabled from doing all the substantial and material acts necessary to be done."

*Continental Casualty Co. v. Mathis*, 150 Ky. 477, 150 S. W. 507, is to the same effect. Here a recovery was sustained, though the insured undertook to do some of his work. The court quotes with approval from *Hohn v. Interstate Casualty Co.*, 115 Mich. 79, 72 N. W. 1105, wherein it was held that a barber, who went to his shop several days after the accident, suffering pain the while, and then was obliged to take to his bed on the eighth day, was immediately, continuously, and wholly disabled.

*Preferred Acc. Ins. Co. v. Gray*, 123 Ala. 482, 26 South. 517, in which a recovery under the policy was sustained, is much in point. The assured, a physician, was injured, and as a result thereof the evidence showed he was unable to continue the practice of his profession for a period of three months, and lost weight from 220 to 147 pounds, and was obliged to go away to recuperate; on the other hand, it was shown by evidence that he had been seen on the street during the three months in question, and the insurance company introduced in evidence some 50 prescriptions shown to have been made by the assured during the time he was alleged to have been "wholly and continuously disabled from transacting any and every kind of business pertaining to his occupation."

See, also, *Monahan v. Supreme Lodge of the Order of Columbian Knights*, 88 Minn. 224, 92 N. W. 972; *Baldwin v. Fraternal Acci. Ass'n*, 21 Misc. Rep. 124, 46 N. Y. Supp. 1016, affirmed in 159 N. Y. 561, 54 N. E. 1089; *U. S. Cas. Co. v. Hanson*, 20 Colo. App. 393, 79 Pac. 176.

In *Fuller on Accident and Employers' Liability Insurance*, the author, on page 296, thus states the rule:

"The courts are a unit in declaring that this clause must be given a practical and rational

construction. It is not often that a man is so completely disabled as to prevent his engaging in any kind of occupation. However, to hold the insurance company liable on its policy, it is not sufficient that the disability impairs the effectiveness and earning power of the assured in a general and superficial way. Nor is it sufficient that the injury resulting from the accident renders him unable to perform all the duties of his profession or occupation. He must be unable to perform them with substantial and reasonable effectiveness, in order to recover on his policy. To entitle the assured to indemnity, it is not essential that his injury should disable him to such an extent that he lacks the physical ability to do anything in the prosecution of his business. It is sufficient, according to the undoubted weight of authority, even under the clause providing for indemnity for injuries which shall 'wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured,' that his injury be of such a character and so severe that he is unable to do all the substantial acts necessary to be done in the prosecution of his business."

And again, on page 305:

"And it is also a question for the jury to determine whether an assured party is 'totally disabled' in all cases, where from the evidence there might be an honest difference of opinion among fair-minded men."

If, as the result of all of insured's efforts, he was able to write only 14 or 15 policies between the date of his injury and his death, and part of this with the assistance of his wife, we are not prepared to say he was able to perform substantially all the duties of his business. Had he performed other services or secured other business, doubtless defendant would have proven it, as they had the books. He certainly did not do near the amount of work done by Dr. Doyle, as will be found from reading the opinion in said case.

In submitting the case to the jury, the court appears to have had in mind the law as stated in the cases herein referred to, and we find no error in the instructions given, and, since those instructions embraced the whole law of the case, the court did not err in refusing to give the instructions tendered by appellants. There was sufficient evidence to take the case to the jury, its decision favored appellee, and, while the evidence would seem to preponderate in favor of appellants, this will not justify or authorize us to set the verdict aside or order a new trial, because we cannot say it is flagrantly against the evidence. Both as to the extent of the disability, and whether insured died of disease or from accident, the two points urged by counsel, the evidence is conflicting; hence a question for the jury.

The judgment in each case is affirmed.

(109 Tex. 385)

**STONE et al. v. JACKSON et al.**  
(No. 2573.)

(Supreme Court of Texas. April 9, 1919.)

**1. HUSBAND AND WIFE ⇨274(3)—COMMUNITY PROPERTY—LIABILITY FOR DEBTS—REMAINDER INHERITED.**

The heirs of the wife on her death are entitled, not to one-half of the community property then existing, but to one-half of what may remain after the discharge of the debts contracted by either husband or wife during marriage for which such property is liable. Rev. St. arts. 4627, 3592.

**2. HUSBAND AND WIFE ⇨273(2)—COMMUNITY PROPERTY—CONVEYANCES BY SURVIVING SPOUSE.**

The husband is entitled to the exclusive management and disposition of the community estate during marriage, which right continues and is likewise exclusive after the wife's death for the purpose of discharging the ordinary debts of the community estate; such power of the surviving husband overriding that of the wife's administrator.

**3. HUSBAND AND WIFE ⇨273(9)—COMMUNITY PROPERTY — POWER OF SURVIVOR TO SELL FOR PAYMENT OF COMMUNITY DEBTS—FAILURE OF SURVIVOR TO QUALIFY.**

The power to sell property belonging to the community estate to pay community claims, which may be exercised by the regularly qualified survivor, vests in the survivor who fails to qualify under the statutes.

**4. HOMESTEAD ⇨146 — COMMUNITY PROPERTY—RIGHT OF SURVIVOR TO SELL HOMESTEAD TO PAY COMMUNITY DEBTS.**

Notwithstanding the statutes except the homestead from the community property liable for community debts making it "exempt from forced sale" (Rev. St. arts. 3592, 3235), nevertheless the survivor may convey the community homestead to discharge community debts which constitute no lien thereon.

**5. HUSBAND AND WIFE ⇨273(9)—COMMUNITY PROPERTY—CONVEYANCE BY SURVIVING SPOUSE—VALIDITY—PAYMENT OF NOTE BARRED BY LIMITATION.**

The power of the survivor to convey property of the community estate in satisfaction of demands against that estate cannot be held to sustain only conveyances in discharge of enforceable demands against the property conveyed, but includes the payment of a note barred by limitation.

**6. HUSBAND AND WIFE ⇨273(4)—COMMUNITY PROPERTY — LIABILITY FOR DEBTS — JUDGMENT AGAINST SURVIVING SPOUSE.**

The same binding effect is given to a judgment rendered against the husband alone on a community debt when suit is brought before as when brought after the death of the wife, with respect to the liability of the community property to satisfy the same.

**7. HUSBAND AND WIFE ⇨273(9)—COMMUNITY PROPERTY — SALE BY SURVIVING SPOUSE—PAYMENT OF COMMUNITY DEBT.**

A deed to community property made by the surviving husband for the purpose of paying a community debt should be given the same effect as if made in the wife's lifetime, provided the power of sale was not fraudulently exercised against the wife's heirs.

**8. HUSBAND AND WIFE ⇨273(4)—LIABILITY OF COMMUNITY PROPERTY—LIMITATIONS.**

It is not obligatory on a debtor to interpose limitations to defeat a debt he still owes, and the omission of a surviving husband to plead limitations against a community obligation cannot be treated as actuated by a fraudulent intent against the heirs of the wife, when such omission is just as prejudicial to his interests in and to community property as to that of the wife's heirs.

**Error to Court of Civil Appeals of Fifth Supreme Judicial District.**

Suit by T. H. Stone and others, as the heirs of T. M. Stone, against W. J. Jackson and others, heirs of Maria Jackson, to recover land. From a judgment of the Court of Civil Appeals (155 S. W. 960) reversing and rendering in part and affirming in part a judgment of the district court for plaintiffs, the plaintiffs bring error. Judgment of the Court of Civil Appeals reversed; judgment of the district court affirmed.

T. H. Stone and T. C. Ford, both of Houston, and H. C. Howell, of Jasper, for plaintiffs in error.

V. A. Collins, of Beaumont, for defendants in error.

**GREENWOOD, J.** While Cleyton Jackson and Maria Jackson were husband and wife, they acquired 225 acres of land in Jasper county, in consideration in part of Cleyton Jackson's note for \$50 due on the 1st day of January, 1880. The note was secured by only an implied vendor's lien on the land. Maria Jackson died in 1883. On December 22, 1888, Cleyton Jackson conveyed the 225 acres to T. M. Stone, in consideration in part of the payment by T. M. Stone of said purchase-money note for \$50, which was then barred by limitation, or in consideration in part of money furnished by T. M. Stone to pay the barred note.

This suit was by the heirs of T. M. Stone, as plaintiffs, to recover the 225 acres from the heirs of Maria Jackson, as defendants. The trial court gave plaintiffs judgment for the 225 acres, and on appeal the judgment was reversed, and judgment rendered awarding one-half the 225 acres to plaintiffs and one-half to defendants. A writ of error having been granted, the Supreme Court referred the cause to section B of the Commission of Appeals, who recommended that the judg-

ment of the Court of Civil Appeals be affirmed.

The controlling question presented is of far-reaching importance and is whether the surviving husband is empowered to convey community land, in order to secure the discharge of a community debt, after the expiration of the period required by the statute of limitations to bar the debt.

[1] Nothing is clearer in our law, as declared both by statute and by repeated decisions of this court, than that the community property of the husband and wife is subject to the payment of the debts contracted by either of them during the marriage, except when otherwise specially provided, such exception having no application to the facts of this case; and that the heirs of the wife, on her death, are entitled, not to one-half of the community property as it may then exist, but to one-half of what may remain, after the discharge of the debts to which such property is liable. Articles 4627, 3592, R. S.; *Jones v. Jones*, 15 Tex. 147; *Carter v. Conner*, 60 Tex. 60.

[2] It is equally clear that the husband is not only ordinarily entitled to the exclusive management and disposition of the property of the community estate during the marriage, but that such right or power of management and disposition, for the purpose of discharging the ordinary debts of the community estate, continues and is likewise exclusive, after the death of the wife; it having been determined that this right or power of the surviving husband overrides that of the administrator of the estate of the wife. *Primm v. Barton*, 18 Tex. 227; *Good v. Coombs*, 28 Tex. 50; *Moody, Administrator v. Smoot*, 78 Tex. 123, 14 S. W. 285; *Levy v. Moody*, 87 S. W. 208.

[3-5] Under these rules, there can be no reasonable doubt of a surviving husband's right and power to dispose of community property, for the purpose of discharging ordinary community indebtedness, save such community property as may be exempt, under recent legislation, from such disposition, unless it can be said that upon the husband becoming entitled to defeat the enforcement, by law, of the community indebtedness, through limitations, he is deprived of that right and power.

In the early case of *Stramler v. Coe*, 15 Tex. 211, the heirs of the wife sought to defeat a conveyance by the husband, in 1853, of land belonging to the community estate of the husband and wife, in satisfaction of the husband's bond for title, executed in 1835 during the lifetime of the wife, upon the ground that the right to enforce specific performance of the bond was barred at the date of the wife's death in 1851. In sustaining the title of the vendee of the husband, Chief Justice Hemphill, speaking for the court, declared:

"The conveyance of Price, after the death of his wife, being but the completion of a pre-existing arrangement, made during the existence of the matrimony, must be held as valid as if made in the lifetime of the wife. As surviving partner, he had authority to perfect a transaction commenced during the partnership, and this rule is of special force and application in cases of conjugal partnership, in which there is a head that has the entire control of the affairs of the partnership, with no restraint except that it shall not be abused with fraudulent intent against the rights of the other partner. Such being the rights of the husband, as head of the community and as surviving partner, the heirs of the wife cannot repudiate his acts and contracts, begun before, but finished after, the death of their mother. They receive their mother's interest, but incumbered with burdens which have the same binding force and effect upon them, as they have upon the husband and surviving partner."

After reviewing the facts relied on to show that limitation had run against an action to enforce the bond for title, Chief Justice Hemphill announced the following conclusion of the court:

"The circumstances were not such, it is believed, as would, at the death of Mrs. Price, have defeated a prayer for specific performance; but, whether they were or not, they were certainly not such as would deprive the head of the community, who had made the contract, from the right of carrying it into execution, by his voluntary act."

We do not think that the question presented here differs in principle from that considered in *Stramler v. Coe*; and if the husband possessed the power, in that case, to convey the entire interest of the community in performance of an obligation contracted by him during the marriage, though limitation had barred suit to enforce the obligation, so, in our opinion, the surviving husband must be held, in this case, to have possessed like power to make a conveyance of community land, as against any claim of his wife's children, when such conveyance was executed to satisfy a community debt, though the husband might have defeated a suit on the debt by means of limitation.

In *Leatherwood v. Arnold*, 66 Tex. 416, 1 S. W. 174, it is said:

"The survivor is a trustee of a unique character. He is the owner in his own right of one-half the trust estate. By qualifying under the statute he acquires over the whole the same right of management, control, and disposition possessed by the managing partner during the life of the partnership."

That this right of a managing partner includes the right to both renew a debt of the partnership and pay it with the firm assets, after the debt has been outlawed by limitation, is positively declared by this court in the opinion of Judge Stayton in *Stout v. Bank*, 69 Tex. 393, 8 S. W. 812, when he says:

"If, during the existence of a partnership a debt owed by it, should become barred by the statutes of limitation, no one would doubt that the act of one partner in reviving it by a new promise would bind the firm, and power to pay such a debt stands on the same ground as does his right and power to revive it when barred."

It is well settled that all the power to sell property belonging to the community estate, to pay community claims, which may be exercised by the regularly qualified survivor vests in the survivor who fails to qualify under our statutes; for failure to qualify in no wise restricts or limits a survivor's power to apply community assets to the discharge of community debts. *Dawson v. Holt*, 44 Tex. 178; *Sanger Bros. v. Heirs of Moody*, 60 Tex. 98; *Pierce v. Gibson*, 108 Tex. 66, 184 S. W. 502.

Notwithstanding our statutes undertake to except the homestead from the community property which is liable for community debts, as it is "exempt from forced sale" (articles 3592 and 3235, R. S.), nevertheless it is undeniably the law that the survivor may convey the homestead, belonging to the community estate, to discharge community debts, which constitute no lien on such homestead. *Ashe v. Yungst*, 65 Tex. 631; *Martin v. McAllister*, 94 Tex. 570, 63 S. W. 624, 56 L. R. A. 585; *Burkitt v. Key*, 42 S. W. 232; *Wiener v. Zweib*, 105 Tex. 276, 141 S. W. 771, 147 S. W. 867. It follows, therefore, that the power of the survivor to convey property of the community estate, in satisfaction of demands against that estate, cannot be held to sustain only conveyances in discharge of such demands as might be enforced against the property conveyed.

(8, 7) Our decisions give precisely the same binding effect to a judgment rendered against the husband alone, on a community debt, when suit is brought before, as when suit is brought after, the death of the wife, with respect to the liability of community property to satisfy same. A reason given for this holding in the opinion of Chief Justice Willie in the leading case of *Carter v. Conner*, 60 Tex. 58, is a clear affirmation that the conveyance here attacked by the wife's heirs must bind them; such reason being that—

"The right, title, interest, and claim which the husband has in the property in the lifetime of his wife, so far as the payment of debts is concerned, is no more than it is after her death. He owns the half, and can manage and dispose of all in either case for such purposes."

No one would deny that the deed under consideration in this case would have passed the entire title of the community if the wife had been alive when it was executed. Having been made for the purpose of paying a community debt, after the death of the wife, it should be given the same effect as though made in her lifetime; because the right of

the husband in and over the community property, so far as the payment of community debts is concerned, is the same before and after the wife's death.

During the wife's lifetime the husband owns only half of the community estate, charged always with payment of the indebtedness to which it may be liable, and there is ordinarily no restraint on his power of alienation, save that it be not abused with intent to defraud the wife. After the wife's death, the husband continues to own one-half of the community estate, still liable for the payment of the debts with which it is charged, and we see no good reason for imposing other restraint on the surviving husband's power of alienation, for the purpose of satisfying such debts, than that the power shall not be fraudulently exercised as against the heirs of the wife. In announcing that the authority of the husband to sell community property to pay community debts would attach, after the law providing for the qualification of a community survivor had been enacted, without such qualification, the court used the following language, which is equally applicable here, viz.:

"We are aware that this view of the law places the destinies and fortunes of the offspring in the power of the father, but in forming general laws and rules it is questionable whether any safer or more disinterested custodian of the rights and welfare of the child has ever been devised than that of the father. That this rule is liable to abuse is not a sound argument against it." *Dawson v. Holt*, 44 Tex. 179.

[8] It is certain that a community debt or claim is not extinguished because limitation might be successfully invoked to defeat an action thereon. Our "law denies to the holder of the claim any remedy through the courts for its assertion or enforcement, but does not declare the debt satisfied as by payment. \* \* \* The creditor is simply denied a remedy through the courts, if his adversary asserts the statutory bar as a defense." *Goldfrank v. Young*, 64 Tex. 435, 436; *Fievel v. Zuber*, 67 Tex. 279, 3 S. W. 273. Since limitation does not operate to deprive the creditor of even his action at law to collect his barred debt, unless the debtor invokes the aid of the statute, we would be compelled to sustain a forced sale of community property, under judgment against the husband alone, after the death of the wife, on a barred community debt. It would be contrary to all established rules to make it obligatory on a debtor to interpose limitations to defeat a debt he still owes, and we cannot treat the omission by a surviving husband to plead limitations against a community obligation as actuated by a fraudulent intent against the heirs of the wife, when such omission is just as prejudicial to the right, title, and interest of the surviving

husband, in and to the community property, as it is prejudicial to the right, title, and interest in such property of the heirs of the wife. In considering the effect of a partner's surrender of a legal right of the partnership, in compliance with a moral obligation of the partnership, this court stated:

"It would be difficult to predicate a charge of fraud upon an act done in the discharge of a moral obligation such as rested upon the appellants. To render the act of one partner invalid because it may accomplish a purpose disapproved of by the firm, it would seem that the purpose so disapproved should be one that the firm is under neither a legal nor moral obligation to accomplish. \* \* \* The law encourages the discharge of a mere moral obligation, and the act through which this is done cannot be fraudulent as to one or more who are burdened with it." *Stout v. Bank*, 69 Tex. 393, 394, 8 S. W. 808, 812.

And it would be patently unreasonable to hold that a purchaser could not acquire a good title, as against the wife's heirs, to community property, by virtue of a voluntary sale by the surviving husband, in satisfaction of a barred community debt, while upholding against attack by such heirs the title to community property, acquired by a purchaser at forced sale, under a judgment against the surviving husband on a barred community debt. *Henry v. McNew*, 29 Tex. Civ. App. 288, 69 S. W. 217.

That the power of the survivor over community obligations is greater than that of the partner in a dissolved firm over partnership obligations is made manifest by contrasting our decisions which deny the right of the partner to bind the dissolved firm by acknowledgments or renewals of partnership debts, with our decisions which assert the right of the survivor to bind the community estate by his acknowledgments and renewals of community debts. *Speake v. White*, 14 Tex. 364; *Brown v. Chancellor*, 61 Tex. 438; *Frank v. De Lopez*, 2 Tex. Civ. App. 250, 21 S. W. 279; *Morris v. Morris*, 47 Tex. Civ. App. 244, 105 S. W. 246.

The right or power of the survivor, which we uphold, to make valid disposition of real estate, belonging to the community, for the purpose of paying the community debts for which such realty is liable, unrestrained save that it be always exercised in good faith, has its foundation in the obligation or duty to pay those debts with that real estate, and, as long as that obligation or duty subsists, so long ought the survivor's right or power of disposition to continue. With the law placing it within the surviving husband's power to either pay or defeat a just obligation of the community estate of himself and his deceased wife, it is plainly our duty to uphold his election, in good faith, to pay same, and we accordingly hold in this case that the

surviving husband's voluntary deed to satisfy the purchase-money note, given in the wife's lifetime, for the 225 acres of land in controversy, passed a good title to the entire 225 acres, as against the heirs of the wife, and the judgment of the Court of Civil Appeals is accordingly reversed, and the judgment of the district court is in all things affirmed.

(85 Tex. Cr. R. 234)

**GLASCOE v. STATE (No. 4959.)**

(Court of Criminal Appeals of Texas. March 26, 1919. On Motion for Rehearing, April 23, 1919.)

**1. CRIMINAL LAW §1091(11), 1092(5)—APPEAL—BILL OF EXCEPTIONS—FILING DURING TERM TIME.**

Alleged error in declining to grant a new trial because of misconduct of jury after having taken evidence upon motion must be presented to appellate court by bill of exceptions containing the facts and evidence filed during the term of the court.

**2. CRIMINAL LAW §600(3)—CONTINUANCE—ABSENT WITNESS—ADMISSION.**

Court did not err in refusing to continue trial upon ground of absent witness, where the facts to which witness would have testified were admitted by state to be true.

**3. CRIMINAL LAW §1111(4)—APPEAL—BILL OF EXCEPTIONS—EXPLANATION BY COURT.**

Where bill of exceptions complaining of remarks of prosecuting attorney contained approval and explanation by court setting forth entirely different statement than appellant claimed, and no bill of exceptions was taken by appellant to the bill as approved and explained, the court on appeal will accept the court's statement in the approval as correct.

**4. WITNESSES §274(2)—CROSS-EXAMINATION OF CHARACTER WITNESS—SPECIFIC INSTANCES.**

Where witness testified to defendant's reputation, it was permissible for state, upon cross-examination, to ask witness if he had not heard of certain specific matters affecting the reputation, but such examination should not have extended to particulars of specific instances.

**5. WITNESSES §286(4)—REDIRECT EXAMINATION.**

Where defendant, without objection, permitted state to cross-examine witness testifying to defendant's reputation as to specific instances, he could not, on redirect, go further into such objectionable particulars.

**6. CRIMINAL LAW §396(1)—EVIDENCE ADMISSIBLE BECAUSE OF ADVERSE PARTY'S EVIDENCE.**

Where one silently permits objectionable matters to be introduced against him, he may not be heard to complain because he is not

also permitted to violate the rules of evidence by further investigation of such objectionable matter.

**On Motion for Rehearing.**

**7. CRIMINAL LAW §600(3)—CONTINUANCE—ADMISSION OF TESTIMONY OF ABSENT WITNESS.**

Where defendant's motion for continuance upon ground of absent witness is denied, state may thereafter admit the truth of facts to which such witness would have testified, since it could have called the witness himself.

**8. CRIMINAL LAW §597(1)—CONTINUANCE—ABSENCE OF WITNESS.**

On application for continuance upon ground of absence of witness, where it plainly appears from other testimony that the absent witness would not testify as alleged, or that such testimony is improbable, and not likely true, the application for continuance is properly denied.

**9. CRIMINAL LAW §603(7)—CONTINUANCE—SUFFICIENCY OF APPLICATION.**

Application for a continuance because of absence of witness should be genuine and truthful, and should state as accurately as possible what witness would testify to.

**10. CRIMINAL LAW §720(4)—TRIAL—REMARKS OF PROSECUTOR.**

Where defendant's motion for continuance on ground of absence of two witnesses was denied, and state thereafter produced one of the witnesses and admitted the facts to which the other would have testified, prosecutor's statement in argument that the state had found one of the witnesses and brought him to court, but were unable to find the other, and therefore admitted the truth of his testimony, was not objectionable.

**Appeal from District Court, Hunt County; Wm. Pierson, Judge.**

Lowry Glascoe was convicted of murder, and appeals. Affirmed.

Neyland & Neyland, Thos. W. Thompson, and Evans & Shields, all of Greenville, for appellant.

Clark & Sweeton, of Greenville, and R. B. Hendricks, Asst. Atty. Gen., for the State.

**LATTIMORE, J.** In this case appellant was convicted in the district court of Hunt county for the offense of murder, and his punishment fixed at 12 years' confinement in the penitentiary.

[1] An examination of the record discloses but four bills of exception, which will be noticed by us in their regular order. The first bill of exceptions complains of the trial court's action in declining to grant appellant a new trial because of the misconduct of the jury. Touching this matter, the court heard evidence for and against the contention of

appellant, and, after hearing same, overruled this ground of appellant's motion for new trial. The matter which is the basis of this complaint is not presented to us in such way as we are able to say whether the court's action was correct or not, as it is now the well-settled law of this state by decisions of this court that, in order to present such matter of complaint, the evidence heard by the court must be brought here for consideration by bill of exceptions containing the facts and evidence which must be filed during the term of the court. An examination of the record discloses that the term of court at which this trial was had adjourned on December 1, 1917, and the bill of exceptions containing the evidence and facts heard by the court in support of this ground of the motion for new trial was not filed until February 25, 1918, and therefore such facts cannot be considered by us, and, as stated, we are unable to determine whether the court correctly decided said issue or not.

[2] The appellant's second bill of exceptions was taken to the court's action in overruling his application for a continuance. A continuance was sought by the appellant because of the absence of the witnesses Brewer and Wheeler. The former was brought into court before the trial was concluded and tendered to the appellant as a witness by the state; and prior to the conclusion of the trial the state in open court admitted the truth of the matter which appellant set up in his application as to what he expected to prove by the witness Wheeler, and said matters were read to the jury and admitted by the state to be true. In this state of the record we see no error in the court's action in overruling the application for a continuance.

[3] Bill of exceptions No. 3 was taken to the action of the court in permitting the argument of the private prosecuting counsel for the state made in his closing address to the jury. And stated by appellant in the bill, the argument was very objectionable, but in the court's approval and explanation an entirely different statement is set forth of what was in fact said by the state's attorney in his argument, and as the same appears in the approval of the court, the contention of the appellant is wholly negated, and the argument was in no wise erroneous. There is no further controversy in the record over the matter, and no bill of exceptions was taken by the appellant to the bill as approved and explained by the trial court. Accepting the court's statement in said approval as correct there is no error shown in said bill of exceptions.

[4-6] The remaining bill of exceptions in the record is to the court's refusal to grant appellant's motion for new trial generally.

There is only one ground in said motion not covered by the objections already discussed herein, and that complains of the court's action in refusing to grant a new trial because of the alleged error of the court in refusing to permit appellant to re-examine the witness Patterson as to certain matters about which said witness had been interrogated upon cross-examination by the state. There is no separate and independent bill of exceptions in the record showing the facts surrounding this action of the court, and, as presented, we are unable to say if error was committed or not. When said witness Patterson testified to the reputation of appellant upon the point of his being a peaceable, law-abiding citizen or otherwise, it became permissible for the state to ask said witness if he had not heard of certain specific matters affecting said reputation, but such examination should not have been extended to the particulars of such specific instances, and, if appellant sat quietly, and without objection permitted the particulars of such specific instances to be inquired into, he may not attempt upon redirect examination, over objection, to interrogate said witness further as to such objectionable particulars. The well-recognized rule is that, when one silently permits objectionable matters to be introduced against him, he may not be heard to complain because he is not also permitted to violate the rules of evidence by further investigation of such objectionable matters.

There being no errors shown by the record in this case, the judgment of the lower court is affirmed.

#### On Motion for Rehearing.

Appellant brings his case before us asking for a rehearing and that we set aside our opinion rendered at a former time during this term.

In our original opinion we declined to consider the facts adduced in support of that part of appellant's motion for new trial setting up misconduct of the jury, because no statement of such facts as were brought before the court in support thereof was filed during the said term of court at which the case was tried; neither was any bill of exceptions containing said evidence filed during said term. The settled law of this state, by the decisions of this court, requires that a statement of the facts in such case be filed during the trial term.

Appellant insists in this motion that we were in error in our above holding, but a review of the record has confirmed us in the correctness of our opinion. There is no separate statement of such facts filed, and the only reference thereto is found in appellant's bill of exceptions No. 1, which was filed on

February 25, 1913, long after the adjournment of said trial term of court. An examination of said bill of exceptions shows what purports to be the testimony adduced on said hearing, set out at length, but there is nothing in said bill, or the approval of the same, which shows any filing of said statement during term time. Following said testimony, as set out in said bill, appears a blank agreement for the signature of the attorneys and an approval of said statement by the trial court which is not in any wise dated, and this is followed by a blank for the approval of the district clerk showing when the same was filed, but there are no dates in said certificates, nor is the name of the district clerk appended thereto; and there is nothing in the bill, as stated before, which shows when said statement of facts was filed, if same was ever filed, and this bill of exception, as stated, was not filed until adjournment of the term.

It is also strongly urged in said motion that we were in error in holding that the trial court correctly overruled appellant's application for a continuance. He insists that it is error for the lower court to overrule an application for a continuance in the beginning of a trial, and thereafter let the accused try his case believing and relying upon the fact that reversible error has thus been committed by the court, when in fact, the court is acting in accordance with a secret agreement or understanding that the state is to be permitted near the close of the trial to admit the truth of the facts set up in said application, and thereby seek to deprive appellant of the benefit of such error.

[7-8] Appellant bases his complaint on an erroneous assumption, to wit, that there was some secret agreement shown on the part of the lower court in overruling said application, to the effect that he would later permit the state to admit the truth of the matters which appellant expected to prove by the absent witnesses. We have searched the record carefully to ascertain if there be anything on which such assumption of appellant might be fairly based, and our conclusion is that the facts seem to warrant the opposite assumption, that the state had tried to find and bring into court the two absent witnesses, and did in fact produce one of them, but, failing to find the other, the state was then forced to the necessity of admitting the truth of the alleged testimony of said witness whom they could not find. This, we think, the state had a clear right to do. If the rule should be as appellant contends, and the state be compelled to make its admission of the truth of the facts set out in the application, at the time or before the court overruled same, it might easily result in studied efforts to keep witnesses away who might otherwise



be found during the progress of trials; and it certainly would render nugatory the well-settled rule that, where it plainly appears from other testimony that the absent witness would not testify as alleged, or that such testimony is improbable, and not likely true, in such case the application is properly overruled. The application for a continuance because of the absence of a witness should be genuine and truthful, and the party making same should state as accurately as possible what said witness or witnesses would testify. The opposite party cannot be deprived of the right to bring such witnesses into court at any time before the evidence is concluded, nor do we see any weighty reason why the truth of such testimony may not be in like manner admitted when the personal presence of the witness is not had. If counsel wished this court to act upon the proposition that the trial court was a party to any proceeding to deprive appellant of any right, the same should be shown otherwise than by an argument.

[10] Appellant further contends that we should have reversed the case because of the language used by the prosecution in the closing argument. It is apparent that appellant misunderstood our former opinion. We did not say in the same, as we are quoted in this motion as having said, "The language used in the closing argument was very objectionable," but stated that the language of the prosecutor, as stated by the court in his qualification of the bill of exceptions, was in no wise erroneous. The language attributed to the prosecutor in the bill of exceptions as prepared and presented to the trial court by appellant was very objectionable, but said court, in approving said bill, emphatically says that no such language was used, and, appellant having accepted the bill in that form, we have no other option except to do likewise. We have again examined the argument, as stated by the court, and find nothing erroneous therein. The statement in said argument that the state had found one of the absent witnesses and brought him to court, but were unable to find the other, and therefore admitted the truth of his testimony, seems to us not open to the criticism of appellant. It appears to have been repeatedly stated in said argument not only that the state had admitted as true all the facts stated in said application, but also that the jury were to consider them as true. This motion is strongly and ingeniously argued by appellant, and we regret we are unable to agree with his learned counsel in the legal propositions announced.

Believing that the former opinion of this court is correct, the motion for rehearing is overruled.

(35 Tex. Cr. R. 134)

## MAUNEY v. STATE (No. 4861.)

(Court of Criminal Appeals of Texas. Feb. 26, 1919. On Motion for Rehearing, April 16, 1919.)

1. HOMICIDE  $\Leftrightarrow$  158(1, 4) — EVIDENCE — THREATS.

In homicide prosecution, where, during the evening before the killing, accused's sister had threatened to shoot deceased, and accused in answer had said, "Never mind; that is my affair, and I will see to it," the statements by both the sister and accused are admissible.

2. CRIMINAL LAW  $\Leftrightarrow$  1091(4) — APPEAL — BILL OF EXCEPTIONS — SUFFICIENCY.

Bill of exceptions, consisting of questions and answers, followed by statement that evidence was objected to because irrelevant, immaterial, incompetent, and prejudicial, where no surrounding facts are stated, and no reason given why the evidence is irrelevant, etc., will not be considered.

3. CRIMINAL LAW  $\Leftrightarrow$  450 — EVIDENCE — PROVINCE OF JURY.

In homicide prosecution, question asked defendant's sister whether it was not a fact that she, her father, and defendant had had no intention of pleading insanity until after the examining trial, and people had testified that the reputation of witness and defendant for virtue and chastity was bad, leading them to think that their plea of insult to female relative was broken down, and answer thereto that witness "knew it at the examining trial," and "as soon as we employed our lawyer," did not invade province of jury.

4. CRIMINAL LAW  $\Leftrightarrow$  448(1) — EVIDENCE — CONCLUSION OF ATTORNEY.

In homicide prosecution, question asked defendant's sister of whether it was not a fact that she, her father, and defendant had had no intention of pleading insanity until after the examining trial, and people had testified that the reputation of witness and defendant for virtue and chastity was bad, leading them to think that their plea of insult to female relative was broken down and answer thereto that witness "knew it at the examining trial," and "as soon as we employed our lawyer," did not call for a conclusion of the attorney.

5. CRIMINAL LAW  $\Leftrightarrow$  448(1) — EVIDENCE — HOMICIDE PROSECUTION.

In homicide prosecution, question of whether witness was under the rule, and answer that witness did not think so, was not objectionable.

6. CRIMINAL LAW  $\Leftrightarrow$  338(1) — EVIDENCE — HOMICIDE PROSECUTION.

In homicide prosecution, evidence that witness was present at the examining trial was not objectionable.

7. WITNESSES  $\Leftrightarrow$  77 — REPUTATION OF DECEASED — DISCRETION — PRELIMINARY EXAMINATION OF WITNESS.

Examination by prosecuting attorney of witness offered by defendant on question of general reputation of deceased, for purpose of prelimi-

nary test of witness, is discretionary with the court.

**8. CRIMINAL LAW §1091(3)—APPEAL—BILL OF EXCEPTIONS—EXAMINATION OF EXPERTS.**

Bill of exceptions, quoting from a hypothetical case stated to expert witness, and stating that it was objected to because it did not conform to the statutes of Texas, nor to rules of courts, without specifying the particular statute or rule violated, is insufficient.

**9. CRIMINAL LAW §1091(3)—APPEAL—BILL OF EXCEPTIONS—EVIDENCE.**

Bill of exceptions objecting to testimony upon ground that the proper predicate had not been laid, not containing statement of any fact showing why such evidence is objectionable, was insufficient.

**10. CRIMINAL LAW §1091(4)—APPEAL—BILL OF EXCEPTIONS.**

Bill of exceptions setting out numerous questions and answers with general objection to the whole, or a general motion to exclude all the testimony of witness, not specifying any fact or facts making the evidence inadmissible, will not be considered.

**11. CRIMINAL LAW §730(14)—ARGUMENT OF COUNSEL—ACTION OF COURT.**

In homicide prosecution, prosecutor's statement during his argument that, "if the jury under the evidence in this case cannot convict the defendant, they might as well tear down the courthouse," and further statement that if defendant was convicted she would have the right to go to the Governor and ask him for a pardon, was not reversible error, where court instructed jury not to consider such statements.

**12. CRIMINAL LAW §1163(6)—REVIEW—MISCONDUCT OF JURY—CONVERSATION WITH OUTSIDER—PRESUMPTION AS TO PREJUDICE.**

Conversation of juror with another person without court's permission, in violation of Code Cr. Proc. 1911, art. 748, will be presumed upon conviction to have been injurious to defendant, but such presumption can be overcome, burden being upon the state to satisfy court that no injury has resulted.

**13. CONTEMPT §14 — CONVERSATION WITH JUROR.**

Juror and person with whom he converses without court's permission, in violation of Code Cr. Proc. 1911, art. 748, is guilty of contempt under article 749.

**14. CRIMINAL LAW §855(8)—MISCONDUCT OF JURY—CONVERSATION WITH OUTSIDER.**

Code Cr. Proc. 1911, art. 748, prohibiting juror from conversing with another person without court's permission, should be strictly enforced.

**15. HOMICIDE §340(4)—REVIEW—HARMLESS ERROR—INSTRUCTION.**

In homicide prosecution alleged errors in charging as to what facts would reduce an unlawful killing from murder to manslaughter was harmless where defendant was convicted of manslaughter.

**16. CRIMINAL LAW §829(5) — TRIAL — INSTRUCTIONS.**

There was no error in refusing special charge on self-defense substantially the same as the special charge given by court on the same subject.

**17. CRIMINAL LAW §1159(3)—REVIEW—CONFLICTING EVIDENCE.**

Court of Criminal Appeals will not reverse judgment where the evidence is merely conflicting.

**18. HOMICIDE §332(3)—REVIEW—INSANITY—CONFLICTING EVIDENCE.**

In homicide prosecution defended on ground of insanity, evidence held sufficiently conflicting to justify court of criminal appeals in refusing to disturb verdict of guilty.

On Motion for Rehearing.

**19. CRIMINAL LAW §1091(1, 10)—APPEAL—BILL OF EXCEPTIONS.**

Bill of exceptions must be complete in itself, and must show not only what transpired, but must set out objection and enough facts to make the error complained of apparent, without the necessity of appellate court searching the record.

**20. CRIMINAL LAW §1091(3)—APPEAL—BILL OF EXCEPTIONS.**

Bill of exceptions to cross-examination as to witness' examination before the grand jury, objected to on ground that defendant was not present and that such evidence was not binding upon her, is insufficient.

Appeal from District Court, Hopkins County; William Pierson, Judge.

Maude Mauney was convicted of manslaughter, and she appeals. Affirmed.

J. A. Dial, of Sulphur Springs, and Martin & McDonald, of Austin, for appellant.

E. B. Hendricks, Asst. Atty. Gen., for the State.

LATTIMORE, J. In this case the appellant was charged by indictment in the district court of Hopkins county with the offense of murder, which, upon trial, was by the jury reduced to manslaughter, of which she was convicted, and her punishment fixed at confinement in the penitentiary for five years.

Appellant took 35 bills of exceptions during the course of the trial, a number of which do not appear in the record by written and filed agreement by counsel. We shall notice all those which we deem of sufficient importance.

[1] By her bill of exceptions No. 2 appellant seeks a review of the trial court's action in permitting the witness Easley, for the state, to tell what the sister of the appellant, Miss Allie Lee Mauney, said the evening before the killing; the objection being that it was the act and statement of another party

not shown to be ratified by the appellant, but disaffirmed by her. We see no error in the ruling as the same appears in the record. The witness Easley testified that appellant had phoned him to come to where she and her sister were on the second day before the killing, but that he told her he could not come until the next day, and accordingly he met the two women on the evening before the killing. Appellant then told Easley at length of the acts, statements, and conduct of deceased in watching and following the witness' car and appellant's car and having others to watch and follow them. During the conversation Allie Lee Mauney spoke up, and said that he had been following her (which "her" is not very clear), and stated that "if he did not cut it out—she would shoot his G—d—off." It appears that appellant then said never mind, that was her affair, and she would see to it herself.

Reference to the statement of facts for the surroundings discloses that witness had told "them" that he would not do anything with it, and that Miss Maude (appellant) said that she would attend to it herself, directly after the statement by Allie Lee which is here objected to. This was about sundown before the killing the next morning. The statements of Allie Lee so made are admissible to explain and make clear what appellant meant when she made the threatening statements attributed to her. It seems clear that if one person threaten to shoot another, and the accused, being present and hearing the threat, says, "Never mind, that is my affair and I will see to it," and very soon thereafter herself shoots such party, that both her statement and that of the other person, explanatory and antecedent to hers, will be admissible.

[2] Appellant's bill No. 7 cannot be considered for several reasons. It consists of about 10 questions and their answers, followed by the statement that said evidence at the time it was offered was objected to because it was irrelevant, immaterial, incompetent, and prejudicial. No surrounding facts are stated, and no reason given why the same falls under any of these general heads of objection. This court holds that "incompetent and irrelevant" is without meaning and indefinite. *Pangburn v. State*, 56 S. W. 72; also that "irrelevant and prejudicial" is too general to be considered. *Wilson v. State*, 63 Tex. Cr. R. 82, 138 S. W. 409; also "irrelevant and immaterial" is too general to be considered. *Jones v. State*, 65 Tex. Cr. R. 69, 144 S. W. 252. For these reasons this bill cannot be considered, and we note the same defects obtain as to appellant's bills Nos. 9, 10, 13, 15, 16, 17, 24, and 25, none of which will be further considered.

Bill of exceptions No. 12 complains of the action of the trial court in permitting the

prosecution to ask Allie Lee Mauney, the sister of appellant, if it was not a fact that she and her father and the appellant had no intention of pleading insanity until after the examining trial, after the best people of that country had come there and testified that the reputation of appellant and witness were bad for virtue and chastity, "and you thought your plea of insult to a female relative was broken down, then you decided to put in the insanity plea." To which the witness answered "I knew it at the examining trial; I knew it just as soon as we employed our lawyer." The objection, as stated, to both question and answer, is that the same is argumentative, prejudicial, called for a conclusion of the attorney, and invades the province of the jury.

[3, 4] Neither the question nor answer invades the province of the jury, nor does the same call for a conclusion of the attorney, and to say that the same is argumentative and prejudicial is merely a general and indefinite statement, which presents nothing that we can consider.

Bill of exceptions No. 14 presents no error. Several different questions were asked, and when objection was made the same were not pressed to answer, and the only questions permitted by the court to be answered were whether the witness Jack Mauney was under the rule, to which he answered he did not think so, and the further question if he was not present when the examining trial was had, to which witness answered that he was. This court has held many times that when the bill of exceptions only shows questions and omits the answers the matter will not be considered. *Hatzfeld v. Walsh*, 55 Tex. Civ. App. 573, 120 S. W. 525; *Clark v. State*, 67 Tex. Cr. R. 38, 148 S. W. 801.

[5] The two questions which were answered, as shown by this bill, present no possible objection.

[6] Bill of exceptions No. 15 states a number of questions and answers, with a general statement of the objection thereto, but without any connecting statement of any fact or facts in the case. The bill is entirely too general for consideration. *Howard v. State*, 65 Tex. Cr. R. 25, 143 S. W. 178.

Bill of exceptions No. 18 sets out a page of questions and answers to the witness Dr. Holbrook, with the statement that the appellant objected to the question as propounded. We are wholly uninformed as to which question the objection is aimed at, and find nothing of error in the bill.

Bill of exceptions No. 19 complains that in the hypothetical case stated by the prosecuting attorney to the appellant's witness Dr. Holbrook it was incorrectly stated to said witness that "immediately after she came back, after she had fired the fatal shot, she made the statement, as testified to by Allie

Lee or Fred, that she had killed Will Bridges;" to which statement by the prosecution objection was made that no such testimony was in the record and that no witness had so testified. While this was very indefinite, we took the trouble to look through the testimony of Fred Mauney, as set out in the statement of facts, and observe that on page 96 thereof said witness stated, "She came back and gave me the gun. \* \* \* She called up the sheriff, and just said to the sheriff that she had killed Will Bridges." It thus appears that the hypothetical question was correct and no error is shown.

[7] Bill of exceptions No. 20 complains that the state's attorney was permitted to "take the witness from defendant's counsel." Examination of the same discloses that the court allowed the prosecuting attorney to make the preliminary test of the witness who was offered on the question of the general reputation of the deceased. No abuse of the court's discretion in such matters is shown.

[8] Bill of exceptions No. 21 quotes at length from a hypothetical case stated to Dr. Gregory, and after finishing the quotation from the question, states that counsel objected to the same because "it did not conform to the statutes of Texas nor to the rules of the courts." No statute or rule is pointed out to us as having been violated. The bill is wholly insufficient.

[9] Bill of exceptions No. 22 objects to the testimony of Luther Romine, the objection, as stated being that the "proper predicate had not been laid." This is not a statement of any fact showing why the evidence is objectionable and is not sufficient to call for our review. *Douglass v. State*, 67 Tex. Cr. R. 431, 148 S. W. 1069.

[10] No error appears in bill No. 26, and bill No. 27 consists of several pages of questions and answers, and concludes with the statement that after this evidence had been introduced defendant's counsel moved the court to exclude all the testimony of the witness as to what was said by the defendant at the time and from the time of the arrival of the officers, because she was in the custody of the law and had not been warned, etc. A bill of exceptions setting out numerous questions and answers, with a general objection to the whole, or a general motion not specific in its statement, such as this here, does not conform to the requisites and should not be considered. *Boyd v. State*, 72 Tex. Cr. R. 521, 163 S. W. 67; *Lank v. State*, 73 Tex. Cr. R. 82, 164 S. W. 987. The bill, if in proper condition otherwise, wholly fails to set out any fact or facts which makes the evidence inadmissible, and does not specify, or make plain any particular matter complained of as being in the testimony of appellant.

[11] Bills of exceptions Nos. 28 and 29 com-

plain of the argument of the special prosecutor. Language such as used by him in his statement that "if the jury, under the evidence in this case, cannot convict the defendant, they might as well tear down the courthouse," and the further statement that if she was convicted they would have the right to go to the Governor and ask him to exercise his pardoning power, is not such as to demand a reversal of the case under the authorities. No written charge was presented by the appellant asking that the jury be instructed not to consider same. The court did then and there verbally instruct the jury not to consider such statements of said prosecuting attorney. *Hatchell v. State*, 47 Tex. Cr. R. 380, 84 S. W. 284; *Pemberton v. State*, 55 Tex. Cr. R. 464, 117 S. W. 837; *Parshall v. State*, 62 Tex. Cr. R. 177, 138 S. W. 770.

Bill No. 31 raises the question of misconduct on the part of the jury, based on the fact that one juror talked frequently with his wife during the trial of the case without the permission of the court, and in violation of article 748, C. O. P. The language of this article plainly forbids any one being with the jury while they are deliberating on a case and from communicating with a juror after he has been impaneled, except in the presence and by permission of the court, in a felony case; and the officers in charge of juries should be vigilant and careful to see that the provisions of this statute are carefully observed, and that our trials are free from criticism, and are conducted according to law. The trial court before passing upon this matter, heard evidence pro and con bearing on the matter set up in this bill, and concluded that the matter did not constitute such error as to justify the granting of a new trial. The juror testified that his wife discussed with him only matters concerning the home and the farm, and that she did not mention the case on trial in any way. She testified to the same facts. The sheriff also testified that he heard part of some of the conversations, and that it was about the business at home. We feel that this statutory provision is a wise and just one, and that the interests of both the state and the accused in a fair trial are so great as to demand of officers and jurors an observance of its requirements. Not only should the appearance of evil be avoided by strict observance of this statutory rule forbidding communications with the jury when the court is not present, but the further fact is true that human nature is frail and prone to excuse itself; and it is easily possible to conceive a case where the party conversing with a juror, as well as the juror himself, fearful of punishment for contempt, might not remember all that passed at such con-

versations, and might deny mention of the case between them by virtue of a convenient memory.

[12] We think the rule in cases of a violation of the provisions of article 748 ought to be that injury in such case is presumed unless the contrary is made to appear to the satisfaction of the court; the trial court primarily, and ultimately this court. Any presumption can be overcome by evidence, and in such case of presumptive injury the burden ought to be on the state to satisfy the court that no injury has resulted from such violation of the statute. In the instant case we think the presumption of injury was met and overcome by the evidence showing what the conversations were, and that no fact bearing on the case was discussed between the juror and his wife.

[13] We observe, however, for the benefit of all parties, that article 749 C. C. P., expressly embraces in a contempt proceeding the juror and any offending person who violates the sacred rights of both the state and the accused; certainly the trial court should strictly enforce these safeguarding statutes.

[14] Sheriffs and deputies who willfully or negligently disregard them should be held to the same strict account as jurors and outside offenders.

[15] Bills of exceptions Nos. 32 and 33 relate to supposed errors in the charge as to what facts would reduce an unlawful killing to manslaughter, but, inasmuch as appellant was only convicted of this grade of homicide, no error appears.

[16] There was no error in refusing special charge on self-defense, which was substantially the same as the special charge on that subject given at the request of appellant. We confess ourselves unable to find any facts in this record bearing out any theory of self-defense, even had the trial court refused both special charges asked on this subject.

[17, 18] Appellant complains of the verdict as being against the weight of the evidence on the defense of insanity, and asks a reversal for that reason. We do not think this court should reverse cases where the evidence is merely conflicting, and where the defense of insanity is interposed, and the doctors placed on the stand by the accused make their statements that she was insane at the moment of the shooting expressly and repeatedly dependent on the truth of what appellant swore as to her inability to remember the immediate facts of the killing, and farther when the accused takes the stand and testifies in detail to all that occurred up to the moment of the shooting and what occurred after the shooting, and says that she is unable to remember only what occurred at the time of the same, and when other witnesses, whose testimony was apparently reliable, state that

she is sane, we do not feel it proper to disturb the verdict.

We have gone through this record carefully and repeatedly, not content with a general statement as to a large number of the bills of exceptions that they were not sufficient to demand our review. Each has been carefully scrutinized, and finding no reversible error, the judgment of the lower court is affirmed.

#### On Motion for Rehearing.

Appellant has filed an exhaustive motion for rehearing, in which her counsel have reviewed at length this court's action upon the several contentions as presented in her bills of exceptions and passed upon by this court in its original hearing of the case. It is urged that we were in error in that opinion in declining to consider the bills of exceptions which were too general to call for a review of the matters presented, and we have again considered each of these matters in the light of this motion.

[19] First, let us observe that it is well settled that a bill of exceptions must be complete within itself, that it must not only show therein what transpired, and what the objection thereto was, but such objection must be set out, and enough facts also must be stated in the bill itself to make the error complained of apparent, without the necessity of this court searching through the entire record to see if perchance there be not something that will sustain the theory of said objection; and hence such bill, if it show the ground of the objection made was that the evidence was immaterial, irrelevant, and prejudicial, will not be considered by us unless it is made to appear from the bill itself why such evidence is not material and relevant and how such evidence is prejudicial. The reason and necessity for some such rule is too apparent to need discussion by us. Could it be expected that an appellate court should have to search through a record containing a hundred pages, as for instance in the instant case, where the statement of facts contains 240 pages, in order to ascertain if there be any theory of the case upon which evidence might have some bearing, the only objection to which is that it is immaterial, irrelevant, and prejudicial? Is it not perfectly manifest that the labors of this court would be interminable if such were the practice, and is it not clear that it is the duty of the practitioner to put all those things in his bill and make his error apparent so that this court may therefrom decide the point raised?

Keeping this observation in mind, and as illustrative of the necessity for such rules, let us notice the first of appellant's bill of exceptions which it is insisted in the motion we erred in holding to be too general and insufficient to call for our review, which is

bill No. 7. In this bill it is set forth that the prosecuting attorney asked Jack Mauney, a witness for the defendant, a number of questions, which are set out, with their answers, as follows:

"Q. You met Mug English Friday evening in Brashear, didn't you? A. Yes, sir. Q. Where did you meet him? A. I couldn't say exactly where I met him; I met him all over the place. Q. It rained a little that evening, didn't it? A. I don't remember whether it did or not; didn't rain much, if it did. Q. You and he were in the lumber shed, weren't you? A. In the lumber yard, I think; we were not in the shed at all. Q. How long did you stay there? A. Two or three minutes."

It is then stated that said evidence at the time it was offered was objected to by the defendant because it was irrelevant, immaterial, incompetent, and prejudicial to the rights of the defendant, which objections were by the court overruled and the defendant excepts.

As stated above, this court held the bill thus stated in such condition as not to merit our consideration, and we can see now no error in our former ruling. It is impossible to tell which question and which answer were objectionable, nor is there any statement of how any of the questions could have prejudiced appellant, nor is there one thing in the bill from which this court might obtain any light in striving to decide whether the answer to this or that question was competent or material. We might easily conjecture many hypotheses on which such evidence might be very material, and on the other hand, we might conjecture hypotheses which might render such evidence immaterial. But it is clear that none of these hypotheses, and nothing upon which we can base them, appear in the bill itself.

Appellant next insists in said motion that we should have considered her bill of exception No. 10, which we declined in the original opinion to consider because same was too general. Said bill is as follows:

"Be it remembered that upon the trial of the above entitled and numbered cause, that while Allie Lee Mauney, a witness for the defendant, was testifying before the court and jury upon cross-examination by the state, the state asked the witness if she was not told while she was before the grand jury last winter, in February, if her attention was not called to the fact that she and Miss Maude had been places and watched by people, and if she was not questioned specifically about she and her sister's conduct at Pleasant Grove schoolhouse one night; was she not questioned in the grand jury about the trip she and Lester Long and her sister and some other young fellows made up to the Pleasant Grove schoolhouse, and if she was not questioned about a song that had been sung in the crowd that night; and the witness answered that she was brought before the grand jury, but that she did not know who had brought her

there and didn't care; that she was questioned something about it, but did not remember that she was questioned about the song. The defendant's counsel objected to such questions and the testimony at the time it was offered, because it was immaterial and irrelevant, and defendant was not present, and same was not binding on the defendant and was prejudicial; which objections of the defendant were overruled by the court, and the state's attorney was permitted to ask the questions and the witness to testify as above stated, to which action and ruling of the court the defendant then and there in open court excepted."

[20] It will be noted at a glance that there is nothing in this bill as to any surrounding facts, and nothing to show the materiality of the evidence, or how or in what way the same was prejudicial or irrelevant; in fact, nothing but the statement, in substance, as to a number of questions and answers which were purported to have been asked and answered by the witness Allie Lee Mauney before some grand jury some time. The general objection to all of these was that such questions and answers were immaterial, irrelevant, and prejudicial; that appellant was not present and same are not binding on her.

It is not clear how defendant's counsel expects this court to determine from the bill what merit there is in such objections; certainly, we are unable to find anything therein that would disclose lack of materiality, or the absence of relevancy, or the presence of anything to prejudice the case. The mere fact that, as stated, what occurred was in the absence of appellant does not affect the same. There are innumerable instances where predicates are laid and evidence introduced as to what occurred and was said by witnesses and others out of the presence of the accused, and we do not suppose that it will be necessary to instance such cases. This is sufficient to call attention to the fact that the objections made and set out in this bill of exceptions are not such as to make it necessary for this court to violate the plain rules of practice, and to search through this entire record to try to find some way in which this evidence was objectionable.

Deference to the earnest insistence of counsel for appellant might lead us to consider one by one again the bills which our original investigation lead us to conclude were insufficient, but it would unnecessarily prolong this opinion to do so. The bills which we have set out sufficiently show how well-founded were our conclusions, and we are constrained to believe that no good could result from an individual review of each ground of such former opinion. We believe from the record that the appellant has had a fair trial and that no reversible error is shown therein.

The motion for rehearing is overruled.

(85 Tex. Cr. R. 83)

**MORSE v. STATE. (No. 5319.)**

(Court of Criminal Appeals of Texas. March 19, 1919. Rehearing Denied April 23, 1919.)

**1. CRIMINAL LAW §598(6)—CONTINUANCE—DILIGENCE—APPLICATION FOR SUBPŒNAS.**

Failure to apply for subpœnas until the 15th of the month, where the prosecution began on the 9th, *held* lack of the diligence required to warrant continuance on ground of absence of witness.

**2. CRIMINAL LAW §598(8)—CONTINUANCE—DILIGENCE—ATTACHMENT.**

Upon nonattendance of defendant's subpoenaed witness, defendant's failure to have attachment issued, under Code Cr. Proc. 1911, art. 536, constituted lack of diligence.

**3. CRIMINAL LAW §1086(4) — APPEAL — RECORD — ABSENT WITNESS — REFUSAL TO CONTINUE TRIAL.**

Where refusal to grant continuance upon ground of absence of witness is complained of, record should disclose whether or not the subpœna was returned, and, if returned, the information therein imparted should appear.

**4. CRIMINAL LAW §1151—APPEAL—DISCRETION — PRESUMPTION — CORRECTNESS OF COURT'S RULING.**

Where abuse of the discretion vested in trial court with reference to denying an application for continuance is charged, the presumption is in favor of the correctness of his ruling until its vice is affirmatively shown.

**5. CRIMINAL LAW §945(1)—NEW TRIAL—ABSENT WITNESS — PROBABLE EFFECT OF TESTIMONY.**

Where showing of diligence in procuring absent witness is insufficient, it is not incumbent upon court to order new trial, unless considered in connection with evidence adduced on the trial, it is reasonably probable that a result more favorable to accused would have been occasioned by the presence of the witness.

**6. WITNESSES §287(3) — REDIRECT EXAMINATION—EXPLANATION OF CROSS-EXAMINATION.**

In prosecution for keeping disorderly house, defendant, after having cross-examined state's witness as to her objection to association of her child with defendant's child, could not complain that witness on redirect examination stated that her reason for objecting was her knowledge of defendant's bad reputation for chastity.

**7. WITNESSES §287(1) — REDIRECT EXAMINATION—EXPLANATION OF CROSS-EXAMINATION.**

A witness, put in bad light before the jury by the development of testimony on cross-examination, may, by a pertinent explanation on re-examination, remove the unfavorable impression.

**8. CRIMINAL LAW §1169(3) — REVIEW — HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In prosecution for keeping disorderly house, statement by witness for state that her objection to defendant's child playing with her child

was due to her knowledge of defendant's bad reputation for chastity was harmless, where defendant had testified that she had been engaged in running an assignation house at several places and for a number of years.

**9. CRIMINAL LAW §1169(9) — REVIEW — HARMLESS ERROR — CONCLUSION OF WITNESS.**

In prosecution for keeping a disorderly house, testimony that one of the girls residing with defendant was a prostitute, if objectionable as a conclusion, was not reversible error, where witness was a policewoman, with duty of looking after prostitutes, and testified that she had found the girl in bed with a man, and where defendant's testimony showed that the girl engaged in criminal intercourse with men at her house.

**10. CRIMINAL LAW §1091(4), 1170½(1) — WITNESS — HARMLESS ERROR — REDIRECT EXAMINATION—BILL OF EXCEPTIONS.**

In prosecution for keeping disorderly house, where defendant, on cross-examination of a witness for the state, who had been called to testify to reputation of defendant's house, elicited that another witness "took his name," bill complaining of testimony on redirect examination that he had signed a petition *held* not to show error, where nature of petition was not shown by bill, and where it appears that witness had given no material testimony for either party.

Appeal from Harris County Court at Law; R. M. Love, Special Judge.

Dora Morse was convicted of keeping a disorderly house, and she appeals. *Affirmed.*

Jack Ciulla and Calvin & Ciulla, all of Houston, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

MORROW, J. Conviction was for keeping a disorderly house. An application for continuance based upon the absence of certain witnesses was made.

[1-3] The prosecution began on the 9th of September; the trial on the 19th of that month; all of the witnesses named in the application resided in the city of Houston, Harris county, where the trial took place. One of the witnesses, however, was temporarily in McLennan county. The subpœnas were applied for on the 15th, and issued on the 16th, day of September. No reason is stated for not applying for them at an earlier date, and this fact alone discloses an absence of the diligence required by the law. *Barrett v. State*, 18 Tex. App. 64; *Dove v. State*, 36 Tex. Cr. R. 105, 35 S. W. 648; *Holmes v. State*, 38 Tex. Cr. R. 370, 42 S. W. 996. The sheriff of Harris county executed the process, and returned it on the same day it was issued, showing service of the witness. Their nonattendance entitled appellant to an attachment for them (C. C. P. art. 536), and diligence required its issu-

ance (*Hill v. State*, 18 Tex. App. 665). The subpoena for King, who was in McLennan county, was sent to the sheriff of that county, by what means is not shown, and neither in the application, the bill of exceptions, nor the motion for new trial is it made to appear what became of the subpoena. The record should disclose whether the subpoena was returned or not, and, if returned, the information therein imparted should appear. *Todd v. State*, 57 Tex. Cr. R. 27, 121 S. W. 506.

[4] Where the abuse of the discretion vested in the trial court with reference to denying an application for continuance is charged, the presumption is in favor of the correctness of his ruling until its vice is affirmatively shown by the record. Branch's An. P. C. p. 183, § 306, and cases listed. This court is not advised what, if any, effort appellant made to secure the service of the process at Waco, if it was not served, or what diligence he exercised to secure the attendance of the witness with other process. The affidavit of the witness King, attached to the motion for new trial, shows that he was in Waco, but does not show whether he was served with subpoena or not, nor does it explain the cause of his non-attendance. The affidavit, moreover, shows that such testimony as he would have given was cumulative, of a negative character in part, and the remainder mainly conclusions. It consists of his statement that he roomed at the house of appellant from September, 1917, until June 6, 1918, and that the appellant and the women living with her conducted themselves in an orderly manner, and he saw no lewd conduct, and that men and women did not meet there for immoral purposes.

[5] On the trial there was direct testimony that some of the women who were inmates of the house were prostitutes, and that some made assignments there with appellant, knowledge and received money, a part of which was paid to appellant. Whether these transactions occurred after the witness King's departure or before is not disclosed, but that they might have occurred without his knowledge is manifest. The diligence being clearly insufficient, it was not incumbent upon the trial court to order a new trial on account of the absent testimony, unless considered in connection with the evidence adduced on the trial, it is reasonably probable that a result more favorable to the accused would have been occasioned by the presence of the witness. *Covey v. State*, 23 Tex. App. 391, 5 S. W. 283; Branch's An. P. C. p. 183, § 319, subd. 2.

[6, 7] A witness for the state, on cross-examination, responding to questions by appellant, admitted that she had told the five year old child of appellant to leave her premises, and that she did not want her to associate with her little girl. The mo-

tive of the witness having been thus assailed by appellant, she is not in a position to complain that the witness on redirect examination stated that her reason for objecting to the association of the children was her knowledge of the bad reputation of appellant for chastity. There is a just rule of evidence which permits a witness, put in bad light before the jury by the development of testimony on cross-examination, by a pertinent explanation on re-examination, to remove the unfavorable impression. *Wigmore on Evidence*, vol. 2, § 952; *Oxsheer v. State*, 38 Tex. Cr. R. 505, 43 S. W. 335.

[8] The complaint of the reference to the reputation of appellant was, by the circumstances detailed, rendered unsound, even though the reputation of appellant in the respect mentioned was not an issue, which could be raised by the state. Moreover, the appellant having testified that she had been engaged in running an assignation house at several places and for a number of years in the city of Houston, we would be inclined to hold the answer of the witness harmless, on the ground that there was other similar testimony before the jury without objection.

[9] The bill complaining of the action of the court in permitting a witness to testify that one of the women residing with appellant was a prostitute does not disclose error justifying reversal. It was objected to as a conclusion, and, standing alone, might have been subject to that objection. The witness giving the evidence was a policewoman whose business required her to look after prostitutes, and she said she knew of her own knowledge that the girl was a prostitute, and gave facts supporting her knowledge—among others, that she was confined on the city farm; that witness went to appellant's house after the girl, and found her in bed with a man. The appellant, testifying about the same girl, gave testimony showing that she, at her house, engaged in criminal intercourse with men, and further said she was diseased, stating facts from which the inference is clear that she was afflicted with a venereal disease. The girl bore the reputation of a common prostitute.

[10] The bill complaining that a witness testified that he had signed a petition discloses no error. The petition is not described in any manner in the bill. It appears therefrom that appellant proved by the witness, on cross-examination, that a certain witness "took his name"; and the state on redirect examination proved by him that he signed a petition. He was called by the state to show the reputation of appellant's house, but failed to qualify, and gave no material evidence, so far as we learn from the bill, for either party.

We find nothing in the record which would require or justify reversal. The judgment is affirmed.



(88 Tex. Cr. R. 4)

**GILLESPIE v. STATE. (No. 4981.)**

(Court of Criminal Appeals of Texas. March 5, 1919. Rehearing Denied April 30, 1919.)

**1. HOMICIDE §171(5) — EVIDENCE — ACTS OF DECEASED.**

In homicide trial, it was not error to admit testimony of deceased's wife, showing that after receiving his fatal wound he went into his home and lay down on the floor and died in about five minutes, and that the only statement he made was, "I think he has killed me," or words to that effect.

**2. CRIMINAL LAW §680(1) — ORDER OF PROOF.**

In homicide trial, where the defense was largely predicated upon the fact that the fatal difficulty arose over certain rubber goods which were exhibited to accused at the time of the difficulty, the admission of testimony that witness had examined the contents of a pocketbook taken off deceased immediately after the difficulty, that he failed to find such articles therein, since much of the testimony of accused and his witnesses was directed to showing that these articles were in deceased's possession.

**3. CRIMINAL LAW §723(1)—INFLAMMATORY ARGUMENT OF PROSECUTOR.**

Argument of the prosecutor that deceased's family had been ruined and his wife and children forced into another state, held not of such inflammatory nature as to require or justify a reversal.

**4. CRIMINAL LAW §728(2)—ARGUMENT OF COUNSEL—OBJECTION.**

If argument of the prosecutor was improper, objection should have been made to it in open court.

**5. CRIMINAL LAW §1092(12)—BYSTANDERS' BILL OF VERIFICATION.**

The Court of Criminal Appeals is not authorized to consider exception attempted to be preserved by bystanders' bill, where the affidavit to such bill is signed by two persons instead of three as required by statute.

Appeal from District Court, Clay County; Wm. N. Bonner, Judge.

Cauley Gillespie was convicted of manslaughter, and appeals. Affirmed.

R. E. Taylor and Wantland & Parrish, all of Henrietta, for appellant.

E. B. Hendricks, Asst. Atty. Gen., for the State.

**MORROW, J.** Appellant was convicted of manslaughter, and his punishment assessed at two years' confinement in the penitentiary.

The former appeal is reported in 80 Tex. Cr. R. 482; 190 S. W. 146, and sufficiently states the facts.

[1] The complaint of the admission of the testimony of the wife of deceased, showing his movements during the short lapse of

time between the receipt of the wound and his death, is not well taken. The effect of it is to show that he went into his house and lay down on the floor and died in about five minutes; that the only statement he made was, "I think he has killed me," or words to that effect.

[2] A witness testified to an examination of the contents of a pocketbook which was taken off the deceased immediately after the difficulty, and his failure to find therein certain rubber goods, and his statement that if they had been there he believed he would have seen them. The appellant's defense was largely predicated upon the fact that the difficulty arose over the articles mentioned which were exhibited to him at the time of the difficulty. The bill states that, at the time the evidence mentioned was introduced, the appellant's testimony touching these matters had not been developed. Since it appears from the record that much of the testimony of the appellant and his witnesses was directed to the affirmative side of the issue as to whether these articles were in the possession of the deceased at the time mentioned, we think there was no harmful error shown in the bill.

After the difficulty, and after various people had come to the home of deceased, passed in and out at the gate, which was about 10 or 15 feet from the place where the buggy in which the difficulty took place was standing at the time, a handkerchief, according to the testimony of one of the witnesses, was picked up near the gate. Various objections were urged to the admission of this testimony. There is an absence of any explanation in the bill relating to whom the handkerchief belonged and in what way it was connected with the transaction or injuriously affected the appellant's case.

[3, 4] One of the bills complains of the argument as follows:

"Jesse Murphy's family has been ruined; his wife and children forced into the state of Oklahoma and out of the state of Texas."

The bill shows that since the homicide the wife and children have moved to Oklahoma and reside there. The bill is qualified with the statement that appellant's counsel came to the trial judge and told him that the state's attorney had used the language mentioned, which the judge says he did not hear, but that he would approve the bill upon the statement of counsel for the appellant. We do not regard the argument as one of such inflammatory character as to require a reversal or to justify one. We are not prepared to say that the inference of counsel that the family of deceased was ruined by the death of deceased was an unauthorized one, and it affirmatively appears they had moved out of the state. Granting, however, that it

was not a proper argument, it might have been withdrawn if counsel had made his objection to it in open court. See *Weige v. State*, 196 S. W. 524.

[5] There was an effort to preserve an exception to another argument by bystanders' bill. The affidavit is signed by two persons. The statute requires the verification of such a bill by three bystanders. Unless it is so verified, we are not authorized to consider it. *Osborne v. State*, 56 S. W. 53.

We think the evidence is sufficient to sustain the verdict of manslaughter.

Finding no error in the record, the judgment is affirmed.

(85 Tex. Cr. R. 128)

CLAY v. STATE. (No. 5343.)

(Court of Criminal Appeals of Texas. April 2, 1919.)

1. LARCENY  $\S$ 70(1) — INSTRUCTIONS — SUFFICIENCY.

Charge held sufficient presentation of issues in a prosecution for theft of an automobile.

2. CRIMINAL LAW  $\S$ 1097(5)—APPEAL—REQUESTED INSTRUCTIONS—ABSENCE OF STATEMENT OF FACTS.

Refusal of requested instructions is not reviewable, in the absence of the facts.

3. LARCENY  $\S$ 50½ — EVIDENCE — INCriminating CIRCUMSTANCES.

Where the stolen automobile was dismantled after being taken, a jack and bolt shears and automobile parts found in defendant's possession were properly introduced to show fraud in taking and in dismantling the car, and to identify it, though the jack and shears and some of the parts were not identified by the owner as his property.

4. CRIMINAL LAW  $\S$ 1097(4) — APPEAL — STATEMENT OF FACTS.

In the absence of the facts, in a prosecution for theft of an automobile, the appellate court cannot review a ruling permitting a state's witness to demonstrate the use of instruments found in defendant's possession to show how the car was dismantled after it was taken.

Appeal from District Court, El Paso County; W. D. Howe, Judge.

Ivy Clay was convicted of theft, and he appeals. Affirmed.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of theft of an automobile alleged to be the property of N. S. Williams.

The motion for new trial complains of many rulings of the court with reference to the introduction of testimony and the failure of the court to give certain requested instructions. Bills of exception were re-

served to the ruling of the court with reference to the refusal to give requested instructions, and to the introduction of facts in reference to certain things found in the possession of appellant, testified by the alleged owner Williams.

The first and second bills of exception were reserved to the refusal of the court to give, first, an instruction that the defendant could not be convicted, unless the jury should believe, beyond a reasonable doubt, that defendant was present or in a position to aid or assist, and did take or aid and assist, in the original theft of the automobile, although they might find that he had possession of parts of the alleged stolen vehicle. The second requested instruction asked the court to direct the jury not to consider any testimony with reference to property found in possession of defendant, if any, that was not claimed to be the property of prosecuting witness, Williams.

The court charged the jury, with reference to the general law of theft, that unless they should believe appellant took the property they should find him not guilty. He then gave a charge on circumstantial evidence, and specifically charged the jury that unless they should find, beyond a reasonable doubt, that defendant committed the theft, they should acquit, and further charged the jury that if the evidence raised in their minds a reasonable doubt as to whether appellant came in possession of the articles introduced in evidence, and which the witness N. S. Williams testified belonged to him, the said Williams, by having purchased the same, either separately or in connection with the purchase of other property, or by having the same left with him by some person from whom he had purchased property, as testified to by the defendant, then they should acquit.

[1] We are of opinion, in the absence of the testimony, and in the manner the charge was given, that this is a sufficient presentation of the issues; at least, without the facts before us, we are unable to ascertain whether it was necessary to give the requested instructions or not. It seems from the charges, and from some of the bills of exception, which will be mentioned later, that the theory of appellant was that he did not take the property, but purchased or received it after it was stolen, and was an innocent purchaser. As the record is presented, we are unable to say that there was error in the action of the court, either in the charge given, or in refusing special instructions.

[2] Appellant also asked the court to instruct the jury not to consider any testimony with reference to property found in possession of defendant, if any, that was not claimed to be the property of prosecuting witness

Williams. Without the facts, the same may be said of this charge as of those mentioned.

[3,4] Another bill recites that, while the witness Williams was testifying, there was exhibited before the jury an automobile jack and bolt shears, which Williams testified were found in the possession of defendant at the time of his arrest, and that Williams was permitted to demonstrate before the jury the use of said articles, explaining how these articles worked, and showing that with them an automobile could be easily dismantled. To the exhibition of these articles before the jury appellant urged exception, on the ground that it was not shown by the evidence that the auto jack and bolt shears were the property of Williams, nor that same were in his automobile at the time it was stolen, and further, that there was no evidence to show that these articles were stolen, either from Williams or any one else. The bill also recites that the witness testified the auto jack and bolt shears were found in appellant's possession at the time of his arrest, and further recites that there was no evidence showing that these articles were stolen. Another bill was reserved, which recites that there were brought in the courtroom, so that same could be seen by the jury, grass sacks containing divers and numerous articles, the nature of which was not disclosed, and which articles were not shown by the testimony to have been the property of Williams, the alleged owner, nor were they shown to have been stolen articles. The appellant thereupon urged various objections. The court signs this bill, with the statement that the sacks in question contained only articles in the automobile in defendant's possession at the time of his arrest; that the sacks, under the court's instructions, were placed on the side of the clerk's desk opposite to the jury, and were not exhibited to the jury, and were not in sight of the jury. The witness Williams, during his examination, did go to said sacks and take therefrom certain articles, which he said were parts of his automobile when same was stolen, and were in his automobile at the time it was stolen, and certain other articles, similar to articles which were parts of his automobile and were in his automobile when same was stolen, but which he did not positively identify as his property.

As these two bills are presented, in the absence of the statement of facts, we are unable to discover any sufficient reason why the judgment should be reversed. If the property mentioned was owned by Williams, it was legitimate to prove that fact. It seems from the bill Williams' automobile was dismantled after being taken, and these articles were found in possession of appellant. If there were other articles found in

connection with Williams' testimony, and brought before the jury for the purpose of showing how the automobile might be dismantled, this was legitimate and proper. There seems to have been no contention that appellant might be convicted for the theft of any of those articles; but those that were taken from the dismantled car of Williams were used as some of the circumstances to show the taking and the fraud in taking the car, and in dismantling it. These were but circumstances which tend to identify Williams' car, by showing they came from it after it was stolen. This was proper and legitimate testimony. Whether it was proper or not for Williams to have some of these instruments mentioned before the jury, to enlighten the jury as to how the car was taken apart and dismantled, we are unable to decide without the facts. It may have been legitimate to introduce this character of evidence, and several reasons might be suggested why this could be true; but in the absence of the facts, and as the bills are presented, we do not believe there was any such error manifested as would require this court to reverse. All the facts which might be necessary, or the connecting facts which justified the court's ruling, will be supposed to have existed, in the absence of a showing to the contrary. The appellant accepted the bills of exception as qualified by the judge, and does not send to this court a statement of the evidence.

In the condition of the record, therefore, we are of opinion there was no error shown, and the judgment should be affirmed.

# FT. WORTH & D. C. RY. CO. v. HAPGOOD et ux. (No. 1505.)

(Court of Civil Appeals of Texas. Amarillo.  
March 19, 1919. Rehearing Denied  
April 16, 1919.)

## 1. EVIDENCE $\S$ 488 — OPINION EVIDENCE — MARKET VALUE — ACTUAL VALUE.

In suit against railway for damages by fire to grass and land, where no market value is shown, the opinion of witnesses, qualified as practical and experienced men, as to its actual value, is admissible.

## 2. EVIDENCE $\S$ 142(1) — VALUE — OTHER SALES.

Value is not fixed at the place where buyers and sellers meet, but is established or shown by sales, public or private, in the ordinary course of business.

## 3. EVIDENCE $\S$ 113(1) — VALUE — "MARKET VALUE."

Supply and demand, the use and benefit, the quantity and quality, what buyers are willing

to give and sellers to take, all enter into "market value."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Market Value.]

4. EVIDENCE  $\Leftrightarrow$ 501(7) — OPINIONS — VALUE OF GRASS.

In suit against railway for damages by fire to grass and land, one who shows that he has been dealing with grass pastures and land and observed the price paid and the sales for years may be able to give an opinion as to market value of grass at the time of the injury, although no sales are shown at or about that time.

5. EVIDENCE  $\Leftrightarrow$ 501(7), 568(4) — MARKET VALUE—FOUNDATION.

It is a sufficient predicate for the admission of opinion evidence as to market value that the witness is willing to testify that he knows it; and cross-examination showing insufficient knowledge goes only to the weight of the testimony or the credibility of the witness.

6. EVIDENCE  $\Leftrightarrow$ 498½ — OPINION EVIDENCE — DISCRETION.

The admission of opinion evidence as to market value of an article is largely discretionary.

7. EVIDENCE  $\Leftrightarrow$ 568(4) — OPINION EVIDENCE — VALUE—CREDIBILITY.

The credibility of opinion evidence as to market value of an article is for the jury.

Appeal from Clay County Court; E. W. Coleman, Judge.

Suit by K. N. Hapgood and wife against the Ft. Worth & Denver City Railway Company. From judgment for plaintiffs, defendant appeals. Affirmed.

Taylor, Allen & Taylor, of Henrietta, and Thompson, Barwise, Wharto & Hiner, of Ft. Worth, for appellant.

Wantland & Parish, of Henrietta, for appellees.

HUFF, C. J. The appellees, Hapgood, sued appellant railway company to recover damages for the destruction by fire of certain grass owned by appellees and damage to the land. It is alleged that the grass and grass seed were then worth and of the reasonable value of \$2 per acre, and that they were damaged to the extent of the difference in the value of the land before and after the fire, \$2 per acre. The jury found damages to the grass \$1 per acre and to the land \$1.50 per acre or a total of \$440.85.

[1] The first five assignments of error assert the court should have excluded the opinion or testimony upon motion made to so exclude such evidence as to the market value of the grass at the time it was burned, December, 1916, of the witnesses R. J. Brown, Tom Weldon, H. C. Budd, S. M. Brightwell, and K. N. Hapgood, because, it is asserted, while each of the witnesses testified that he knew the market value and gave his opinion as to

its value, upon cross-examination that such witnesses showed that they did not know what it took to constitute market value, and had based their testimony on direct examination upon erroneous conclusions as to what it took to constitute market value. It may be stated generally that each of the witnesses were practical cattlemen and landowners, who bought and sold land and cattle, ran and handled cattle on grass pastures; that they had bought and sold land and grass pastures, had known of sales and that they each had been so engaged for from 25 to 35 years; they knew the pasture and grass burned in question; they saw the grass on the land and described the kind of grass and its condition when burned, and were familiar with the land in that immediate neighborhood, together with the grass lands and pastures, and knew the amount of grass land and cattle and the demand for grass at that time, and then stated, after detailing minutely their experience, knowledge, etc., that they knew the market value, and then gave their opinion or estimate, which was from \$2 to \$3 per acre. Upon cross-examination these witnesses stated substantially that they knew of no sales of grass in December, 1916, and perhaps some of them stated they knew of none during the year. The witnesses state that grass was hard to get in 1916, and inferentially that the demand was greater than the supply; that they based their opinion on what they judged grass to be worth for a man with cattle and for grazing purposes; that the grass would be worth the amount for grazing purposes, as it was scarce that fall; that they based their opinion on what they thought was the value of the grass, and not upon sales they knew of being made. The witnesses, some of them, said their opinion was based on what it would sell for in a reasonable time for cash upon the market. The witnesses, on cross-examination, revealed the fact that in leasing or buying grass after its maturity the method of using it was by grazing the cattle thereon, and that the use so purchased was usually for a period of time; that in the meantime new grass or winter grass may spring up, and it, together with the old grass, would be consumed. Some of them state they knew of some sales that year, but do not give the price. The witnesses generally on redirect examination restated they fixed the value at the market value, etc. We might be able to say from this record that no market value was shown if the restricted meaning of market value is adopted, which appellant apparently insists upon. If so, the witnesses' opinion as practical men and men experienced as to its actual value would be admissible, and, strictly speaking, under the assignment no reversible error is shown. Just what appellant means by market val-

us we are left to infer. Doubtless when the value of the land is sought, or that growing on it, appellant would not restrict market value thereof to a place where such products are daily exposed to sale and sellers and buyers assemble to sell and buy, or contend that it should be used in the sense that Longfellow used "market" in the Wayside Inn:

"And he answered, What's the use,  
Of this bragging up and down,  
When three women and one goose  
Make a market in your town?"

[2-7] As we conceive it, value is not fixed at the place where buyers and sellers meet, but is established or shown by sales, public or private, in the ordinary course of business. We think also the supply and demand, the use and benefit, the quantity and quality, and what buyers are willing to give and sellers to take—all these things enter into market value. One who shows that he had been dealing in such articles and observing the price paid and the sales for years, revealing that, owing to scarcity at a particular time, there were fewer or no sales, we believe, may be able to give an opinion as to the market value. While sales is a factor in fixing market value, it would be hard to find in the sale of this kind of property a sale on the day of the destruction or in the midwinter when food for stock had been provided prior thereto. It would be hard to prove the value by the opinion of any one if the witness must know of sales at the time or near the time. If he has observed sales prior thereto and the value placed on grass by men in that line of business, and what they paid or are willing to pay, we see no valid objection to receiving his opinion for what it is worth. We believe the rule announced in *Whitney v. Thacher*, 117 Mass. 526, is generally recognized:

"It is not necessary, to give an opinion as to value, that his information be of such a direct character as would make it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business, for the conduct of that business, that qualifies him to testify."

This rule we think may also be supplemented by that adopted by New York:

"No rule of law can be laid down, defining how much acquaintance with property a witness must have to render his opinion of its value competent evidence. He must have some knowledge of it, sufficient to enable him to form an estimate, and it is then for the jury to say, in view of his means of judging, to what weight his estimate is entitled." *Bedell v. Long Island Ry. Co.*, 44 N. Y. 367, 4 Am. Rep. 688; *Brown v. Aitken*, 90 Vt. 569, 99 Atl. 265.

In this state we have adopted the market value as the measure where there is such, but just what we mean is not quite so clear. That we do not mean it as that established

in some market place by sellers and buyers is quite certain. In the sale of land and pastures in rural communities the sales must necessarily be few and at long intervals. If lands or pastures sell, it will be insisted that there is a market, but if the witness does not know of a sale on the day or near the time, it will be urged, perhaps, as in this case, that he is not qualified, although he for years has given consideration to the question and studied the use, the benefits to be derived, the quality of the particular land, observed the prices received in the sales, and is cognizant of the demand, yet it will be urged he does not know the market value. We believe our courts are not inclined to adhere to too literal a meaning of the words "market value." It has been said:

"Knowledge of the market value of an article is hardly an opinion. It is a fact known from information. If a witness is not fully qualified to state the fact, a cross-examination will show it. Such matters go to the weight of the evidence and the credibility of the witnesses, and not to the competency of the testimony." *Railway Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776.

"Evidence as to market value is not objectionable because it is in a measure the opinion of a witness." *Railway Co. v. Hogsett*, 67 Tex. 685, 4 S. W. 365; *Railway Co. v. Knight*, 51 Tex. 592.

Whether it is a fact or an opinion, the necessary predicate is required, and as a rule a sufficient predicate is that the witness is willing to testify that he knows. When he so states, he may give the value. The cross-examination may show insufficient knowledge, and this would only contradict his previous evidence, which contradiction would then be a question for the jury, or, in other words, the weight of the evidence or the credibility of the witness. The admission of evidence of this kind or its competency is largely in the discretion of the trial court. *Railway Co. v. Starr*, 194 S. W. 637; *Studebaker v. Gerlach Mercantile Co.*, 192 S. W. 546. As we understand, the Court of Civil Appeals for the Second District has ruled against appellant's contention in this case, in *Railway Co. v. Hapgood* 201 S. W. 1040. We do not believe the fact that the grass was purchased to graze and run cattle thereon, and that other grass sprang up before the contract ended and which may have entered into its value, should exclude the opinion of the witness. The jury in this case evidently gave the Railway Company credit for the present payment by finding only half as much as the lowest witness' evidence would have authorized. This they could do if, in their judgment after hearing all the evidence they found \$1 an acre would compensate the appellees for the value lost at the time of the destruction of the grass.

The fifth assignment will be overruled and the case affirmed.

**MCCRELESS v. HOWELL** (No. 6189.)

(Court of Civil Appeals of Texas. San Antonio.  
March 19, 1919. Rehearing Denied  
April 16, 1919.)

**BROKERS**  $\S$ 86(1)—COMPENSATION—ACTION—EVIDENCE.

In broker's action for commissions for services in securing exchange of properties between defendant and another, judgment for defendant *held* clearly against the great preponderance of the evidence, necessitating reversal.

Appeal from District Court, Dimmit County; J. F. Mullally, Judge.

Suit by J. O. McCreless against Lee Howell. From judgment for defendant, plaintiff appeals. Reversed and remanded.

Vandervoort & Johnson, of Carrizo Springs, for appellant.

T. F. Mangum, of San Antonio, and Wm. H. Davis, of Crystal City, for appellee.

**FLY, C. J.** This is a suit instituted by appellant against appellee to recover \$2,500, alleged to be due as commissions for services performed in securing an exchange of properties between appellee and another person. It was alleged that appellee agreed to pay appellant \$2,500 for securing an exchange of Texas lands for a three-story brick apartment house in Los Angeles, Cal.; that appellant secured an exchange of the properties, and deeds were passed between the parties, and appellee refused to pay the commissions. The cause was tried without a jury, and judgment rendered that appellant recover nothing and pay all costs.

The evidence of both appellant and appellee showed that appellee had agreed that he would pay appellant \$2,500 if the exchange of the properties was consummated. A contract of exchange was made subject to an inspection of the California property by appellee. Appellee, after the inspection, declared the trade off, but at the solicitation of appellant made a second contract of exchange which was executed. He said that the \$2,500 was based on a valuation of \$100,000 for the California property; but he did declare the first contract off, not because the property was not worth as much as represented, but because there was an indebtedness on it. Appellant brought appellee and Knight, the owner of California property, together the second time, and appellee never at any time repudiated his contract to pay appellant the \$2,500. Appellee obtained for his land practically what he desired, and there was no condition attached to the agreement to pay appellant \$2,500 that California property should be worth \$100,000.

The exchange of the property was inter-

rupted for a short time; but through the efforts of appellant it was resumed, and the exchange was made of the identical real estate contemplated in the first negotiations. Appellee denied that he renewed his promise to pay the \$2,500, although he is contradicted in that statement by both Knight and appellant. He did not state, however, that he had ever abrogated or set aside his contract with appellant. He made the contract with appellant, and he does not allege or prove that it was procured by a fraudulent representation as to the value of the California property. He was satisfied with its value, got a big value in the exchange for his land, and should pay for the services rendered by appellant.

The testimony upon which the court must have rendered its judgment is so meager and unsatisfactory, and is so clearly against the great preponderance of the evidence, that we cannot allow it to stand. Yet we are not prepared to render judgment on the evidence, but will return the case for further development.

The judgment is reversed, and the cause remanded.

**PITTMAN & HARRISON CO. v. BOATEN-HAMER et al.** (No. 1510.)

(Court of Civil Appeals of Texas. Amarillo.  
March 26, 1919. On Motion for Rehearing, April 16, 1919.)

**1. APPEAL AND ERROR**  $\S$ 442 — PLEA OF PRIVILEGE—EFFECT OF NOTICE OF APPEAL.

Where defendant corporation, sued for breach of implied warranty of seed sold by it, brought cross-action against another, from whom it purchased the seed, and the latter's plea of privilege was sustained, whereupon defendant excepted to and gave notice of appeal from the order sustaining the plea, it was not error to try the case before determination of the appeal from such order; the only effect of the notice of appeal being to suspend the transfer of the case to the county claimed in the plea of privilege, under Rev. St. 1911, art. 1903, as amended by Acts 35th Leg. c. 176 (Vernon's Ann. Civ. St. Supp. 1918, art. 1930).

**2. VENUE**  $\S$ 22(1)—JOINING ADDITIONAL DEFENDANT.

Defendant corporation, sued for breach of its implied warranty of seeds sold, could not properly join, by cross-action, another from whom it purchased the seed, and thereby defeat such other's privilege to be sued in his own county, the cause of action set up against such other arising under a different contract from that on which defendant was sued.

**3. VENUE**  $\S$ 78—CHANGE OF VENUE—EFFECT.

When a separate cause of action is improperly attempted to be joined by defendant's cross-action against an additional party, the transfer of the cause against such party to

the county of his residence does not carry the original cause to such county.

**4. CORPORATIONS** ⚡503(2)—ACTION—VENUE—BREACH OF WARRANTY.

Under Rev. St. 1911, art. 1830, subd. 24, as to suits against private corporations, suit against defendant corporation for breach of implied warranty of kind of seeds sold by it was properly brought in the county where the seeds were planted and the damage from their failure occurred.

**5. PRINCIPAL AND AGENT** ⚡143(2)—SUIT BY UNDISCLOSED PRINCIPAL.

The undisclosed principal may sue a third party, with whom his agent has contracted, to enforce his rights under the contract so made.

**6. PLEADING** ⚡34(7) — OBJECTION ON APPEAL.

The objection, made by argument on appeal, that the fact that one of the defendants contracted with another defendant for plaintiff as the first defendant's undisclosed principal was not sufficiently pleaded, should be overruled, if all the pleadings, including the first defendant's pleadings and plaintiff's reply to plea of privilege of the second defendant, taken together, present such an issue.

On Motion for Rehearing.

**7. COURTS** ⚡170—JURISDICTION OF COUNTY COURT.

In action in county court for breach of implied warranty of seeds, a complaint alleging that if the seed had been as represented plaintiff would have produced five tons of broomcorn on his land, worth \$200 a ton over and above all expenses of raising and harvesting, was not bad as in excess of jurisdiction of the county court; plaintiff not asking for judgment in excess of \$1,000 and not asking for interest in any form.

**8. COURTS** ⚡170—JURISDICTION—PLEADING.

To render a complaint bad as asking recovery in excess of the court's jurisdiction, it must affirmatively appear that plaintiff sues for an amount in excess of the jurisdiction, and a prayer for general relief will be confined to that which the court has jurisdiction to grant.

Appeal from Clay County Court; E. W. Coleman, Judge.

Suit by J. P. Boatenhamer against Pittman & Harrison Company and another, in which the named defendant filed cross-action against James C. Hunt. From judgment for plaintiff against the named defendant, said defendant appeals. Affirmed.

J. A. L. Wolfe and French, Jones & Harney, all of Sherman, and W. G. Eustis, of Henrietta, for appellant.

Taylor, Allen & Taylor, Wantlant & Parish, and P. M. Stine, all of Henrietta, for appellees.

HUFF, C. J. Boatenhamer brought suit in Clay county against A. Snearly, a resident of that county, and Pittman & Harrison Company, a corporation, under the laws of Texas, with its principal office or place of business in the city of Sherman, Grayson county, Tex. It is alleged, in effect, that appellee applied to Snearly to purchase dwarf broomcorn seed for the purpose of planting 14 acres in dwarf broomcorn; that Snearly informed appellee he did not have such seed on hand, but could procure same for him in a few days by ordering them; Snearly applied to Pittman & Harrison Company for the seed, and in a few days thereafter procured them, and informed appellee that he had procured dwarf broomcorn seed, which appellee believed and paid therefor \$1.75, and planted his 14 acres of land therewith, believing at the time the seed were as represented; that the seed came up, and and that appellee cultivated his land, believing at the time that the seed were dwarf broomcorn seed, and that it was not until September of that season, 1917, when and after the crop headed out, that he learned they were not as represented; the crop produced from the seed proved to be a blend or mixture of sorghum and broomcorn, and was not broomcorn, and not fit for use as broomcorn, nor as sorghum, and in fact was of no value for any use or purpose; that, if the seed had been broomcorn seed, he would have produced five tons on the land, which would have been of the value of \$200 per ton, over and above all expenses of raising and harvesting. The appellant, Pittman & Harrison Company, answered by plea of privilege to be sued in Grayson county, alleging its principal office and place of business was in Sherman, Grayson county, and that it was a private corporation, duly incorporated under the laws of Texas, making the general necessary negative allegations as to the exceptions mentioned in articles 1830 or 2308 of the Revised Statutes. And subject to its plea of privilege, answered by general exception and general denial, and specially set up that the seed in question were purchased by it from James C. Hunt, a resident of Wichita county, Tex., who represented that the seed were dwarf broomcorn seed, and that appellant believed such representations to be true, and relied upon same in again selling the seed, by reason of which it is alleged Hunt is liable to appellant for any damages or judgment which might be rendered against it, praying that he be cited or made defendant, and that it have its judgment over against Hunt in accordance with its allegations. Hunt answered, interposing the plea of privilege to be sued in the county of his residence, Wichita county. This plea was in proper form. The appellee Boatenhamer controverted the appellant Pittman & Johnson Company's plea of privilege by a properly sworn reply, alleging that one of the exceptions to the right of appellant to be sued

in the county of its residence existed as provided in subdivision 24 of article 1890, R. O. S.; that appellant was a private corporation, and that the appellee's cause of action, or a part thereof, against appellant, arose in Clay county, alleging therein that, in response to the request of appellee for broomcorn seed, appellant shipped the defective and worthless seed described in the petition to Clay county, Tex., which were there delivered and paid for by appellee. The seed were planted in said county on appellee's farm, and a worthless crop of mixed broomcorn and sorghum was raised therefrom, which was cultivated in Clay county, and the damages sued for herein accrued in Clay county, and under such subdivision of the statute appellee had the right to sue the appellant in that county. At the time these pleas were filed, and also later, by an amendment, Snearly alleged that in ordering the seed he was acting as the agent of Boatenhamer; that at the request of the appellee he ordered from appellant the seed, and paid \$1.75 to appellant therefor; that in due course of time appellant sent the seed to him, which he delivered to appellee Boatenhamer in the identical package in which appellant had shipped the same, and that he turned the same over to appellee for the same amount he paid, \$1.75, without any charge or profit to himself. We find no controverting answer to Hunt's plea of privilege to be sued in Wichita county. The trial court sustained the plea of privilege filed by Hunt, reciting in the order that Hunt's plea of privilege was not controverted, and it was therefore sustained, and that the cause of action set up by appellant against Hunt be transferred to Wichita county, ordering proper transcript, etc. The appellant noted in the order that it excepted to the action of the court thereon, and gave notice of appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas. The trial court submitted the case to the jury by a general charge, but first instructing the jury on the plea of privilege filed by appellant, and directed them, if they found in favor thereof, that they need not consider the charge on the other issues, but if they found against the plea then to consider the case on its merits under the charges following. The jury, by their verdict, specially find against the plea of privilege, and find a general verdict in favor of appellee against appellant for \$500 damages, and by direction of the court found a verdict in favor of Snearly.

The first assignment, in effect, is that the uncontroverted evidence sustained the plea of privilege of appellant to be sued in Grayson county; that the seed were purchased there by Snearly by an order sent through the mail, and paid for by Snearly by check sent to appellant in Grayson county, and that no part of the transaction occurred in Clay county. The evidence shows an order addressed by Snearly at Henrietta to appellant

at Sherman, which reads, "Please ship me one-half bushel of broomcorn by mail." This was shipped to him by appellant, with a charge of \$1.75, which Snearly paid by check, sending it to appellant at Sherman. Snearly turned the seed over to appellee as received by him, appellee paying the amount Snearly had advanced, without any charge for his services or profit to himself. Both Snearly and Boatenhamer testified that when appellee called on him for the seed that he told appellee he did not handle broomcorn seed, but told him he would order it as a matter of accommodation, and that Snearly collected from appellee \$1.75, without charging for his trouble or profit to him. The seed were shipped to Clay county, planted there on appellee's land, and the damages resulting from sending mixed seed occurred in Clay county. The appellant is a private corporation, with its office at Sherman, Grayson county, as alleged. The facts stated in the plea and the controverting answer thereto are substantially proven as pleaded as above stated.

[1-3] Before we notice the assignments as made, we perhaps should notice the contention, not properly raised by the brief, but suggested by argument, and possibly by an assignment; that is, that this case was prematurely tried because Hunt's plea of privilege was sustained; that exceptions were taken thereto and notice of appeal given. The order sustaining the plea of privilege was made December 4, 1917. The final judgment in this case was entered January 9, 1918. This appeal appears to be from both the order and the final judgment, and the bond is made payable to all parties. We find no assignment assailing the action of the court in sustaining Hunt's plea. Evidently under the statute, in the absence of a controverting answer, the action of the court was proper in sustaining Hunt's plea of privilege. The only effect of the notice of appeal was to suspend the transfer or the case to Wichita county until the final determination of such appeal. Article 1903, R. O. S., as amended by the 85th Legislature, Acts 1917, at page 388 (Vernon's Ann. Civ. St. Supp. 1918, art. 1903). The cause of action set up by appellant against Hunt arose under a different contract from that sued on by appellee and could not be properly joined with the one set out by appellee; especially is this true if it would have the effect to defeat Hunt's privilege to be sued in his own county. *Ry. Co. v. Boger*, 169 S. W. 1096 (7). The appellant, by setting up an independent cause of action against an outside party, could not compel appellee to await final action on the plea of privilege therein before he could proceed upon the cause set up by him; certainly the transfer of the cause against Hunt would not carry the cause set up by appellee to Wichita county. We do not think the case of *Hickman v. Swain*, 106 Tex. 431, 167 S. W. 209, or *Griffith v. Gohlman*, 200 S. W. 233, can either



be said to go to the extent here contended or either support appellant's contention.

[4] Subdivision 24, art. 1830, R. O. S., applies in this case:

"Suits against any private corporation, association or joint-stock company may be commenced in any county in which the cause of action, or a part thereof, arose."

Venue may be laid in the county in which the contract was made or to be performed. The jury were authorized to find that Snearly, as agent for and acting for appellee, ordered through the mills the seed, and that appellant accepted the order, intrusting them to the same agent, to be delivered at Henrietta, Clay county. Without entering into a discussion of the subtleties of making a contract by two parties in different counties by letter as affecting the cause of action or a part thereof, as alleged in this case, we think it may be said that when appellee ordered a certain kind of seed, and appellant sent him through the mails, to be delivered to his address, the seed so ordered, there was an implied undertaking that the seed so delivered were the kind ordered. True, when appellant placed the seed in the post office at Sherman it accepted the order and consummated the contract, and it may be said that it at the same time breached its contract by sending seed not ordered. But this was not all of the cause of action. The contract, the breach, and the damages as well constituted the cause of action. It was said in *Ry. Co. v. Hill*, 63 Tex. 334, 51 Am. Rep. 642:

"This court has held that a cause of action consists as well of the right of the plaintiff as of the injury to that right. *Phillio v. Blythe*, 12 Tex. 127."

In the case referred to in the quotation, the court had under consideration an exception in the venue statute before a magistrate; that is where a cause of action accrued in a precinct other than that in which the defendant resided. In discussing this exception the court said:

"In what does a cause of action consist? It may be defined to consist as well of the right of the plaintiff in the action as of the injury to such right. In 1 *Chitty on Pleadings*, p. 288, the three principal points of a cause \* \* \* are said to be the right, whether founded upon contract or tort, (2) the urging to such right, and (3) the consequent damages. It may be admitted that the terms 'cause of action' are sometimes used in a more limited sense, and that where the cause is founded on a contract the contract is itself denominated the cause of action; but more frequently, and where the terms are used with more precision and accuracy, the terms embrace a much wider scope, and include not only the contract, but its performance, if executory, and also the breach of such contract. For instance, the statute re-

quires a plaintiff, in his petition, to set forth a full and clear statement of his cause of action. This requisition would not be filled by a bald statement of the term of the contract, if the contract lay at the foundation of the action. An averment of the performance of the contract by the plaintiff, of its breach by the defendant, and, according to *Chitty*, of the consequent damages, is equally essential with the statement of the terms of the contract itself, as, together, they contribute the body, or substance, of the cause of action. Is there any reason to believe that the Legislature in the justice's court act employed the terms in their more limited sense? I see none. They employed the phrase with reference, not only to cause of action in contracts, but also in torts independent of contract; and the definition must be sufficiently comprehensive to embrace causes of action of every description. \* \* \* In mixed transactions of this kind, where the cause partly accrues in one place and partly in another, there is more reason why the suit should be brought at the place of performance than at any other locality. There the witnesses to prove the value of the work or its defects will most probably live; and it would be unreasonable that they should be dragged from their homes to remote precincts to testify when such inconvenience can be avoided. Besides, the performance, in a just sense, may be said to be the most essential constituent of the cause of action."

In this case, when the seed were ordered, appellant must have known that the order was of that kind which would produce after its kind; that they were for planting in Clay county, where they were to be delivered, and that it would be known at that place whether they were defective or of the kind ordered. They were ordered from Clay county, to be delivered in Clay county. It was there the damages occurred, as a result of the breach, whether the breach occurred in Grayson county or in Clay county, or whether the contract was consummated in Grayson or in Clay county. It was there the injury was inflicted and the damages occurred, the measure of which was that which appellee would have made but for the defective seed delivered. This subdivision of the statute has often been under discussion by the courts, and the question as to what is the cause of action or a part thereof, and where it arose, has also received frequent consideration. We will refer to some of the more recent cases, where many authorities may be found collated and cited in the opinions: *Kell Milling Co. v. Bank*, 155 S. W. 325; *Wright v. Graves*, 198 S. W. 998; *Cummer Mnfg. Co. v. Kellam Bros.*, 203 S. W. 463; *Cuero, etc., v. Feeders' Supply Co.*, 203 S. W. 79; *Baker-Hanna & Co. v. Kempner*, 204 S. W. 350; *Cummer Mnfg. Co. v. Lilly*, 204 S. W. 1010.

[5, 6] The second assignment is to the effect that the evidence shows that appellee had no contract with appellant of any kind, but that

he purchased from Snearly, and did not know from whom Snearly purchased. The jury found that Snearly was acting as the agent of Boatenhamer in the purchase of the seed, and both Snearly and Boatenhamer so testified. The undisclosed principal may sue a third party with whom his agent has contracted to enforce his rights under the contract so made. *Kempner v. Dillard*, 100 Texas, 505-510, 101 S. W. 437, 438, 123 Am. St. Rep. 822. The real difficulty in this case is not presented by assignment, but by argument; that is, that the petition does not sufficiently allege a contract so made. Under a general exception it may be inferred from the allegation that Snearly in ordering did so for appellant. However, there is no doubt under Snearly's pleadings that he ordered as agent of appellee, and also under appellee's reply to the plea of privilege it would appear that such was the effect of the allegations. We believe all the pleadings should be taken together, and that they clearly present the issue of a contract made for appellee by Snearly as his agent with appellant. We do not feel justified in holding after verdict that the pleadings are so defective that the judgment should be reversed.

We do not believe that there is reversible error shown under the third assignment.

The fourth and fifth assignments are not properly briefed. The objections to the charge are not set out, but in looking to the transcript we find only a general exception to the charges. It is not shown what the objections to the charge were at the time they were made.

The sixth assignment is not copied in the brief. However, we think the trial court gave the proper measure of damages in this case as applied to the facts. *Hoopes v. East*, 19 Tex. Civ. App. 531, 48 S. W. 764.

The seventh, eighth, ninth, and tenth assignments are overruled. These assignments present substantially the issues discussed by us under the first and second assignments.

The judgment will be affirmed.

#### On Motion for Rehearing.

[7, 8] The only ground set up by the motion is that the county court did not have jurisdiction over the subject-matter. The appellees do not ask for judgment in excess of \$1,000, and did not ask for interest in any form. It must affirmatively appear that plaintiff sues for an amount in excess of the jurisdiction of the court. All intendments of the plaintiff's pleadings will be held in favor of the jurisdiction of the court. *Railway Co. v. Rayzor*, 106 Tex. 544, 172 S. W. 1103. A prayer for general relief will be confined to that which the court has jurisdiction to grant.

Motion overruled.

#### HOUSTON v. SHEAR et al. (No. 5967.)

(Court of Civil Appeals of Texas, Austin, Jan. 15, 1919. On Motions for Rehearing, April 16, 1919. On Appellee's Second Motion for Rehearing, May 2, 1919.)

#### 1. EXECUTION ⇨268—SALE OF LAND SUBJECT TO CONTRACT LIENS—RIGHT ACQUIRED.

Where lands subject to contract liens are sold on execution against the owner, the purchaser at execution sale succeeds to his rights, and equity confers upon him the privilege of redemption, but only on condition that the rights acquired at execution sale are valid.

#### 2. EXECUTION ⇨251(2) — SETTING ASIDE SALE—IRREGULARITIES—INADEQUATE PRICE.

Statutes governing executions are for the most part directory in their nature, and mere irregularity in connection with gross inadequacy of consideration is insufficient to vacate a judicial sale, unless the irregularity in some way conduced to that inadequacy; although, when the price is enormously inadequate, slight irregularities will be sufficient to justify setting aside the sale by a direct proceeding therefor.

#### 3. EXECUTION ⇨250—ADEQUACY OF PRICE—BUYER'S AGREEMENT TO PAY LIENS—REDEMPTION.

The sale for the sum of \$85 of property of an admitted value of \$85,000, but subject to valid and subsisting liens aggregating a sum considerably in excess of this value, would not warrant an equity court in nullifying the sale for inadequacy of price, where such liens must be paid to secure and enjoy good title to the property and as a condition of redemption.

#### 4. BANKRUPTCY ⇨11 — JURISDICTION OF STATE COURT—LIMITATION.

Authority for the exertion of exclusive and summary jurisdiction by a court of bankruptcy must find enumeration in the acts of Congress, prescribing a "uniform system of bankruptcy of the United States" (U. S. Comp. St. §§ 9585-9656), since such tribunals are creations of statute, and can exercise no judicial powers other than those authorized.

#### 5. EVIDENCE ⇨43(4) — JUDICIAL NOTICE — PROCEEDINGS IN OTHER COURTS—BANKRUPTCY.

State courts and courts other than the initial court of bankruptcy are not required to take judicial cognizance of the proceedings in a bankruptcy court.

#### 6. BANKRUPTCY ⇨216 — JURISDICTION OF STATE COURT—BANKRUPTCY PROCEEDINGS AGAINST JUDGMENT DEBTOR.

A state court was not precluded from jurisdiction for the judicial sale of property, where its judgment was undisturbed by any appropriate action of the bankruptcy court, in which an involuntary petition was filed by judgment debtor's creditors, by taking actual possession of bankrupt's estate, or enjoining execution or sale, or even a suggestion or motion to stay, made in the state court.

# 7. BANKRUPTCY ~~§~~387—COMPOSITION—"RE-INVEST"—NO ADJUDICATION.

The word "reinvest," as used in Bankruptcy Act, § 70-f (U. S. Comp. St. § 9854), providing that "upon the confirmation of the composition offered by a bankrupt the title to his property shall thereupon reinvest in him," means that the owner is to receive the property anew, and the act is without application where there was no divestment of the title, there having been no adjudication in the involuntary proceedings.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Reinvest.]

# 8. CORPORATIONS ~~§~~547(1)—INSOLVENCY—JUDGMENT CREDITORS—VALIDITY OF EXECUTION SALE.

Where a corporate judgment debtor was insolvent, and had ceased to do business when execution was levied on its property, the judicial sale conveyed no title as against the rights of other creditors of the corporation.

# 9. CORPORATIONS ~~§~~547(1)—INSOLVENCY—JUDICIAL SALES AFTER PAYMENT OF OTHER DEBTS—VALIDITY.

Where a corporation has become insolvent and ceased to do business, the title to its property is vested in its officers in trust for the benefit of creditors; but when its debts are paid the trust is discharged, and presents no impediment to title acquired under judicial sale.

# 10. EXECUTION ~~§~~268—REDEMPTION FROM LIENS—TENDER—PLEADING.

A redemptioner, purchaser at execution sale, need not, as a condition precedent to the exercise of the right to redeem the property from existing vendor's and other liens, make his tender prior to the filing of suit; an offer to pay what is due, incorporated in the bill, being sufficient.

# 11. EXECUTION ~~§~~268—REDEMPTION FROM LIENS—GOOD FAITH—ABILITY AND WILLINGNESS TO REDEEM—EVIDENCE.

Where a purchaser at execution sale, seeking redemption of the property from existing liens, gave uncontradicted testimony that he was ready, able, and willing to pay off and discharge the incumbrances, the court should determine his ability and good faith, by according him opportunity upon prescribed terms and conditions.

# 12. EXECUTION ~~§~~268—PURCHASER'S REDEMPTION FROM LIENS—FRACTIONAL INTEREST.

Where a purchaser at judicial sale is entitled to redeem the properties from existing liens, he may apply any lawful available means to secure the money, which the court might direct paid by way of redemption, and it is immaterial that his testimony shows that when redeemed his interests will be only a fractional portion of the value of the property, and that the remainder will be owned by others furnishing him money.

# 13. EXECUTION ~~§~~278—REPAYMENT OF MONEY PAID TO PRESERVE THE PROPERTY.

Money expended for composition with creditors to prevent the property from being sold in bankruptcy proceedings was expended in the

preservation of the property, and the purchaser at execution sale had a right to recover possession on repayment of such amounts thereof as remained unpaid, together with other liens.

## On Motions for Rehearing.

# 14. SUBROGATION ~~§~~22, 26—NECESSITY OF PAYMENT—VOLUNTEER.

The right of purchaser at execution sale to redeem from lien claims is restricted to those properties to which he acquired legal title, and by payment of liens on other property he is not subrogated to the judgment debtor's right therein, where not compelled to do so to save himself a loss, since the right of subrogation is never accorded to a mere volunteer.

# 15. EXECUTION ~~§~~268—PURCHASER'S REDEMPTION FROM LIENS—DEDUCTION OF AMOUNTS PAID TO PRESERVE PROPERTY.

Where a large part of the fund employed in effecting a composition with the general creditors of a judgment debtor, which insured to debtor's benefit, was derived from sale and rental of debtor's properties, the amount realized therefrom should be properly deducted from the amount paid in redemption from liens by purchaser at judicial sale.

## On Appellees' Second Motion for Rehearing.

# 16. EXECUTION ~~§~~268—PURCHASER'S REDEMPTION FROM LIENS—DEDUCTION OF AMOUNTS PAID TO PRESERVE PROPERTY—INSURANCE MONEY.

Where the agreement by a grantee and assignee of judgment debtor corporation to advance money for composition with its unsecured creditors was primarily between the original lienholders and himself, rather than the corporation, whether the purchaser at judicial sale can deduct from the amount paid to redeem from liens on properties actually covered by his purchase the amount paid from insurance money received for destruction of property acquired depends upon whether the destruction of the property was before or after judicial sale.

Appeal from District Court, Travis County; George Calhoun, Judge.

Suit by H. M. Houston, as purchaser, under a judgment against the Farmers' & Ginners' Cotton Oil Company, Incorporated, and another, jointly, against H. H. Shear and others, as grantees and assignees of such judgment debtors, to redeem certain properties claimed to have been purchased at execution sale. From a judgment denying the right of redemption and the cancellation of several sheriff's deeds under which he claims title, plaintiff, H. M. Houston, appeals. Judgment reversed, and cause remanded for new trial.

Fleet, McClendon & Shelley, of Austin, for appellant.

J. D. Williamson, of Waco, and White, Cartledge & Wilcox and Lightfoot, Brady & Robertson, all of Austin, for appellees.

FISHER, Special Judge. Appellant, H. M. Houston, as purchaser under a judgment against the Farmers' & Ginners' Cotton Oil Company, Incorporated, and J. L. Hunter, jointly, brought suit in the district court of Travis county against appellees, H. H. Shear, the Austin National Bank, the Boatmen's Bank, D. T. Bomar, E. P. Wilmot, and C. R. Laws, as grantees and assignees of such judgment debtors, to redeem certain properties claimed to have been purchased by him at execution sale. From a judgment denying the right of redemption and the cancellation of the several sheriff's deeds under which he claims title, appellant prosecutes this appeal.

The trial court's findings of fact are both lengthy and elaborate. For a consideration of the merit of the several questions raised we do not deem it necessary that there be a reiteration of these findings. Such findings as we conceive to be controlling of the substantive rights involved, supplemented by such as are particularly referred to in the body of the opinion, may be summarized in the following:

#### Findings of Fact.

(1) On February 17, 1914, J. L. Hunter conveyed to the Farmers' & Ginners' Cotton Oil Company, a corporation, designated real estate in Travis county, for which it executed, in part consideration therefor, its certain vendor's lien note for \$15,000, which, of contemporaneous date, was transferred by the grantor, J. L. Hunter, to D. T. Bomar.

(2) Subsequent to this transaction, and at various times prior to November 19, 1915, the date upon which certain creditors brought a bankruptcy proceeding against the Farmers' & Ginners' Cotton Oil Company, said company had executed to the several appellees notes secured by deeds of trust in various amounts on which there was due and owing at the time of trial approximately the sum of \$95,000. The parties agreed that at the date of trial the properties had a value of \$85,000.

(3) In addition to the secured indebtedness against the properties, appellees, or certain of them, had paid out, or caused to be paid out, for the protection and preservation of the properties, at the date of trial some \$4,396.28.

(4) On November 19, 1915, as previously recited, certain creditors filed a petition in involuntary bankruptcy against the Farmers' & Ginners' Cotton Oil Company, alleging as grounds therefor acts of bankruptcy and insolvency. The corporation answered under oath, denying such acts and the fact of its insolvency. Subsequent to the filing of the petition no further action was taken in the proceeding until a composition was effected with its general creditors, as hereinafter stated, it being agreed that there had been no adjudication of the alleged bankrupt in the proceeding referred to, that no trustee was

ever appointed, and that at no time were the properties of the Farmers' & Ginners' Cotton Oil Company ever placed in the actual possession of a bankruptcy court through the agency of a receiver or otherwise.

(5) February 8, 1916, and subsequent to the institution of the bankruptcy proceeding, one M. M. Graves obtained judgment in Harris county, Tex., against the Farmers' & Ginners' Cotton Oil Company and J. L. Hunter, jointly, for the sum of \$273. Execution issued thereon, and the properties in controversy were sold by the sheriff of Travis county, Tex., to appellant on July 4, 1916, for the aggregate sum of \$85, and properly executed deeds, pursuant to sheriff's sale, were placed of record in the deed records of Travis county on July 6, 1916. The state court rendering the judgment against the Farmers' & Ginners' Cotton Oil Company and its codefendant, J. L. Hunter, had no actual notice of the proceeding in bankruptcy against the former, and it is admitted that no action was taken to stay the proceedings in the state court subsequent to the filing of the petition in involuntary bankruptcy. It appears that appellant was notified of the pendency of the bankruptcy proceedings on the day of sale and shortly prior to his purchase at execution sale.

(6) July 10, 1916, the Farmers' & Ginners' Cotton Oil Company, in consideration of the cancellation and discharge of the lien indebtedness against the properties, executed its deed of conveyance to appellees, C. R. Laws, E. P. Wilmot, and B. T. Bomar. Subsequently, and prior to February 15, 1917, appellees Laws, Wilmot, and Bomar conveyed the properties which they had acquired to the appellee H. H. Shear, who is the real contestant of appellant herein. On the date last mentioned the Farmers' & Ginners' Cotton Oil Company filed in the court of bankruptcy an offer of composition with its general and unsecured creditors, which, after appropriate notice and a compliance with other prerequisites, was in all things confirmed by the court, and on March 20, 1917, the proceeding against the corporation was in all things dismissed.

#### Opinion.

[1] Where, as here, lands subject to contract liens are sold on execution against the owner, the purchaser at execution sale succeeds to his rights, and equity confers upon him the privilege of redemption, but only on condition that the rights acquired at execution sale are valid. *Willis v. Smith*, 66 Tex. 31, 17 S. W. 247; 27 Cyc. (Mortgages) p. 1806.

[2] Appellee challenges the validity of the sales under which appellant claims, contending that the same were void: (1) Because of statutory irregularities, accompanied by inadequacy of price; (2) that at the date of sale the properties were in custodia legis, under administration by a court of bankruptcy,

and that upon a composition proceeding had therein this in legal effect restored the title to the bankrupt, freed from the claims sought to be maintained by appellant; (3) that the judgment debtor (the Farmers' & Ginners' Cotton Oil Company) being insolvent, and having ceased to be a going concern at and before the date of the levy of the execution under which the properties were sold, its assets became a trust fund for all of its creditors, and consequently that appellant could not acquire at sheriff's sale the title to properties subject to pro rata distribution among all the creditors; and (4) the validity of the court's finding that appellant, in seeking to redeem, made no tender of the amounts due and secured by subsisting liens upon property, or expenses or advances paid out by appellees, or certain of them, of them, for their necessary preservation.

We shall review the availability and the validity of these contentions in the order outlined.

Statutes governing executions are, for the most part, directory in their nature. *Pearson v. Flanagan*, 52 Tex. 266; *Odle v. Frost*, 59 Tex. 684. And, as stated in *Allen v. Pearson*, 60 Tex. 607:

"\* \* \* It is apprehended that under no system would a mere irregularity, when taken in connection with gross inadequacy of consideration, be held sufficient ground for vacating a judicial sale, unless that irregularity in some way conduced to that inadequacy."

The principle is again reiterated in *House v. Robertson*, 89 Tex. 687, 36 S. W. 252, in which the Supreme Court says:

"It is true that inadequacy of price alone is not as a rule a sufficient reason for avoiding a sheriff's sale \* \* \* under a valid judgment and execution, but, when the price paid for the land at such sale is enormously inadequate and disproportioned to the value of the land sold, slight irregularities will be sufficient to justify setting the sale aside by a direct proceeding for that purpose. *Allen v. Stephens*, 18 Tex. 672; *Taul v. Wright*, 45 Tex. 895."

[3] Under this criterion, would we be justified in holding under the facts that the irregularities complained of proximately influenced the trifling price for which the properties were actually sold? It is admitted that the properties were worth the sum of \$85,000, and were sold under execution for no more than \$85. Manifestly, if property valued at \$85,000 was acquired for the paltry and insignificant sum of \$85, without further obligation on the part of the purchaser, a court of equity would be moved to accord relief against such gross and flagrant inadequacy upon any pretext open to it. But should property, as in the instant case, of an admitted value of \$85,000, but subject to valid and subsisting liens aggregating some considerably in excess of this value, be sold for \$85, would a court of equity be warrant-

ed in nullifying the sale upon the ground of inadequacy of price? We think not; and when it is considered that appellant, to secure and enjoy good title, must pay off liens and charges, measuring many thousands in excess of the admitted value placed upon the properties purchased, we are presented, not with the question of inadequacy of price, but rather, as it seems to us, the anomalous condition of a purchaser buying property at a price in excess of its value. With this, however, we are not concerned, and in view of the admitted lien obligations upon the property which must be discharged by appellant as purchaser, as a condition to his privilege of redemption, we conclude that the contention is without merit.

[4] The next question in order is: Was the sale of the properties to appellant rendered void because of the pendency at the time of a bankruptcy proceeding against the judgment debtor (Farmers' & Ginners' Cotton Oil Company)? This is the position of appellees predicated upon the proposition that the filing of the petition in bankruptcy, in legal contemplation, placed the property of the bankrupt in custodia legis, and upon this hypothesis that no court other than the court of initial jurisdiction could properly entertain suits affecting the title or estate of a bankrupt.

If this view is tenable, the authority for the exertion of exclusive and summary jurisdiction by the court of bankruptcy must find enumeration in the Acts of Congress prescribing a "uniform system of bankruptcy of the United States and Territories" (U. S. Comp. St. §§ 9585-9656), since it is fundamental that such tribunals are creations of statute, and can exercise no jurisdictional powers other than those authorized.

[5] It cannot be questioned that the Acts of Congress confer upon designated federal courts the exclusive rights to administer the benefits of the so-called Bankruptcy Act, and, as stated by the Supreme Court in *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 32 Sup. Ct. 98, 56 L. Ed. 208:

"It is the purpose of the bankruptcy law, passed in pursuance of the power of Congress, to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with the view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition. It is true that under section 70a of the Act of 1898 [U. S. Comp. St. § 9654], the trustee of the estate, on his appointment and qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt, but there are many provisions of the law which show its purpose to hold the property of

the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings. \* \* \*

The question, therefore, is, Did the admitted failure by the court of bankruptcy to exercise any of the powers which would have withdrawn the estate of the bankrupt from interference on the part of other courts leave the latter free to entertain suits against the bankrupt, and the corresponding power to reach the properties of the bankrupt, title to which was in it at the time a sale was had pursuant to the judgment of the state court? To hold negatively would be to announce that state courts, or any other court than the initial court of bankruptcy, must take judicial cognizance of the proceedings in that court, contrary to well-settled judicial announcements. *Conner v. Long*, 104 U. S. 228, 26 L. Ed. 726; *Bank v. Bray*, 182 S. W. 968.

[6] We therefore hold that the state court, under whose judgment appellant purchased, was not precluded from entertaining and exercising jurisdiction. Its judgment being undisturbed, the judgment creditor was entitled to all the remedies authorized by law for its enforcement, and could competently proceed with the satisfaction of his remedies, until his rights were cut off or abbreviated by appropriate action had in the court of bankruptcy, either by it taking actual possession of the estate of the bankrupt before the rights of third parties attached, or, upon proper predicate, enjoining an execution and sale of any of the estate of the bankrupt awaiting a determination of the question of adjudication. No such action was taken in the instant case, nor was there any suggestion made in the state court, by motion to stay or otherwise, inviting its attention to the pendency of the bankruptcy proceeding against the Farmers' & Ginners' Cotton Oil Company, the judgment debtor. The court of bankruptcy did nothing, in the exercise of its jurisdictional powers, subsequent to the filing of the petition. The Circuit Court of Appeals for the Eighth Circuit, in *Re Rathman*, 183 Fed. 913, in particular 925, 926, 106 C. A. 253, 265, in discussing the essential requirements of summary jurisdiction, says:

"If the commencement of bankruptcy proceedings without more, without any act of the bankruptcy court, or any of its officers, to give notice to adverse claimants, or to reduce the property claimed to belong to the bankrupt to the possession of the officers of that court as his property, gives it constructive possession, and hence a legal custody that enables it to determine by summary proceedings the merits of adverse claims to liens and titles to such property in the actual possession of others, then no case could ever arise in which any other court could have jurisdiction by plenary suit to determine the merits of such claims; for in every case a bankruptcy proceeding is com-

menced, and the only ground on which the jurisdiction to determine summarily the merits of such claims is sustained is that the bankruptcy court's legal custody of the property excludes the jurisdiction of every other court, and gives it the power to determine summarily all claims to liens upon, or interests in, the property in such custody. But this theory flies in the face of the settled rule, repeatedly announced by the Supreme Court, that the actual possession by the bankruptcy court is the indispensable condition of its exclusive and of its summary jurisdiction here."

[7] The contention is further made in this connection by appellees that the sales relied upon by appellant are void, for the reason that, upon a confirmation of the composition had in the court of bankruptcy with the general creditors of their grantor (the Farmers' & Ginners' Cotton Oil Company), its title under the operation of section 70f of the Bankruptcy Act reinvested in the bankrupt, freed and discharged from such claims as are sought to be asserted by appellant. The provision (section 70f) provides:

"Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon reinvest in him."

It requires no extended comment to show that the provisions cannot be properly invoked here to defeat the rights acquired by appellant as purchaser at execution sale. For the bankrupt to be reinvested with title means, if the word "reinvest" is to be given the meaning and application apparently intended, that the owner of the title is to receive it anew. This necessarily implies that, before there could be any reinvestment, there must have been a divestment of the title. If, as undisputed, there was no divestment of title because of no adjudication and no appointment of a trustee in whom the title, under operation of the act, vests, how could the bankrupt, appellees' assignor, be reinvested with title to the estate upon the confirmation of the composition, when none of the conditions which would have divested it of title were ever called into operation? The bankrupt was never divested of title to his estate in contemplation of the section relied upon, and since, prior to a confirmation, appellant purchased such title as the defendant in execution then had, his rights as purchaser could not be affected by a composition proceeding to which he was not a party.

[8] Appellees next contend that the sheriff's sale was void for the reason that the Gin Company at the time of the levy of the execution was insolvent, and had ceased to be a going concern.

It was held by this court in *Harrigan v. Quay*, 27 S. W. 897, that "the fact that a corporation may be insolvent does not deprive the creditor of his right to sue it and to levy upon its property to satisfy his judgment." To the same effect is *Moon v. Grain Co.*, 13 Tex. Civ. App. 103, 35 S. W. 339, by

the Court of Civil Appeals for the Fourth District.

It will be observed that in the first case above cited nothing is said about the corporation having ceased to do business. In the second case the defendants alleged that the Grain Company had not ceased to do business when the attachment was levied; and the findings of fact show that this was true, though the Grain Company was then insolvent.

In *Wright v. Duless*, 12 Tex. Civ. App. 136, 34 S. W. 302, it was held by the Court of Civil Appeals for the Second District that a creditor who attaches the property of an insolvent corporation, which has ceased to be a going concern, acquires no right thereby as against other creditors of such corporation. To the same effect is *Rogers v. Lumber Co.*, 11 Tex. Civ. App. 108, 33 S. W. 312.

These decisions are based upon the doctrine announced by our Supreme Court in *Lyons Thomas Hardware Co. v. Perry Stove Co.*, 86 Tex. 143, 24 S. W. 16, 22 L. R. A. 802, and *Orr Shoe Co. v. Thompson*, 89 Tex. 502, 35 S. W. 473. In the latter case Mr. Justice Brown, speaking for the court, said:

"In the case of *Lyons Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 86 Tex. 143 [24 S. W. 16, 22 L. R. A. 802], this court held that when a corporation becomes insolvent and has ceased to do business, or, by the act of making a deed of trust, mortgage, or conveyance of its property, terminates its business with no intention or ability to resume it, it has no power to give preference to one or more of its creditors over others; but its assets become a trust fund in the hands of its directors, to be distributed pro rata among its creditors to the extent that such assets are not incumbered by valid prior liens. The rights of all creditors in the fund are by law fixed so soon as the conditions arise out of which the trust relation springs. After the trust attaches, neither the corporation nor the trustees can by any act of theirs affect the rights of the creditors, and we think that it necessarily follows that no creditor can, by any act of diligence on his part, accomplish that which neither the corporation nor trustees could do by agreement with him. In such case the trust attaches in favor of creditors without acceptance by them. If one could secure an advantage by garnishment or attachment over other creditors, the equality of right created by law would be destroyed. Indeed, it would be a remarkable proposition to say that one by legal process may appropriate to himself that which belongs equally to him and to others."

It being admitted by the parties hereto that the Gin Company was insolvent, and had ceased to do business when the execution was levied on its property, the sale under such execution conveyed no title, as against the rights of other creditors of said corporation. But no such creditors are asserting any rights to such property in this suit. No such creditors are parties to this suit. In this respect this case is similar to the case of *Florsheim v.*

*Wettermark*, 10 Tex. Civ. App. 102, 30 S. W. 506. The attempt to have such distribution made by the bankruptcy court was abandoned when the proceedings therein were dismissed under the composition proceedings.

[9] In the instant case there is this fact in addition to those stated in *Florsheim v. Wettermark*, supra: There are no creditors who could demand a ratable distribution of the estate of the Gin Company. The debts of all creditors were discharged in the composition proceedings, except the debts of the secured creditors, whose debts, together with the amounts expended in the preservation of the property, appellant herein seeks to pay.

As stated in *Lyons v. Perry* and in *Orr v. Thompson*, supra, upon the Gin Company becoming insolvent and ceasing to do business, title to its property was vested in its officers; but such title was a special title, held in trust for the benefit of creditors. This title ceased when the debts of the creditors, the beneficiaries in such trust, were discharged. There can be no trust estate without a cestui que trust.

For the reasons hereinbefore stated in our discussion of the effect of the bankruptcy proceedings, we hold that title to its property remained in the Gin Company, notwithstanding that it became insolvent and ceased to do business, subordinate only to the special title vested by law in its officers in trust for the creditors of such corporation. Such trust estate having ceased, its former existence presents no impediment to the title acquired by appellant under the sheriff's sale.

[10] The trial court found that appellant was not, at the time of trial, ready, able, or willing to redeem the properties in controversy by paying off the amount of valid and subsisting liens to which the properties were subject, and that he had never offered, and did not at the time of trial offer, to pay the amounts necessarily expended by appellees in their necessary preservation.

The finding is, in essence, a deduction from the facts testified to by appellant alone. The evidence on the issue, so far as material, is as follows:

"I did not at any time prior to the filing of the petition in this case know the exact amount of money that was due on the various liens, principal, interest, and attorneys' fees, machinery liens, insurance charges, and other matters that constituted charges against these properties. I am now ready and able and have the ability to pay such amount as may be found to be due on such items against this property if it is given to me by way of redemption. \* \* \*

"With regard to my statement that I had the ability and the readiness to redeem this property, I have not the money arranged and in bank to pay for this property if it should be adjudged to me, but it will be there within forty-eight hours. I have in my pocket a contract that I think would satisfy the court. That contract is not yet executed and put in the shape of money. My estimate is that it would take for-

ty-eight hours to get that money up. I am contributing to the extent of twenty-five thousand dollars to buy the property. That amount of money is all provided for; I can borrow it. All of the remainder is provided for. I have made provision for and can borrow twenty-five thousand dollars as my part of it. As to the remainder, I have a contract in relation to it; it is executed, but not converted into money. That contract is executed by thoroughly substantial persons. My interest in the redemption of this property that I am seeking in this suit is limited to twenty-five thousand dollars. If this property should be redeemed, there are other parties that will furnish the principal part of the money. As to my not being interested in it further than I have stated, I have a contract with those parties for the control and operation of the business. I have an arrangement with reference to operating it and controlling it for the several owners of the property. I have made provision for a sum of money which, in the opinion of my attorneys, is in excess of any possible decree of the court, and to provide for any additional expense connected with acquiring the property and putting it in running condition and doing business and for paying attorneys' fees. That sum is \$140,000. That includes the payment of attorneys' fees and necessary expenses to put the mill in proper running order. The amount allowed for those expenses is what is left over and above the decree of the court. I have figured on an amount that will be left over, but have not arrived at it. I have figured on an amount of about \$126,000, and the other \$14,000 would be expended in the manner I have indicated. I do not say that \$126,000 is the maximum amount that would be available to redeem the property. I have already stated that whatever amount would be needed to redeem the property up to \$140,000 was available for that purpose. In other words, I figure that \$140,000 would cover whatever might be necessary for me to pay to redeem the property, pay my attorneys' fees, and put the mill in proper running order. None of the parties who are to be interested in this property, if it is redeemed, are parties to this suit except myself. \* \* \*

"The arrangement referred to is to become effective after I secure the property in this proceeding, if I do secure it. It is tentative, and depends upon the recovery by me of the property in this suit. My arrangement is to raise as much as \$140,000, and to use such portion of it as may be necessary to redeem these properties, the balance, if any, to be used for the other purposes I have mentioned."

Appellees seek to defend the correctness of the court's finding upon the grounds, generally, (1) that, no offer of redemption having been made prior to the filing of the bill, the right to redeem was lost; (2) that there was no or insufficient evidence which would have justified the court in finding that appellant was either ready, able, or willing to make good his tender by paying off the liens and charges against the properties; and (3) that he was not seeking to redeem the properties for himself, but for the use and benefit of others.

It being undisputed that no tender was

made by appellant to appellees or their predecessors in interest prior to the filing of the bill, did this failure cut off the equity of redemption where it is both alleged and shown that, prior to the institution of suit, he did not know the exact amount of lien indebtedness against the property, nor with certainty of the distributive interests of the several appellees? That appellant might have made the ascertainment with certainty is strongly suggested. Still we do not understand, nor have we found any well-considered adjudication announcing the requirement, that the redemption must, as an indispensable condition to the exercise of the right of redemption, make his tender prior to the filing of suit. An offer to pay what is due, if incorporated in the bill, is sufficient. *Spann v. Sterns*, 18 Tex. 563; *Ward v. Worsham*, 78 Tex. 180, 14 S. W. 453; *Perego v. White*, 77 Tex. 196, 13 S. W. 974; *Maloney v. Eaheart*, 81 Tex. 283, 16 S. W. 1030; 27 Cyc. title Mortgages, p. 1845. Appellant met this requirement, specifically alleging:

"\* \* \* Plaintiff further avers that, through the public records, or any other means at his hands, he is not able to determine with any degree of accuracy the total amount of money which is required to be paid by him for the purpose of having the title to all of the above-described property vested in him; but plaintiff further avers that he is ready, able, and willing, and hereby offers, to pay such of said defendants, or their assigns, as upon trial of this cause may be found to be entitled to receive same, the full amount of money which the court may decree that he should be required to pay in order to redeem all of said property from said liens and to have the title thereto vested in him."

[11] The next inquiry in order is, Was the court authorized in deducing from the plaintiff's evidence that he was not, at the date of trial, either ready, able, or willing to pay off and discharge the incumbrances with which the properties were charged, including, besides the ascertainable contract liens, advances made by appellees, or certain of them, for the necessary and proper preservation of the properties? There was no actual tender at the time of trial. Appellant did, however, testify, and his testimony stands uncontradicted, that he had made arrangements for the procurement of such funds as might be necessary to discharge all liens and charges as were judicially ascertained and established by the court, and that the money would be available for the purpose within a period of 48 hours from the court's announcement of the amount found to be due. In legal contemplation, was this showing sufficient to give appellant the right of redemption if he made good his assertion to pay off the amounts within the time stated or within a time fixed within the discretion of the court for the exercise of the privilege? There was but one way, it seems to us, in which the ability and good faith of appellant could be authori-



tatively determined, and that was to accord him the opportunity of payment. It was the province of the court, in the exercise of its equity powers, to prescribe the terms and conditions under which it would receive and authorize payment, or forever foreclose the privilege of redemption if appellant did not avail himself of the right within the time and upon the conditions decreed. *Jones v. Porter*, 29 Tex. 456; *Simkins, Equity*, p. 361.

[12] Appellees further contest the sufficiency of the tender upon the ground that appellant's own testimony shows that he was not seeking redemption for his exclusive benefit, but that his interest in the properties, in the event it was established that he was entitled to redeem, constituted only a fractional portion of their value. We do not concur in this position. Appellant, if entitled to redeem the properties could employ any lawful means available and open to him to secure the money which the court might direct paid by way of redemption. If appellant had secured, as his uncontradicted testimony suggests, the agreement of others to advance the funds in the redemption of the properties, is the right to be defeated merely because the redemptioner invokes the aid of another for the protection and exercise of a remedy which equity conferred upon him? We think not, for to hold otherwise, under such circumstances as are here presented, would be to defeat the exercise of the very right which the principle of redemption recognizes. In contests of this nature, the court is primarily concerned in determining whether the redemptioner is entitled to the exercise of the equitable privilege. If it concludes affirmatively, its only remaining consideration is to give timely and appropriate protection to those having senior interests in the property sought to be redeemed. If their interests are protected and discharged, how can complaint be urged that the fund in redemption may have come or is to come through the agency of a third person?

[13] For the reasons stated, we conclude that the appellant had the right to pay off the liens against the property purchased by him at the execution sale, and to recover possession of such property upon making such payments, together with the amounts expended by appellee Shear in the preservation of such property. As the amount expended by Shear in the composition proceedings prevented the property of the Gin Company from being sold in the bankruptcy proceedings, we hold that it was expended in the preservation of such property. It appears that a portion of the money so expended by Shear was returned to him from the proceeds of a certain fire insurance policy. It is not made to appear with certainty to whom the proceeds of this policy belonged. We are therefore unable to determine the exact amount appellant

should pay. The determination of the amounts to be paid in redemption can be computed and fixed by the trial court.

For reasons stated the cause is reversed and remanded for a new trial in accordance with the principles herein announced. Reversed and remanded.

#### On Motions for Rehearing.

Upon grounds and for reasons assigned in an opinion rendered herein on January 15, 1919, we reversed and remanded this cause. In this disposition we still adhere. We find, however, upon an examination of the pending motions for rehearing, that we failed to make a specific disposition of certain of the issues which, in two respects at least, we conceive to be material to the rights of the parties.

The first is whether appellant, as purchaser of the properties of the Farmers' & Ginners' Cotton Oil Company and one of the gin properties, would, upon payment of all the primary liens resting against the mill properties which would operate as a discharge of the secondary liens against the gin properties, be entitled, under the doctrine of subrogation, to assert title to such unacquired gin properties.

The second is whether the moneys derived by the appellee Shear, or his predecessors in interest, from the sale and rental of designated gin properties, and the collections realized on account of the destruction of certain gin properties by fire, and employed by appellee in effecting the composition with the general creditors of the Farmers' & Ginners' Cotton Oil Company, should be deducted from the amount to be paid by appellant by way of redemption, where it appears that the property sold, as well as the property destroyed, was incumbered to secure liens which must must be discharged by appellee as a condition to his exercise of the right of redemption.

Our additional findings of fact upon these respective contentions may be summarized as follows:

1. The Farmers' & Ginners' Cotton Oil Company, at various dates prior to November 19, 1915, the date upon which certain of its general creditors filed a petition in involuntary bankruptcy against it, had borrowed on its promissory obligations sums which, with interest and attorney's fees computed to the date of judgment rendered herein, aggregated some \$137,000. This indebtedness was secured, or sought to be secured, by a pledge or hypothecation of all of its assets, consisting of certain acreage, mill sites, improvements, etc., located in the city of Austin. J. L. Hunter, who, as found in the original opinion, was a joint judgment debtor with the Farmers' & Ginners' Cotton Oil Company, under which appellant, Houston,

purchased designated properties, was individually liable upon many of said mill company's obligations; and on October 1, 1915, but subsequent to the execution of the notes of said Farmers' & Ginners' Cotton Oil Company, Hunter, for the purpose of additionally securing or supplementing the security of such obligations of said mill company, conveyed in trust certain gin properties, scheduled as follows:

First. Two acres, constituting the Del Valle gin.

Second. One and three-tenths acres, constituting the Creedmoor gin.

Third. Lots 6, 7, 8, 9, 10, 11, 12, and 13, block 2, town of Sprinkle.

Fourth. Lots 19 and 20, block 2, town of Sprinkle.

Fifth. Lots 5 and 14, block 2, town of Sprinkle.

Sixth. Lots 19 and 20, block 2, town of Sprinkle.

Seventh. Two acres, more or less, constituting the El Roy gin.

Eighth. Lot No. 8, known as "gin lot."

Ninth. Leasehold interest in outlot No. 2, block No. 7, covering all gin stands, gin machinery, etc., located thereon.

At execution sale appellant purchased of the gin properties only the third and fourth items of the foregoing schedules, the property so acquired being commonly known as the "Sprinkle gin property."

2. From the stipulations and agreements of the parties we adopt the following:

"20. It was further agreed and admitted by the parties that, subsequent to the execution and delivery of the deeds of trust of the Austin National Bank and the Boatman's Bank, heretofore referred to, certain gin property located on said lots in the town of Sprinkle was destroyed by fire, and the sum of \$3,306.48 was collected by the owners of the notes secured by liens on said property, as they were entitled to under the provisions of the deeds of trust; also that the sum of \$180 was received by C. R. Laws, as rentals from the gin properties heretofore referred to, for the ginning season of 1916-1917, and the further sum of \$75 was refunded to said C. R. Laws on account of insurance paid on said El Roy gin at the time same was sold to A. W. Johnson."

It was further agreed and admitted by the parties that—

"in the purchase of said property by the defendant H. H. Shear it was a part of said trade that he was to offer the composition in bankruptcy which was offered, and that \$10,000 was deposited by him for said purpose in accordance with said agreement; that the amount of the proceeds of the sale of the El Roy gin, to wit, \$8,500, and the \$3,306.48 insurance money collected on the Sprinkle gin, less the amount set out in Exhibit B, aggregating \$4,046.61, was paid to the defendant Shear, as alleged in his first supplemental answer in this cause, and that said net amount, being \$7,759.89,

77, constituted a part of the \$10,000, and was deposited by the defendant Shear for said composition; that of the said \$10,000 the sum of \$9,776.49 was used in effecting said composition, and the balance thereof, to wit, \$223.51, is to be returned by the bankruptcy court to the defendant Shear."

[14] In the original opinion and judgment we held that appellant was entitled to redeem the properties purchased by him at execution sale, provided he discharged all liens and charges existing thereon, if done in accordance with the terms and conditions under which the trial court might authorize the acceptance of payment. It appearing without dispute that both the so-called mill and gin properties were incumbered by the liens and obligations of the Farmers' & Ginners' Cotton Oil Company, appellant claims that, upon satisfying these outstanding liens and charges, he should be subrogated to all liens which he has discharged, and upon this theory this would accord him the right to claim all the gin properties, though he only holds title to the one by purchase. This position would be a correct one, if it was shown that appellant, in order to protect his purchase, had to discharge a senior or paramount lien. The principle which lies at the very foundation of the doctrine of subrogation is "that the person seeking it must have paid the debt under the grave necessity to save himself a loss. The right is never accorded to a mere volunteer." *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 6 Sup. Ct. 625, 31 L. Ed. 537; *Sheldon on Subrogation*, § 240; 14 *New Jersey Equity*, 234. The gin properties individually owned by Hunter were, as has been shown, pledged to additionally secure the primary obligations of the mill company. Appellant, to redeem the mill properties, must discharge all liens and charges against these assets. When this is done the primary debt is paid, and this would operate, as we understand the rule, as an extinguishment of all liens resting against either the mill or the gin properties. Such being the operation of the rule, the fact that appellant's redemption of the properties actually purchased by him would likewise discharge the liens on the unacquired gin properties would not entitle him to succeed to this ownership by way of subrogation. We therefore hold, under the circumstances, that appellant's right of redemption is limited and restricted to those properties the legal title to which he acquired at execution sale.

[15] It appearing without controversy, under the stipulations of the parties, that a large part of the fund employed by the defendant Shear in effecting a composition with the general creditors of the Farmers' & Ginners' Cotton Oil Company, which inured to its benefit, was immediately derived from the sale and rental of certain gin properties, and the collection of insurance indemnities on account of the destruction of certain other

of said gin properties by fire, that the amount so realized from these two sources should be properly deducted from the amount to be paid by appellant in redemption.

The respective motions are overruled.  
Motions overruled.

**On Appellees' Second Motion for Rehearing.**

In the concluding paragraph of an opinion rendered herein April 16, 1919, upon rehearing, we held that so much of the fund as was employed by the appellee H. H. Shear in effecting a composition with the general creditors of the Farmers' & Ginners' Cotton Oil Company, which was immediately derived from the sale of the Elroy gin, the rental upon the gin properties for the season of 1916-1917, and the insurance money collected on account of the destruction of what is referred to in the record as the "Sprinkle gin property," should be deducted from the amount to be paid by appellant in redemption of the several properties to which we have held his right of redemption extended.

[16] The conclusion was based upon the finding of the trial court, as we understood it, that appellee Shear, under an agreement with the Farmers' & Ginners' Cotton Oil Company, was to advance personally the \$10,000 necessary to effect a composition with the corporation's unsecured creditors. Upon further consideration of all the agreements of the parties relative to this undertaking, we are of the opinion that the agreement, whereby the appellee H. H. Shear was to make the advancement called for, was one primarily between the original lienholders and himself, rather than the corporation. Such being the case, the fact that a portion of the fund paid by him to effect the composition was realized from the sources in question would not entitle appellant to have these amounts deducted from the sum he would be required to pay to effect a redemption of those properties which his purchase actually covered, since none of the gin properties, save that known as the "Sprinkle gin property," was ever acquired. As to this particular property (the Sprinkle gin property), it is shown that the same was destroyed by fire, and that the sum of \$3,308.48 was realized on account thereof. A careful search of the record, however, fails to disclose whether this property was destroyed before or after the execution sales at which appellant purchased. Proof of the date of that event will determine whether or not appellant will be entitled to a credit or allowance on account of this item.

To the extent that this opinion modifies the opinions heretofore filed, the motion is sustained, and in all other respects it is overruled.

BRADY, J., disqualified, and not sitting.

**HANNES v. RAUBE. (No. 6052.)**

(Court of Civil Appeals of Texas, Austin.  
March 5, 1919. Rehearing Denied  
April 16, 1919.)

**1. APPEAL AND ERROR  $\S$  1087—PARTNERSHIP  $\S$  329—TRIAL  $\S$  203(1)—INSTRUCTION—DEFENSE—GROUPING FACTS.**

In an action for partnership accounting, it was material and prejudicial error to refuse to give defendant's requested special charge that profits were to be determined only upon business transacted before the purchase of plaintiff's interest by another, such purchase being clearly indicated by the evidence.

**2. WITNESSES  $\S$  228—MANNER OF TESTIFYING.**

It is improper practice to permit a witness to testify by stating that, if another witness swore to a certain state of facts, such other's statement was not the truth; but each witness should testify to his own version of the facts.

Appeal from Lee County Court; John H. Tate, Judge.

Suit by Mrs. Annie Raube against F. Hannes. From judgment for plaintiff, defendant appeals. Reversed and remanded.

E. T. Simmang and P. J. Alexander, both of Giddings, for appellant.

Wm. O. Bowers, Sr., and Wm. O. Bowers, Jr., both of Giddings, for appellee.

BRADY, J. Appellee, Mrs. Annie Raube, as surviving wife and sole legatee of F. Raube, deceased, brought this suit against appellant, Frank Hannes, for an accounting and for recovery of one-half the profits of a wholesale beer agency at Dime Box, Tex.

It was alleged in the amended petition that F. Raube and Frank Hannes had operated said agency as partners from December 8, 1913, until November 12, 1914, the date of the death of F. Raube, that F. Raube left a written will, wherein appellee was made the sole legatee of his estate, and that, after the death of Raube, the appellee, as surviving wife and sole legatee, continued to operate and carry on the business and partnership affairs with Frank Hannes, until on or about March 22, 1915, when, by mutual agreement between appellant and appellee, the partnership business was dissolved and discontinued.

The case was tried before a jury on special issues, and, based upon the findings of the jury, the court rendered judgment against appellant for the sum of \$492.90, from which judgment this appeal was taken.

The questions submitted to the jury and the answers thereto are as follows:

"Special Issue No. 1: Was there a full and final settlement of the partnership affairs existing between the plaintiff, Mrs. Annie Raube, the legal representative of the estate of F.

Raube, deceased, and the defendant, Frank Hannes, made on or about the 22d day of March, A. D. 1915? Your answer to this special issue will be yes or no, and a proper form for your answer is as follows: To special issue No. 1, we answer no.

"Special Issue No. 2: When did the partnership relations between the plaintiff, Mrs. Annie Raube, the legal representative of F. Raube, deceased, and the defendant, Frank Hannes, terminate? A proper form for your answer to this issue is as follows: To special issue No. 2 we answer that the partnership relation between the plaintiff and the defendant Frank Hannes, terminated on the 22d day of March, A. D. 1915.

"Special Issue No. 3: What was the total amount of the gross profits of the partnership between F. Raube and the plaintiff as the legal representative of the estate of F. Raube, deceased, up to the termination of the partnership relation? A proper form of your answer to this issue is as follows: To special issue No. 3 we answer that the gross profits of said partnership were \$2,248.21.

"Special Issue No. 4: What were the expenses incident to the conduct of the business of said partnership up to the termination of the contract? A proper form for answer to this special issue is as follows: To special issue No. 4, we answer that the expenses incident to the conduct of said business up to the termination of the same was \$1,262.40."

[1] Appellant has assigned several errors, but we have found only one assignment which we think shows reversible error, namely, the fourth assignment. This assignment urges that the court committed material error in refusing to give to the jury appellant's special charge No. 3, which was as follows:

"I instruct you that in determining the gross profits and net profits herein, you will do so upon the basis of business transacted between the date of the beginning of the partnership and the date of the purchase by Carl Raube of the wholesale business from his mother, Annie Raube. You will not consider any of the profits or losses arising from the partnership business between Carl Raube and Frank Hannes."

This charge was presented to the court, refused, and appellant duly took his bill of exception to the action of the court. We think it was material and prejudicial error for the court to refuse this charge, in view of the pleadings and the state of the evidence. Appellee, Mrs. Annie Raube, claimed an equal division of profits of the business for the entire period from December 3, 1913, when the original partnership began, to March 22, 1915. The undisputed evidence shows that there was a considerable period of time between the date of the death of F. Raube (which was November 12, 1914) and March 22, 1915, when Mrs. F. Raube was no longer a partner in the business and was not interested in the profits. Mrs. Raube testified that her son, Carl Raube, looked after her husband's business after he got sick and

up to the time of his death, and after that he looked after the business for her until she sold out to her son, after which he conducted the business for himself. She did not state when she sold out her interest in the business to Carl Raube, but the latter testified that it was on January 1, 1915, that he bought out the business from his mother, and that thereafter, and until March 22, 1915, he operated the business in his name. A United States revenue license, dated December 9, 1914, issued in the name of Carl Raube for operating the business of wholesale dealer in malt liquor at Dime Box, Tex., was introduced in evidence, and tends to support the testimony of appellant, Frank Hannes, who testified that on that date he and Carl Raube formed their partnership, which continued to March 22, 1915. Appellant further testified that Mrs. Raube had nothing to do with the business after December 9, 1914, but that Carl Raube was his partner and had succeeded to her interest. This evidence is undisputed by any testimony in the record, except that, as above stated, Carl Raube fixed the date of the beginning of his partnership with appellant as January 1, 1915. It is true that Carl Raube testified that "the business between my father and Frank Hannes commenced December 3, 1914, and ended March 22, 1915"; but it is clear that this was a mistake, because the undisputed evidence shows that the partnership began in September, 1913, and that F. Raube died November 12, 1914.

The jury found that the partnership relation between appellant and F. Raube terminated March 22, 1915, and the profits found by the jury were computed up to such date. We are unable to explain these findings of the jury, except on the theory that the jury considered it "all in the family," and that they were authorized by the court's charge to find that the partnership relation between appellant and appellee continued up to March 22, 1915; and also that they should compute the undivided net profits up to that date.

There was no separation in the evidence or in the findings of the jury of the profits accruing to Mrs. Raube as surviving wife and legatee of F. Raube and the profits after she sold out to her son, Carl Raube. She was clearly not entitled to any of the profits accruing during the partnership between appellant and Carl Raube, since she had sold out her entire interest in the business to her son, yet the verdict of the jury and the judgment of the court awarded Mrs. Raube a share in the profits during a period when she was not a partner and not entitled thereto. The findings of the jury, in answer to questions Nos. 3 and 4, were evidently based largely upon the testimony of Carl Raube, whose statement of the gross and net profits of the business embraced the entire period up to March 22, 1915.

The court nowhere in its charge limited the recovery of profits to the period when F. Raube was a partner of appellant, and when appellee, Mrs. Annie Raube, as his successor, was interested in the partnership business. This demonstrates that, if appellant was entitled to have the above charge given, the refusal of same was highly prejudicial to his rights, and so materially erroneous as to be reversible error.

Our Supreme Court in the case of *Railway Co. v. McGlamory*, 89 Tex. 635, 35 S. W. 1058, held that a defendant is entitled to a charge, when properly and seasonably requested, requiring the jury to find whether the evidence establishes the existence of any specified group of facts which, if true, would in law establish a defense properly pleaded and made an issue by the evidence, and instructing them, if they find such group of facts to be established by the evidence, to find for the defendant. This rule has been followed in numerous decisions since, and it is now settled law that a defendant is entitled to have his defenses affirmatively presented upon a proper request.

In view of Mrs. Raube's claim for profits during the entire period from September, 1913, to March 22, 1915, during a period of which time she was not a partner, we think appellant was entitled to have the jury instructed that they could not consider any of the profits or losses arising from the partnership business of Carl Raube and Frank Hannes, and that they should restrict their findings to the period when F. Raube and his successor in the business, Mrs. Annie Raube, were partners with appellant.

For the error of the court in refusing to give this charge the case must be reversed.

In view of the probability of another trial, we think it proper to discuss some questions raised by other assignments, although not considered by us as reversible error.

In the second assignment, appellant complains of the refusal of the trial court to give a charge defining accord and satisfaction, and applying the definition to the facts claimed by appellant to show a full and final settlement of the partnership affairs.

While we do not approve the charge requested as correct, we think, under the rule above stated, that appellant would be entitled

to a charge affirmatively presenting this defense, and grouping the facts upon which he relies to establish the same.

In other assignments appellant complains because the trial court permitted a witness to testify, that if appellant stated that the settlement made with the brewing association was also a settlement of the partnership affairs of F. Raube and Frank Hannes, such statement by appellant was not true, and also permitting another witness to testify that, if appellant swore that the partnership contract was signed at Dime Box, this statement was not true.

[2] We do not think it necessarily follows that such answers amounted to a statement on the part of the witnesses that appellant was lying, as contended by appellant's counsel, but we do think it is improper practice to permit witnesses to testify in this manner. They should be permitted to testify to their version of the facts, but not to state that, if another witness swore to a certain state of facts, it is not the truth.

In his last assignment, appellant complains of the refusal of the trial court to permit a witness to testify as to the cost of icing beer at Dime Box, Tex.; it being claimed that said witness was a wholesale dealer in ice, and familiar with the cost of icing beer at that point, and that the evidence tended to establish appellant's right to an item of credit for icing the beer belonging to the partnership. It is contended by appellee that there was no issue as to the allowance of this item.

We think it unnecessary to go to the record to settle this question, but think it proper to say that if, on another trial, there should be an issue as to appellant's right to this allowance and as to the amount thereof, and the testimony should be again offered, it should be admitted. It seems that appellant claimed credit for the actual cost of icing the beer, and the testimony of a witness having knowledge of this fact would be admissible as tending to establish the right to the allowance, where the amount is in dispute.

For the error pointed out in the fourth assignment of error, as above indicated, this case will be reversed and remanded for another trial.

Reversed and remanded.

**SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. PAYNE. (No. 2008.)**

(Court of Civil Appeals of Texas. Texarkana. April 4, 1919. Rehearing Denied April 17, 1919.)

**1. TELEGRAPHS AND TELEPHONES 6-45 — FAILURE TO FURNISH TELEPHONE SERVICE.**

Defendant telephone company *held* not liable for its alleged negligent failure to locate plaintiff so that he might be informed of his child's illness, where it did not agree to attempt such service.

**2. TELEGRAPHS AND TELEPHONES 6-45 — TELEPHONE SERVICE—FAILURE TO LOCATE PERSON.**

A telephone company is not liable for failure to perform its agreement to locate a person to whom it was desired to telephone, unless its agreement was founded on a consideration.

Appeal from District Court, Hunt County; Wm. Pierson, Judge.

Action by L. M. Payne against the Southwestern Telegraph & Telephone Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The appeal is from a judgment in appellee's favor for \$1,250, the amount a jury found he was entitled to recover of appellant because of negligence on its part in failing to notify him at Haskell, where he was temporarily, of a telephone call for him from Campbell, where his wife and children were, advising him of the serious illness of one of his children. In his petition, after alleging that appellant was a corporation engaged in the transmission of telephone messages for hire, appellee alleged that on September 8, 1915, he was near Anson, but about 7 or 8 o'clock of the morning of that day left that place for Haskell, where he arrived about 9 o'clock of the same morning. He further alleged:

That his wife and family were then at their home in Campbell, and that at about 10 o'clock of that morning, acting by and through Rev. B. F. Harris, "put in a call for plaintiff at the residence of Rev. G. W. Guinn, near Anson, Tex., and at the same time advised the agent of the defendant at Campbell, Tex., who received said call, that the infant child of this plaintiff and his wife was seriously sick and was not expected to live, and that plaintiff's wife wanted to get in communication with him for the purpose of advising him of said serious sickness of their said child; that the said G. W. Guinn informed the defendant, its agents and servants, that the plaintiff had left his home that morning, and was then in the town of Haskell, whereupon the said Rev. B. F. Harris requested that the defendant locate the said plaintiff in the town of Haskell so that he could convey to him said message and information, and at the same time instructed the agent

at Campbell, Tex., to have, a search made for plaintiff at the various hotels, banks, and livery stables in the town of Haskell, and was willing and ready to pay the toll and expense thereof, whereupon it became the duty of defendant, its agents and servants, to make said search, and, if possible, to locate the plaintiff and notify him of said call."

**Appellee then alleged:**

That "if the defendant, its agents and servants, had made the slightest efforts to locate him in the town of Haskell, they could have done so on September 8, 1915, or on the morning of September 9th, \* \* \* but they negligently failed and refused to make any efforts to discover his whereabouts so as to get him to the phone so as to put the said B. F. Harris in communication with him."

**Appellee then alleged:**

That, if defendant's agent had used due diligence, "he would have received said message on September 8, 1915, and could and would have arrived at his home on the following day to comfort and assist his wife during the said serious ill of their infant child, but the plaintiffs says he knew nothing of said call until the following Saturday night, September 11, 1915."

**He then alleged as follows:**

"That on account of the negligence of defendant, its agents and servants, in failing to notify him of said telephone call, plaintiff's wife was caused to suffer great and excruciating pain and mental worry and anguish and distress of mind and uneasiness on account of the fact that their said baby was seriously sick and was expected to die, and she was unable to get any message to her husband, the plaintiff herein, so that he could come home and be a comfort and help to her during these trying hours for a period of three or four days, she all the time expecting said baby to die and being advised by her physicians that it could not live; that she was thereby rendered extremely nervous and caused to lose sleep, and was finally confined to her bed by nervous prostration on account of the absence of her husband and on account of the fact that she could get to him no communication as to the serious condition of their said baby. And plaintiff avers that by reason of the premises he has been damaged in the sum of \$2,500 on account of the physical and mental pain and worry and distress of mind endured by his wife."

C. M. Means, S. P. English, and John E. Frank, all of Dallas, for appellant.

Evans & Shields, of Greenville, and Mahaffey, Keeney & Dalby, of Texarkana, for appellee.

WILLSON, C. J. (after stating the facts as above). In its brief appellant insists that a cause of action against it was not stated in appellee's petition, in that it was not therein alleged that appellant "undertook or agreed or became bound to transmit or deliver the call made the basis of the suit,"

and in that it was not therein alleged "that there was a payment or offer to pay for services rendered or to be rendered, or a readiness and willingness to pay therefor."

[1] It seems to be settled law in this state that a petition in which such allegations or their equivalent is omitted is subject to a general demurrer, and therefore cannot be the basis of a judgment in the complainant's favor. *Telegraph Co. v. Henry*, 87 Tex. 165, 27 S. W. 63; *Lewis & Renfro v. Tel. & Tel. Co.*, 59 S. W. 808; *Tel. Co. v. Smith*, 138 S. W. 1062; *Tel. Co. v. Twaddell*, 47 Tex. Civ. App. 51, 103 S. W. 1120.

In the *Lewis & Renfro* Case the allegations were that one Weeks, plaintiff's attorney at Palo Pinto, notified the defendant's agent at that place "that he desired to converse with plaintiff Renfro at Jacksonville, and requested said agent to at once call up Jacksonville and get said Renfro to the telephone so that Weeks could consult with him," etc., and that defendant's agent at Jacksonville received the call and negligently failed to notify Renfro thereof. The court said:

"We think the petition fails to state a cause of action, and the trial court did not err in sustaining the general demurrer. There is no allegation that appellee undertook or agreed to serve appellants in any capacity, or to do any act or thing for failure to perform which appellee would be liable, and, if any such undertaking can be inferred from any of the allegations of said petition, it was a contract without consideration, because the petition nowhere alleges that appellants paid, or offered to pay, or were ready and willing to pay, appellee anything for the services desired of it."

In the *Smith* Case the allegations were that the defendant company was "engaged in the business of receiving and sending telegrams over its wires and lines for pay"; that a telegram was "turned over" to its agent at Kingsland addressed to the plaintiff at Santa Anna; and that, instead of promptly and correctly transmitting and delivering same to the addressee, the defendant negligently incorrectly transmitted and negligently delayed delivery of the telegram. The court said:

"We think the general demurrer should have been sustained. It will be noted that, while the petition alleges that Mrs. Albert Smith duly delivered to the defendant's agent at Kingsland the above-mentioned telegram for transmission addressed to plaintiff at Santa Anna, Tex., yet there is no allegation that the said Mrs. Smith, or any one for her, paid defendant for its transmission and delivery, nor is it alleged that defendant bound and obligated itself to deliver said message to plaintiff, nor is there any allegation showing that there was any contract between said parties relating to the delivery of same. Without such allegations no legal obligation was imposed upon defendant to transmit and promptly deliver the same."

It will be noted that, while it was alleged in appellee's petition that his wife "was willing and ready to pay the toll and expense thereof" to have appellant make a search for appellee in Haskell and put him in communication with Harris so the latter could tell him his child was sick, it was not alleged in said petition that appellant undertook to perform such service. Therefore it must be held that, under the authorities cited, appellee's petition was subject to a general demurrer, and hence not sufficient as a support for a judgment.

[2] While, as stated above, it was alleged in appellee's petition that his wife was ready and willing to pay the expense of getting him to the telephone in Haskell so Harris could talk with him, it seems the allegation was not supported by any evidence offered at the trial. To show liability on the part of appellant to appellee it devolved on the latter to show, in addition to an undertaking on the part of the former to perform the service in question, a consideration therefor. 1 *Elliott on Contracts*, § 247; *Lewis & Renfro v. Tel. & Tel. Co.*, 59 S. W. 308.

Of the assignments in appellant's brief presenting other questions, the third is sustained. We think it was error, over the objection appellant interposed thereto, to admit as evidence the testimony of the witness Mrs. Ben Clifton set out in the statement under that assignment. The assignments remaining undisposed of, except the ninth, in which the judgment is attacked as excessive, and as to which we will not express an opinion are overruled.

The judgment will be reversed, and the cause will be remanded for such further proceedings as may be had in the court below.

#### TEXAS & N. O. RY. CO. v. SPENCER. (No. 2117.)

(Court of Civil Appeals of Texas. Texarkana.  
April 10, 1919.)

#### CARRIERS § 4(3)—CONVERSION OF GOODS— ELEMENTS NECESSARY FOR RECOVERY.

In an action against a railway for conversion of cotton, a judgment for plaintiff cannot stand, where there is no proof that the cotton was ever delivered to the railroad, or any evidence concerning the quality or weight of the cotton.

Appeal from Henderson County Court;  
J. A. McDonald, Judge.

Action by J. A. Spencer against the Texas & New Orleans Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

W. R. Bishop, of Athens, and Baker, Botts, Parker & Garwood, of Houston, for appellant.

Miller & Miller, of Athens, for appellee.

**HODGES, J.** The appellee sued the appellant for the conversion of two bales of cotton, valued at \$148.50. In the amended original petition it was alleged that the cotton was delivered to the defendant railway company for shipment during the month of October, 1915, at Athens, Tex., and was converted by the railway company some time during the fall or winter of 1915. In a trial before the court a judgment was rendered in favor of the appellee for the amount sued for.

We have examined the evidence carefully, and conclude that it is insufficient to support a finding of liability. There is no proof that the cotton was ever delivered to the appellant, nor is there any evidence concerning the quality or weight of the cotton for which a judgment might have been rendered.

The judgment will therefore be reversed, and the cause remanded.

**BREHARD MFG. CO. v. BARNETT.**  
(No. 2093.)

(Court of Civil Appeals of Texas. Texarkana.  
March 13, 1919.)

**1. EVIDENCE**  $\S$  441(1) — **PAROL EVIDENCE — ADMISSIBILITY.**

Evidence of an oral agreement that a contract should run six months, instead of twelve months, as stipulated in written contract later executed by the parties, is inadmissible.

**2. BILLS AND NOTES**  $\S$  491 — **BURDEN OF PROOF.**

Defendant maker has the burden of showing why plaintiff payee should not recover on notes according to their tenor and legal effect.

Appeal from Hunt County Court; A. J. Gates, Judge.

Action by the Brehard Manufacturing Company against L. T. Barnett. Judgment for plaintiff for part of the demand, and it appeals. Affirmed as modified.

Appellant was in the advertising business at Iowa City, Iowa. Appellee was in the drug business at Quinlan, Tex. August 7, 1914, appellee gave to appellant's salesman (one McBride), for transmission to appellant, an order in writing as follows (so far as material to the understanding of the case):

"Quinlan, Tex., August 7, 1914.

"Brenard Mfg. Co.—Gentlemen: On your approval of this order deliver to me at your earliest convenience, f. o. b. factory or distributing

point, the Claxton piano, watches, silverware and advertising matter described on this and reverse side, in payment for which I herewith hand you my six notes, payable to your order, aggregating \$435. If order is not approved and shipped by you the notes are to be cancelled and returned to me.

"My last twelve months sales were \$12,000 and upon this figure my next twelve months sales to be \$15,000 and that if 2½ per cent. of my gross sales does not amount to \$435 for the next twelve months you will pay me the deficiency in cash and send your bond for \$435 to cover this agreement with me. You are to conduct all of the correspondence in securing club leaders and members in conducting the Club Extension Campaign.

"To make the last above paragraph binding upon you I agree to furnish you within ten days approximately 150 names and addresses of persons whom I believe will make good club leaders and members with whom you are to take up correspondence immediately. I agree to take the shipments promptly, carry out the Trade Extension Campaign plan, promptly meet all obligations entered into under this agreement, keep the piano well displayed in my store, issue piano votes for each cent purchased, and every 60 days of this contract to report to you my gross sales, and promptly furnish you all information you request to enable you to push the Trade Extension Campaign.

"[Signed] L. T. Barnett, Purchaser."

The six notes referred to in the order were for \$72.50 each. Appellee paid two of them when they matured, but refused to pay the other four. The suit was by appellant on the four dishonored notes, to enforce payment thereof. In his answer appellee alleged that his gross sales during the 12 months covered by the contract amounted to only \$5,547.70. He further alleged that by the terms of the contract he was entitled to recover of appellant \$297.31, the difference, he charged, between 2½ per cent. on said \$5,557 and \$435. He prayed that said sum of \$297.31 be offset against any sum the court found he owed appellant. Appellant replied that appellee was not entitled to assert the offset he claimed, because he had not complied with his undertaking to carry on the advertising campaign and pay the notes he had made at their maturity, and had not furnished appellant statements of his gross sales as he agreed to. In reply to this charge appellee in a supplemental answer alleged:

"That at the time of the execution of said contract it was understood between the parties that the principal period for the retail drug business in this country was from September 1st of each year to about the first of January of the following year; that it is a fact and was so understood and known by the parties, and they contracted with that knowledge in view, that the six months following the date of said contract was when business was best, and when in the ordinary course of business two-thirds or more of the volume of business for the current 12 months was transacted; that during the



months of September, October, November, and December following the date of contract the sales of defendant largely decreased and to such an extent that it was entirely obvious that it would decrease to the extent that defendant would owe plaintiff nothing more than he had paid; that plaintiffs are nonresidents of the state of Texas, having their domicile in the state of Iowa, more than 1,000 miles from Quinlan; and that they have not now, and did not have during said period, any property within defendant's knowledge within the state of Texas, subject to execution, out of which he could collect a judgment against them."

It did not appear from the evidence heard at the trial that appellant failed to comply with any part of its undertaking. But it did appear therefrom without dispute that six months after the date of the contract appellee ceased to carry on the "Trade Extension Campaign" and to make the reports of his gross sales he had agreed to make to appellant. Over appellant's objection, on the ground that it changed the contract as reduced to writing, the court permitted appellee to testify as follows:

"After the contract was signed, I had an agreement or understanding with the agent of plaintiff to the effect that the contract would begin on the 1st day of September, 1914, and run for six months. He told me that I might make reports of sales every 60 days until the contest closed, and we would then settle according to the figures for the first six months, if it did not run up to the expectations, which we thought it would do at that time."

It appeared from the testimony that appellee's gross sales for the 12 months covered by the contract amounted to \$6,156.60. The judgment was in appellant's favor for \$64.01, which was the difference between the amount of the notes sued on and \$281.09, the difference between \$435 and 2½ per cent. of appellee's gross sales for the 12 months covered by the contract.

Geo. S. Perkins, of Greenville, and Edward A. Kennedy, of Iowa City, Iowa, for appellant.

H. L. Carpenter, of Greenville, for appellee.

WILLSON, C. J. (after stating the facts as above). [1] The theory upon which the trial court set off \$281.09 in appellee's favor against the amount of the notes sued on, and

awarded appellant a recovery of the sum of only \$64.01, was that the contract evidenced by the order for the advertising outfit had been modified as the testimony of appellee set out in the statement above indicated it had been, so that appellee, notwithstanding he had not carried on the "trade extension campaign" nor reported his gross sales every 60 days during the 12 months immediately following the date of appellant's approval of the order, as he agreed he would, was entitled to recover of appellant the difference between \$435 and 2½ per cent. of the amount of his gross sales for said 12 months. We think the testimony referred to was subject to the objection urged to it, to wit, that it contradicted the writing evidencing the contract between the parties, and that it therefore was inadmissible and not entitled to be considered by the court in determining the controversy. The rule applicable has been stated as follows:

"The execution of a contract in writing is deemed to supersede all the oral negotiations or stipulations concerning its terms and subject-matter which preceded or accompanied the execution of the instrument, in the absence of accident, fraud or mistake of fact; and any representation made prior to or contemporaneous with the execution of the written contract is held to be inadmissible to contradict, change or add to the terms plainly incorporated into and made a part of the written contract." 10 R. C. L. 1016, 1019; and see 2 Elliott on Contracts, 926 et seq.; Gale Mfg. Co. v. Finkelstein, 59 S. W. 571.

It is apparent from the record that the understanding which appellee testified he had with appellant's agent was reached before the order (by appellant's approval thereof) became binding on the parties as a contract, and that the testimony therefore was within the rule just set out, and not within the exception thereto stated by appellee.

[2] The burden was on appellee to show a legal reason why appellant should not recover on the notes according to their tenor and legal effect. He failed to discharge the burden. The judgment therefore should have been in appellant's favor for the amount of the notes. It will be reformed so as to adjudge a recovery in appellant's favor against appellee of the sum of \$345.10, instead of \$64.01, and as so reformed will be affirmed.





